

**The London School of Economics and Political  
Science**

**The Interface Between Competition Law  
and the Restraint of Trade Doctrine for Professionals:  
Understanding the evolution of problems and proposing  
solutions for courts in England and Wales**

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## ***ABSTRACT***

This research considers the interface between the restraint of trade doctrine (hereinafter ROTD) and competition law in England and Wales (comprising the UK Competition Act 1998 and Articles 101-102 TFEU). The ROTD and competition law overlap in cases where both laws appear to be applicable to certain restrictions on professionals (*e.g.* non-competition clauses).

It will be argued that the ROTD and competition are different legal regimes whose *prima facie* concurrent applicability creates an interface problem for some professionals who are precluded from relying on the ROTD to resist a particular restriction. The most acute problem, in cases of overlap, arises where a restriction does not infringe competition law but falls foul of the ROTD.

By examining developments in UK law and in EU law this study analyses how the interface problem evolved incrementally. UK competition legislation may be interpreted so that the ROTD applies only in a *residual* fashion. Moreover, Art 3 of EU Reg. 1/2003 delineates the interface between EU competition law and national competition law. The High Court has interpreted Art. 3 so that once EU competition law is applied to a restriction the court cannot reach a different conclusion under the ROTD. For reasons of consistency, this conclusion may also hold true for the interface between the ROTD and *UK* competition law. The scale of persons affected by this problem becomes greater if some professionals in employment are classified as “undertakings” because such classification would increase the overlap and interface between competition law and ROTD.

This thesis proposes fresh solutions for courts when applying the ROTD. The solutions aim to ensure the availability of the ROTD’s unique protection to professionals who are subject to restrictions to which competition law also applies.

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## INTRODUCTION

This thesis considers the overlap and interfaces between the common law restraint of trade doctrine (hereinafter ROTD) and competition law in England and Wales. The relevant competition law comprises UK competition legislation (chiefly, the Competition Act 1998) and, if there is sufficient effect on trade between Member States, EU competition law (chiefly, Art 101 TFEU). This research identifies interface problems for some professionals who are subject to restrictive provisions and offers some solutions for courts in England and Wales.

The focus is on an area of intersection/overlap between the ROTD and competition law which arises where the ROTD and competition law are both applicable to a restriction. In order to undertake a contained and in-depth analysis, this research does not examine the entire overlap area of concurrent applicability. Its particular focus is on selected restrictions (such as non-competition provisions) on professionals that are contained in either personal contracts or in “rules” of, for example, professional associations. Interface difficulties occur where a restrained person is precluded from relying on the ROTD to resist an unreasonable restriction on the grounds that (either UK and/or EU) competition law applies to but does *not* prohibit the restriction. The problem arises because the applicability of competition law apparently jeopardises the traditional protection available under the ROTD to persons restrained by unreasonable restrictions within the overlap area that are not prohibited by competition law. This research proposes how courts in England and Wales should respond to these challenges in order to ensure the ongoing availability of the ROTD to resist the enforcement of unreasonable restrictions within the overlap area.

This research is organised into three Parts and each Part is next summarised in order to give a concise map of the research.

Part I (Chapters One to Three) aims to demonstrate why the interface between the ROTD and competition law matters to some persons. It argues that the interface is important by showing that the ROTD and competition law are different. To this end, it examines how restrictions on professionals are treated by the ROTD (Chapter One), by EU competition law (Chapter Two) and by UK competition law (Chapter Three). Each chapter takes the perspective of restrained persons in order to highlight how their interests are treated. These chapters explain why some restrained professionals might prefer to rely on ROTD rather than on competition law.

Part II (Chapters Four to Six) identifies and explores the sources, the nature and potential extent of the problematic interfaces between the ROTD and competition law in England and Wales. Chapter Four traces the ROTD's interface with UK competition law. Chapter Five considers the ROTD's interface with EU competition law. These chapters portray the problem for restrained persons where a court feels precluded from deciding that a restriction falls foul of the ROTD on the basis that competition law is applied to but does not prohibit the same restriction. Chapter Six explores the *potential* scale of the interface problem. It argues that “undertaking”, a key jurisdictional criterion in competition law, could include some professionals in employment. It highlights how an expansive interpretation of “undertaking” would increase the overlap area and, thereby, extend the interface problem to affect some employees.

Part III (Chapter Seven) proposes solutions for judges in England and Wales. The solutions aim to prevent the ROTD from being, in effect, emasculated by competition law within the studied overlap area.

Greater detail about each chapter is next provided in order to convey the narrative of this research and its argument.

Part I (Chapters One, Two and Three) argues that the ROTD and competition law are different in substantive and procedural terms. The next paragraphs briefly sketch some of the important elements of the ROTD, EU competition law and UK competition law. In order to illustrate their differences, in a succinct manner, attention is drawn to their contrasting treatment of franchisees.

Chapter One explains how the ROTD is a valuable legal instrument as it allows some professionals to resist unreasonable restrictions contained either in personal contracts or in third party measures such as rules of associations. It is valuable because the interests of the restrained party are discretely taken into account when courts apply the ROTD. The ROTD presumes that all “restraints of trade” are void unless they are justified as being reasonable both in the interests of the parties (“*inter partes*”) and in the “public interest.”<sup>1</sup> In deciding whether a particular provision is a “restraint of trade” courts take account of its negative effects for the restrained person. A “restraint of trade” is not justifiable as reasonable *inter partes* if it “goes further than to afford adequate protection to the party in whose favour it was granted.”<sup>2</sup> In *Vendo plc v. Adams*, the High Court in Northern Ireland refused to grant an injunction to enforce a post-termination non-competition clause in a franchise.<sup>3</sup> It stated that to prevent the franchisee from “carrying on vehicle washing services within the franchised area *would deprive the defendant effectively*

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1 The classic test was stated in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535, 565 HL (Lord Macnaghten) affirming [1983] 1 Ch 630 (CA) as follows: “[T]he public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy and, therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”

2 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 300.

3 [2002] NI Ch 3.

*of earning a livelihood in a field where he has acquired an expertise.*<sup>4</sup> This quotation indicates the ROTD's concern for the economic interests of the franchisee.

Chapter Two examines EU competition law. Greatest attention is paid to Art 101(1) which prohibits agreements (with an actual or potential effect on interstate trade) whose object or effect is the actual or potential restriction of competition. This chapter evaluates determinations of the EU Courts and of the European Commission that certain restrictions on persons are not prohibited even where their freedom to compete is restricted. In *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, the Court of Justice stated that Art 101(1) does not prohibit restrictions on franchisees that are “strictly necessary in order to ensure that the know-how and assistance provided by the franchisor do not benefit competitors” and “provisions which establish the control strictly necessary for maintaining the identity and reputation of the network.”<sup>5</sup> In practice, this test does not apply a standard akin to “essential” and, thus, Art 101(1) does not prohibit restrictions where they are commercially convenient (rather than truly “necessary”) for the franchisor.<sup>6</sup> Moreover, some restrictions on franchisees that are prohibited by Art 101(1) may be exempted under Art 101(3).<sup>7</sup> Automatic exemption to certain franchises is available under Block Exemption Reg. 330/2010 even if they contain a post-termination restriction on ex-franchisees of up to one year.<sup>8</sup> Thus, competition law may take a comparatively benign view of restrictions on franchisees on the grounds that franchises may improve competition by helping new entry and encouraging inter-brand competition.<sup>9</sup> Competition law takes the

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4 [2002] NI Ch 3, 8 (emphasis added).

5 Case 161/86 *Pronuptia de Paris GmbH v. Irmgard Schillgallis* [1986] ECR 353.

6 For example Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] ECR 353, para 21 where the Court of Justice states that Art 101(1) does not prohibit exclusive purchasing on franchisees where it would be “too expensive” for the franchisor to ensure that objective quality standards were observed due to the large number of franchisees.

7 Art 101(3) provides that Art 101(1) may be declared inapplicable to an arrangement “which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

8 Art 5(3).

9 A. Jones and B. Sufrin, *EU Competition Law* (Oxford: Oxford University Press, 4th ed. 2011) 675.

view that certain restrictions must be borne by franchisees in order for franchises to function well in the market.<sup>10</sup>

Chapter Three starts by explaining the strong influence exerted by EU competition law on UK competition law.<sup>11</sup> Then, it demonstrates how a restriction may be treated differently under competition law in the UK (comprising UK competition law and EU competition law) than under the ROTD. It shows that the ROTD and competition law may produce different outcomes when applied to the same restriction. For example, in *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing and Ors*, the High Court stated that an unlimited renewal clause in an exclusive distribution contract did not infringe Art 101(1) but would be void as an unreasonable “restraint of trade” under the ROTD.<sup>12</sup> This chapter also shows that, even where the ROTD and competition law produce the same outcome in a case, the reasoning under each legal regime is different. Moreover, some differences may make litigation under the ROTD more attractive to a restrained party than under competition law.<sup>13</sup> In *Meridian VAT Reclaim UK Ltd v. Lowendahl Group*, Gross J., in the absence of detailed economic evidence on the definition of markets, was reluctant to conclude that there was a serious competition law issue to be tried.<sup>14</sup> By contrast, the judge easily concluded that there was a serious issue to be tried under the ROTD just by examining the terms of the contract. For similar reasons, an interlocutory injunction may be more easily obtained, in practice, under the ROTD than under EU competition law.<sup>15</sup>

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10 Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] ECR. 353 para 15.

11 Understanding the influence of EU competition law is additionally important for Chapter Six which explores the possibility of UK competition law following EU competition law’s possible movements towards interpreting “undertaking” to include some professionals in employment.

12 [2004] EWHC 44 (Comm) Langley J.

13 For example, under the ROTD the party seeking to rely on the restriction (the restraining party) must establish that the restriction is reasonable *inter partes*. By contrast under competition law, the party alleging that the restraint infringes (the restrained party) must discharge the evidential burden.

14 [2002] EWHC 1066.

15 See A. Kamerling & C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) preface xvi where the authors state that “... in interlocutory proceedings it will be considerably easier to show that a clause on its construction is unreasonable, rather than to try and argue that the object or effect of an agreement on competition means that it is void under Article [101](1) and should not benefit from an exemption under Art [101](3) - an economic assessment which national judges post-May 2004 will increasingly be called upon to do, but are unlikely to relish.”

Part I demonstrates that ROTD and competition law are different regimes when considered from the perspective of a restrained professional. Each regime approaches restrictions differently, even where their outcomes are not different. Where a restriction falls in the overlap area between competition law (EU and/or UK) and the ROTD, a restrained party may be disadvantaged if he is not allowed to rely on the ROTD. It is for this reason that the delineation of their interface is a matter of importance.

Part II (Chapters Four, Five and Six) examines problematic interfaces between the ROTD and competition law in England and Wales. It traces their origins and explores their potential extent.

Chapter Four examines the interfaces between the ROTD and UK competition legislation. The Competition Act 1998 does not make express provision for its interface with the common law. General rules on statutory interpretation suggest taking a “residual” approach whereby the ROTD would apply only to the extent that the legislation does not apply.<sup>16</sup> This chapter argues that the “residual” approach may prevent the application of the ROTD where the competition legislation applies but does not prohibit the clause. This is a problem for some restrained professionals as it, in effect, ousts the ROTD’s traditional protection. This chapter traces how the ROTD’s interfaces with the pre-1998 legislation on restrictive practices and fair trade were unproblematic in the sense that a restriction could be void under the ROTD even where it was not prohibited by the legislation. The analysis of the pre-1998 legislation also emphasises some of its operational shortcomings. This examination supports the argument that the Competition Act 1998 intended to remedy particular difficulties with the previous legislation (including its poor fit with EU competition law). It questions whether the 1998 Act was intended to muzzle the ROTD’s applicability to restrictions that also come within the reach of the competition legislation. It argues that the current interfaces between competition legislation and the ROTD emerged incidentally as a

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16 See A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) preface xvi where the authors state “[O]nly if competition law does not apply will the restraint of trade doctrine apply...” Also see M. Furse, *Competition Law of the UK and EC* (Oxford: Oxford University Press, 2003, 4th ed.) 361 where the author comments that “... the common law occupies only a residual role in relation to competition law generally.”

consequence of enacting EU style legislation designed to cure particular operational problems that were not related to its interfaces with the ROTD. It concludes that the general rules on the interface between legislation and the common law are unsatisfactory because they apparently permit the ROTD to apply only in a residual manner with the consequence of muzzling the ROTD.

Chapter Five considers the past and current interfaces between EU competition law and the ROTD. It analyses the evolution of Art 3 of EU Reg. 1/2003 which delineates the interface between EU competition law and national competition law. It considers the implications of Art 3 for the ROTD's interface with competition law. Criticism is directed at the 2004 judgment in *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing Co. Limited and Ors* where the High Court stated that:

“once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade.”<sup>17</sup>

This conclusion was repeated in 2010 in *Jones v Ricoh*.<sup>18</sup> Its effect is to prevent a court from finding that a restriction falls foul of the ROTD where EU competition law applies but does not prohibit the restriction. Moreover, this conclusion may affect the ROTD's interface with *national* competition law because it is logical and practical for the ROTD's applicability to a “restraint of trade” not to differ according to whether *EU* competition law or *national* competition law is applied.<sup>19</sup>

Chapter Six explores the potential extent of the interface problem by considering the expansion of the overlap between competition law and the ROTD. Competition law applies only to activities involving “undertaking” which makes “undertaking” an important jurisdictional concept. Chapter Six predicts that some professionals in employment might be treated as “undertakings” under EU and/or UK competition law. This development could bring some employment contracts within the reach of competition law, create a greater overlap with the ROTD and increase the scale of the interface problem. In this light, the delineation of the interface between the

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17 [2004] EWHC 44 (Comm) para. 49.

18 [2010] EWHC 1743 (Ch) Roth J.

19 A. Scott, “The Evolution of Competition Law and Policy in the United Kingdom” LSE Working Papers 9/2009 p5. Available at SSRN: <http://ssrn.com/abstract=1344807>.

ROTD and competition law acquires even greater importance as the valued protection offered by the ROTD to many employees may be under threat.

Part III (Chapter Seven) seeks and proposes solutions to the interface problems. It considers options for their resolution under, firstly, UK law and, secondly, EU law. One of the examined options is for UK competition law to diverge from EU competition law so that it prohibits more restrictions. Another option is to interpret UK competition law according to particular canons of statutory interpretation in order to produce a better interface with the ROTD for restrained persons. Then, the quest to resolve the ROTD's problematic interface under EU law concentrates on Art 3 of EU Reg.1/2003. After closely examining the intended scope of Art 3 of EU Reg.1/2003, it is suggested that Art 3(3) offers a viable route to allowing the application of the ROTD. Art 3(3) allows the unimpeded application of national laws that do not predominantly pursue the same objective as that pursued by EU competition law. Chapter Seven presents two general and seven specific proposals which are supplemented by detailed studies of key judgments under the ROTD. The proposals aim to ensure that the ROTD could benefit from the options identified under national law (canons of statutory interpretation) and/or under EU law (Art 3(3) of Reg. 1/2003) so that it may be applied within the overlap area (with UK competition law and/or with EU competition law) to restrictions that do not infringe competition law.

## **AIMS and METHODOLOGY**

This research is not a study of how best to regulate restrictions on professionals. Nor is it a comparative evaluation that places the ROTD and competition law in direct juxtaposition. This research identifies interface problems between the ROTD and competition law in England and Wales and proposes how to resolve them. The central hypothesis of this research is that the ROTD differs from competition law (because of why and how it protects restrained persons) and that, therefore, it ought not to be incidentally displaced merely on the grounds that competition law is also applicable to the same restriction.



This research aims to make a substantial contribution to the relatively understudied field of the relationship between competition law and the common law. There is no great bank of literature exploring this area, either from the perspective of the ROTD or from the perspective of competition law. There has been little debate over how Art 3 of EU Reg. 1/2003 affects the operation of national law that is not national competition law. This study is new research in its examination of the implications for the ROTD of past and future developments in EU competition law and UK competition law.

The methodology adopted is to examine cases and the pre-legislative debates in the UK and in the EU. The review of this material provides the foundation for the argument that the interfaces between the ROTD and competition law have been misinterpreted. Specifically, it is argued that the High Court has misread the combined impact of the Competition Act 1998 and of Art 3 of EU Reg. 1/2003 on the ROTD. It is suggested that careful reading of the sources offers guidance as to how the 1998 Act and Art 3 should be interpreted so that the ROTD is not unduly ousted. This research challenges the view (of the High Court and some commentators) that the ROTD cannot lead to a different conclusion after competition law is applied and does not prohibit a restriction. It proposes fresh solutions for judges to ensure the continued vitality of the ROTD within the studied overlap area.

This study of the interfaces between a longstanding common law doctrine and competition law in England and Wales identifies how problematic interfaces between the ROTD and competition law arose, highlights the negative consequences for some persons and proposes viable solutions for judges.

**PART I**

**DIFFERENCES**

**CHAPTERS ONE to THREE**

## THE RESTRAINT OF TRADE DOCTRINE

### 1.1 INTRODUCTION

The central hypothesis of this research is that the ROTD differs from competition law (because of how and why it protects restrained persons) and that, therefore, it ought not to be incidentally displaced where competition law is also applicable to the same restriction. The aim of this chapter is to establish that the ROTD is a valuable instrument for some professionals who are restrained by various provisions contained in either personal contracts or in third party measures (e.g. rules of associations).<sup>20</sup> To this end, this chapter maps the protection offered by the ROTD to professional persons in various circumstances. It takes an intentionally brief and descriptive approach that sketches the ROTD's field of application. Later chapters analyse and evaluate the significance of key ROTD judgments.<sup>21</sup>

In order to show the extent of the protection offered by the ROTD, this chapter examines the scope of the ROTD and its test. It explores *why* a wide variety of measures have been regarded by courts as "restraints of trade" and, thus, subject to scrutiny under the ROTD.<sup>22</sup> It appraises the ROTD's test which presumes

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<sup>20</sup> See A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004); J.D. Heydon, *The Restraint of Trade Doctrine* (Sydney: Butterworths, 2nd ed. 1999); M.J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: The Carswell Company, 1986); H.M. Blake, "Employee Agreements Not to Compete" [1962] 73 Harv LR 625; F. Dawson, "Contracts in Restraint of Trade: Meaning and Effect" [1974] 90 LQR 455 and C-W Yuen, "Exclusive Purchasing at Common Law and under Antitrust Law: A Re-examination of the Restraint of Trade Doctrine" [1987] 16 Anglo Am Law Rev 1.

<sup>21</sup> Chapters Three and Seven present detailed analyses of interesting judgments including *Days Medical Aids v. Pihsiang Machinery & Ors* [2004] EWHC 44 (Comm.); *Hendry v. World Professional Billiards and Snooker Association Ltd.* Sub.nom. *Hendry v. WPBSA* [2002] U.K.C.L.R.5, [2002] E.C.C. 8 Ch D; *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd* [1968] AC 269; *A Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v. A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308; HL affirming [1974] 1 All ER 171 CA, and *Proactive Sports Management Ltd v. Wayne Rooney, Stonegate 48 et al* [2010] EWHC 1807, on appeal [2011] EWCA 1444. For this reason, these judgments are not analysed in depth in this chapter.

<sup>22</sup> There is debate over where the margins of the ROTD should lie, see, for example, S. Smith, "Reconstructing Restraint of Trade" (1995) OJLS 565. This question is not addressed in this chapter, the aim of which is to map the protection that has been provided by the ROTD to persons.

“restraints of trade” to be void and refuses to uphold them unless they are justified as being reasonable both in the parties’ interests (*inter partes*) and in the “public interest.” How courts interpret and apply these two elements of the ROTD’s reasonableness test (*i.e. inter partes* and in the “public interest”) in ways that protect restrained professionals is highlighted.

For clarity, personal contracts are examined in this chapter separately from rules of associations.<sup>23</sup> Section 1.2 examines personal contracts and section 1.3 examines third party measures. Each section considers, firstly, why a particular measure may be treated as a “restraint of trade” and, secondly, how the “reasonableness” test may be applied. The aim is to show that the ROTD allows professionals to resist the enforcement of various restrictions on their economic freedom and that, for this reason, the ROTD is a valuable legal instrument for some persons.<sup>24</sup> Essentially, this chapter details and explains the protection that may be available under the ROTD to persons who are subject to various restrictions.

## 1.2 PERSONAL CONTRACTS

The ROTD has been applied to restrictions contained either in employment contracts and/or in agreements for the transfer of a business. It has also been applied to restrictions contained in other types of personal contracts. Notably, courts have refrained from strictly classifying the categories to which the ROTD applies. Lord Wilberforce insisted that “the classification must remain fluid and the categories can never be closed.”<sup>25</sup> Commentators accept that the ROTD applies beyond the two standard categories (of employment contracts and contracts for sale of business) but struggle to provide a comprehensive definition of such other categories.<sup>26</sup> For this reason, it is important to explore the basis for deciding

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<sup>23</sup> These two groups are not always entirely discrete. For example, a standard form personal management contract may be one that is prescribed by a sporting authority, see *Watson v. Praeger* [1991] 1 WLR 726 (Ch D).

<sup>24</sup> It is not suggested that restrained persons invariably succeed in actions under the ROTD.

<sup>25</sup> *Esso Petroleum Co. Ltd. v. Harper’s Garage (Stourport) Ltd.* [1968] AC 269, 337.

<sup>26</sup> See J.D. Heydon, *The Restraint of Trade Doctrine* (Sydney: Butterworths, 2nd ed. 1999) 171 where the author refers to “a residual third” category. See further A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Sweet & Maxwell, 4th ed. 2004) 16 where the authors define another category as “any situation, not necessarily involving a

whether a particular provision is a “restraint of trade” in the sense intended by the ROTD.

### 1.2.1 “Restraint of Trade”

Classic examples of “restraints of trade” in personal contracts include post-termination non-competition clauses and non-solicitation of customer clauses. Importantly, other types of clauses may be regarded as “restraints of trade” even if they are not framed as express prohibitions. Whether a particular clause is a “restraint of trade,” according to the Privy Council, must be “determined not by the form the stipulation wears but ... but by its effect, in practice.”<sup>27</sup> The High Court framed the issue as follows: “if an artiste is effectively able to be prevented from reaching the public over a prolonged period of time I find it unrealistic to say that this is not a contract in restraint of trade.”<sup>28</sup> This pragmatic approach, based on the effect of the measure on the restrained party, ensures the availability of the ROTD to challenge a wide range of measures that may cause injury to the restrained party.

On this basis, various measures in employment contracts that restrict the employee’s post-termination freedom have been classified as “restraints of trade.”<sup>29</sup> Thus, a “profit sharing agreement” which allowed a former employer to claw-back income that the employee had already earned may be in “restraint of trade.”<sup>30</sup> Similarly, a clause providing that if an insurance broker places business with a different insurance company in a specified lengthy period following termination of his employment, a high percent of any commission must be paid to his former employer may be in “restraint of trade.”<sup>31</sup> So-called “retention” provisions that cause the post-termination forfeiture of an employee’s earned commission to the ex-employer may be in “restraint of trade.” In *Finnegan v. JE Davy*, the Irish High

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contract, in which it appears that a party has acted unreasonably, unfairly or oppressively so as to restrict another party, usually the plaintiff in the action, in the exercise of his trade, profession or employment.”

<sup>27</sup> *Stenhouse Australia v. Phillips* [1974] AC 391, 402-03 (Lord Wilberforce).

<sup>28</sup> *Silverstone Records v. Mountfield* [1993] EMLR 152, 160.

<sup>29</sup> Covenants restricting employees during their employment do not come within the ROTD, see, for example, *McArdle v. Wilson* (1876) 10 ILTR 87.

<sup>30</sup> *Stenhouse Australia v. Phillips* [1974] AC 391, 402 (Privy Council).

<sup>31</sup> *Stenhouse Australia v. Phillips* [1974] AC 391. Also see *Marshall V. NM Financial Management Limited* [1995] 4 All ER 785, 791 (Jonathan Sumption QC) and *Prudential Assurance Co. v. Rodrigues* [1982] 2 NZLR 54.

Court refused to uphold a unilaterally imposed clause that deferred payment for one year of forty percent of a discretionary bonus to those employees believed to be likely to “defect” to a rival stock-broking activity.<sup>32</sup> The Court rejected the employer’s depiction of the policy as an economic incentive to stay which did not restrict the employee because he was free to enter another employment. Once the Court had ascertained the substance and effect of the provision on the employees, it decided that the scheme was an absolute bar to any type of employment anywhere in the stockbroking business and, clearly, was in “restraint of trade.” For similar reasons, a clause whose effect, in reality, is to make the payment of pensions conditional upon post-employment fidelity to ex-employer is in “restraint of trade.”<sup>33</sup> These examples show that the ROTD is available to ex-employees to resist the enforcement of *de facto* shackles that make any aspect of their income (such as bonus, commission, and pension) dependent on not competing with their former employer.

It is significant that courts have recognised “restraints of trade” in several types of personal contracts other than employment contracts. Examples of such other types of agreements to which a professional may be party include joint venture agreements,<sup>34</sup> transfer of patents agreements,<sup>35</sup> licensee agreements,<sup>36</sup> franchises,<sup>37</sup> management and promotion contracts,<sup>38</sup> independent contractor agreements,<sup>39</sup> agency agreements<sup>40</sup> and consultancy agreements.<sup>41</sup> A “Release Contract” that restricted the release of a rugby player from his club came within the scope of the ROTD even though, as the Court noted, it was “*sui generis* and far removed from

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<sup>32</sup> [2007] IEHC 18.

<sup>33</sup> See *Wyatt v. Kreglinger and Fernau*, [1933] 1 K.B. 793, 809 where Slesser LJ refused to find a distinction between the case in which an individual “expressly covenanted to exclude himself...from entering a specified trade and the case in which a person has agreed that a right which he would otherwise have would be defeated by entering the trade.” Similarly, in *Bull v. Pitney Bowes*, [1966] 3 All ER 384, 390 Thesiger J. stated that “... the employer cannot achieve by the inducement of a continued pension that what he could not achieve by obtaining a direct promise in return for particular wages or salary.”

<sup>34</sup> *Dawnay Day & Co v. de Braconier d’Alphen* [1998] ICR 1068, [1997] I.R.L.R 442.

<sup>35</sup> *Dranez Anstalt v. Hayek* [2003] FSR 32.

<sup>36</sup> *Office Overload v. Gunn* [1977] FSR 39 (CA).

<sup>37</sup> *Vendo v. Adams* [2002] NI Ch 3. See also *Fleet Mobile Tyres Ltd v. Stone and Ors* [2006] EWHC 1947 (QB).

<sup>38</sup> *Watson v. Praeger* [1991] 3 All ER 487, [1991] 3 All ER 487. See also *Proactive Sports Management Ltd v. Wayne Rooney, Stoneygate 48 et al* [2010] EWHC 1807 (QB).

<sup>39</sup> *Winnipeg Livestock Sales Ltd. v. Plewman* 192 D.L.R. (4<sup>th</sup>) 525 Court of Appeal in Manitoba.

<sup>40</sup> *Marshall v. NM Financial Management Ltd* [1995] 1 WLR 1461. See also *Berry, Birch & Noble Financial Planning Ltd v. Berwick & Ors* [2005] EWHC 1803 (QB).

<sup>41</sup> *John Michael Laphorne v Eurofi* [2001] EWCA Civ 993.

the ordinary run of cases” where the ROTD usually comes into play.<sup>42</sup> The scope or applicability of the ROTD to provisions is affected by the consideration that the measure may, in practice, negatively impact the economic interests of the restrained professional.

A diverse range of provisions in non–employment contracts can be regarded as “restraints of trade.” As Chapters Three and Seven examine several such examples in detail, this section gives only a flavour of the type of provision that may be regarded as a “restraint of trade.” The first example is that of “*solus*” (exclusive purchase) obligations in standard motor fuels supply agreements. In *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd*, three judgments of the House of Lords took the view that the ROTD applies to restrictions on existing freedom.<sup>43</sup> For example, Lord Reid stated that the ROTD applies where someone “contracts to give up some freedom which he would otherwise have had” and noted that the garage owners had restricted their right to sell petrol supplied to them by others.<sup>44</sup> The second example comes from *Schroeder* where the House of Lords applied the ROTD to restrictions in an exclusive services contract because they appeared to “be *unnecessary or to be reasonably capable of enforcement in an oppressive manner.*”<sup>45</sup> Thus, a one-sided standard form lengthy exclusive services contract between a writer and a music publishing company was in “restraint of trade.” The third example comes from *Days Medical Aids* where an unlimited renewal clause in an exclusive distribution contract was held to be in “restraint of trade.”<sup>46</sup> A fourth example of a “restraint of trade” is “financial incentive to the agent not to carry on business in the specified field.”<sup>47</sup> In *Marshall*, a self-employed agent was paid wholly on the basis of commission which comprised initial commission and renewal commission. His contract provided for the continued receipt of renewal commission post-termination only if he complied with

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<sup>42</sup> *Leeds Rugby Limited v. Harris & Bradford Bulls Holdings Ltd* [2005] EWHC 1591 (QB) para 46.

<sup>43</sup> [1968] AC 269.

<sup>44</sup> [1968] AC 269, 298. See p 309 for the view of Lord Morris Borth-y- Gest and for Lord Hodson’s view see p 317.

<sup>45</sup> *A Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308; 1314 (Lord Reid) HL affirming [1974] 1 All ER 171 (CA). The songwriter was granted a declaration that the contract was contrary to public policy and void. The decision was affirmed by Court of Appeal and, unsuccessfully, appealed to the House of Lords.

<sup>46</sup> *Days Medical Aids Ltd v. Pihsiang Machinery & Ors* [2004] EWHC 44 (Comm.).

<sup>47</sup> *Marshall v. NM Financial Management Ltd* [1995] 1 WLR 1461, 1465.

highly restrictive conditions, including not working for a rival for one year post-termination. In light of the diversity of these provisions (that are all contained in non-employment contracts) it is important to seek the reason why they are regarded as “restraints of trade.”

In deciding whether a particular provision is a “restraint of trade” courts can examine its potentially negative implications for the restrained person. This focus on the person ensures the ROTD is available to protected restrained persons who are not employees even where the provision is drafted in an apparently innocuous format. That the ROTD’s scope is determined according to the negative *de facto* impact of a provision on the restrained party makes the ROTD a valuable legal instrument for professionals in many circumstances. Furthermore, the ROTD’s scope and, consequently, the protection it may offer to professionals is enhanced because courts are not swayed by the form or title of a clause when determining whether a “restraint of trade” exists.

### *1.2.2 Test of Reasonableness*

This section shows *how* the ROTD’s test of reasonableness can protect the interests of professionals who agreed to “restraints of trade” in employment and other types of contract.<sup>48</sup> The restrained party may be either a defendant (resisting an application for an Order to enforce the restriction) or a plaintiff (seeking an Order that the “restraint of trade” is void).

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<sup>48</sup> It is not suggested that all “restraints of trade” are invariably struck down. See, for example, *Thomas v. Farr plc* [2007] EWCA Civ 118 where an ex-employee unsuccessfully sued his former employer for breach of contract and the Court of Appeal ordered that the restrictive clause be enforced. See also *TFS Derivatives v. Morgan* [2005] IRLR 246 (Cox J.).



Lord Macnaghten set out the classic statement of the test and its rationale in *Nordenfelt* as follows:

“All interference with individual liberty of action in trading and all restraints of trade themselves, if there is nothing more, are contrary to public policy and, therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”<sup>49</sup>

The starting attitude of the ROTD towards “restraints of trade” is an antipathetic one. It insists that “all restraints of trade” must be justified as reasonable if they are to be enforced by courts.<sup>50</sup> The ROTD presumes all “restraints of trade” to be void unless they have been justified as being reasonable both *inter partes* and in the “public interest.”<sup>51</sup> The question of reasonableness is one of law for a court to adjudicate.<sup>52</sup> There are two elements or limbs to the reasonableness test. The first limb tests whether the restrictive measure is reasonable *inter partes*.

#### 1.2.2.1 Reasonable *inter partes*

When deciding whether “restraint of trade” has been justified as being reasonable *inter partes*, courts have to take account of the interests of the restrained party and of the restraining party. The ROTD takes a sterner attitude to post-termination restrictions in *employment* agreements than to post-termination restrictions in agreements for the sale of business.<sup>53</sup> This distinction recognises that ex-employees

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<sup>49</sup> *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535, 565.

<sup>50</sup> Some “restraints of trade” cannot be justified. For example, a bare prohibition against competing (sometimes termed “a covenant in gross”) irrespective of the amount of consideration is void. See *British Reinforced Concrete v. Schieff* [1921] 2 Ch 563, 576; *Mc Ellistrem v. Ballymacelliott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, 564; *Vancouver Malt and Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd* [1934] AC 181, 190 (Privy Council) and *Apple Corps Limited and Another v. Apple Computers Inc* [1991] 3 CMLR 49 (CA).

<sup>51</sup> Judicial and academic opinion is divided as to whether a “restraint of trade” is void or voidable. See S. Mehigan and D. Griffiths “*Restraint of Trade and Business Secrets: Law and Practice*” (Longman 1985), 28.

<sup>52</sup> *Mulligan v. Corr* [1925] IR 169,175.

<sup>53</sup> See *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535, 566 where Lord Macnaghten stated that courts should subject “apprenticeship and cases of that sort” to closer

are in different relationships with their other contracting party than vendors of a business. The relative status of the parties affects how their respective interests are treated by courts.

Employment contracts are next examined in order to show the high level of protection available to ex-employees under the reasonableness *inter partes* test. This research is interested in the protection accorded to ex-employees for two reasons. Firstly, the fundamental principles that guide the application of the test to employment contracts may be applied to other types of personal contracts such as exclusive services agreements, consultancy agreements and franchises. Secondly, it will be argued later that ex-employees are disadvantaged if the applicability of the ROTD is ousted by the application of competition law to employment contracts.

When applying the *inter partes* limb of the reasonableness test, courts decide which interests of the restraining party are worthy of protection. Some examples where courts narrowly define the legitimate protectable interests of the restraining party are next examined.

#### **1.2.2.1.1 Employment contracts**

The ROTD does not allow an employer either to prohibit a former employee from competing<sup>54</sup> or to unilaterally impose financial or practical restrictions on an employee departing to compete.<sup>55</sup> An employer may protect only “legitimate interests.” The classic “legitimate interests” of employers are “trade connections” and trade secrets.

In order to be allowed protect something on the basis that it is “trade connection,” the employer must satisfy the court that there is something more than merely

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scrutiny, than agreements for “the sale of a business or dissolution of partnership.” For more recent similar statements see *JA Mont (UK) Ltd v. Mills* [1993] FSR 577.

<sup>54</sup> See *Countrywide Assured Financial Services Ltd v. Deanne Smart, Marc Pollard* [2004] EWHC 1214, para 20 where Laddie J. observed that what counsel for the employer “is really saying is that, because (the employee) has been an exemplary employee of the claimant and that will no doubt have generated good will for the claimant, his client does not want him to work with somebody else. That does not appear to me to be a legitimate interest to be protected by the employer.”

<sup>55</sup> See *Finnegan v. JE Davy* [2007] IEHC 18 where the Irish High Court noted that the bonus could be paid to an employee departing to a non-competing activity (but not if he went to a rival) and, on this basis, rejected the employer’s argument that its purpose was to finance the recruitment of a replacement employee.

customer contact at stake. Recently, in *Russ v. Robertson* the employer of an estate agent was not allowed to protect his customer base.<sup>56</sup> Frequent contact, alone, between the employee and customer is not a sufficient basis for seeking protection.<sup>57</sup> Restriction will only be permitted if the employer establishes that the employee has a certain level of “magnetism”<sup>58</sup> or influence *vis-à-vis* customers. To quote the Irish High Court, a restriction will not be upheld unless the employer shows that an employee “might obtain such personal knowledge of, and influence over, the customers of his employer as would enable him, if competition were allowed, to take advantage of his employer's trade connection.”<sup>59</sup> Thus, an employee cannot be restricted merely by an employer claiming that “trade connection” is at stake.

When deciding whether particular information constitutes a protectable “trade secret” courts may similarly take a strict approach. In order to be allowed protection the information must be a secret of the “particular employer and not a general secret of the trade.”<sup>60</sup> In addition, the secret must be essential to the employer’s business, one that he disclosed to the employee during the employment in confidence and be of “such character that if disclosed to a rival they would seriously prejudice employer; and that if employee is allowed to work for rival there would be imminent, real danger of those secrets being disclosed to and confiscated by rival.”<sup>61</sup> The Court of Appeal in *Faccenda Chicken Ltd v. Fowler*

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<sup>56</sup> [2011] EWHC 3470 (Ch).

<sup>57</sup> See *Arthur Murray Dance Studios of Cleveland Inc. v. Witter* (1952) 105 NE 2d 685,695 where Hoover J. gave the example of an elevator operator, whose departure, notwithstanding the most frequent contact with his employers’ customers, would not cause tenants to quit their apartment building. He further speculated that if the “...Deans of the Harvard and Yale Law Schools exchanged chairs it might be very unflattering to see how few if any of their students would try to follow them.”

<sup>58</sup> See *Arthur Murray Dance Studios of Cleveland Inc v. Witter* (1952) 105 NE 2d 685, 699 where Hoover J. explained that, as the employer seeks to show “that the customer will automatically follow the employee” four questions should be addressed. These are: “1. How powerful a hold did the employee get on the customer? There are strong magnets and weak ones. Some can lift only a small coin. Some can lift tons. 2. How difficult is the particular customer to move? What are the employer’s holds? What are the customer inconveniences? A magnet must be considered in the light of the load to be lifted. 3. How far does the employee have to move the customer? 4. Does this employee have a powerful enough hold to pick this customer up and move him that far?”

<sup>59</sup> *Murgatroyd and Co v. Barry Purdy* [2005] IEHC 159.

<sup>60</sup> *Arthur Murray Dance Studios of Cleveland Inc. v. Witter* (1952) 105 NE 2d 685.

<sup>61</sup> *Arthur Murray Dance Studios of Cleveland Inc. v. Witter* (1952) 105 NE 2d 685, 696. See also *Thomas v. Farr*, [2007] EWCA Civ 118 where the Court of Appeal upheld an earlier decision that a firm of insurance brokers specialising in social housing had a legitimate continuing interest in protecting information from being used by its former managing director in the following categories i) business development through the use of a captive insurer, ii) exploitation of new areas of

did not allow a restraint on ex-employees using information on the former employer's pricing and customer details.<sup>62</sup> It can be difficult to convince a court that important commercial information is a trade secret which may be protected by a "restraint of trade" clause.

Any claim by an employer for protection outside these two categories of "legitimate interests" must be founded on the "*identification of some advantage or asset inherent in the business* which can properly be regarded as, in a general sense, his *property*."<sup>63</sup> This is a strict test and, as such, takes good care of employees' interests. Some employers have sought to restrain their employees from soliciting colleagues and have argued that protecting the stability of "their" workforce is a legitimate interest. This argument has been accepted by some courts,<sup>64</sup> while other courts refuse to regard staff as company assets "like apples or pears or other stock."<sup>65</sup> Another knotty issue is whether an employer can restrain the exercise of his employee's *personal talents*. Lord Wilberforce was keen to ensure ex-employees' post-termination freedom to use "to the full any personal skill or experience even if this has been acquired in the service of his employer."<sup>66</sup> In Lord Shaw's view, "a man's aptitudes, his skill, his dexterity, his manual or mental ability ... are not his master's property: they are his own."<sup>67</sup> Under the "property" paradigm it can be difficult for employers to establish a "legitimate interest" to restrain the employee's personal skills.<sup>68</sup>

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business within social housing, iii) exploitation of new geographical markets, iv) business development through acquisition of other businesses and v) pricing and financial information relating to clients and insurer.

<sup>62</sup> [1987] 1 Ch 117 and applied in *AT Poeton (Gloucester Plating) Ltd v. Michael Ikem Horton* [2001] FSR 169. At an earlier stage in the litigation in *Faccenda Chicken* [1987] 1 Ch 117,137, McNeill J. was prepared to allow the protection of "material which, while not properly described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as trade secret *eo nomine*. His judgment mentions four criteria: firstly the nature of the employment, secondly the nature of the information, thirdly, the extent to which the confidential nature was impressed on the employee and finally the ease of isolating the information from other information which the employee was free to use.

<sup>63</sup> *Stenhouse (Australia) Ltd. v. Phillips* [1974] AC 311, 322 (Privy Council).

<sup>64</sup> See *Alliance Paper Group v. Prestwick* [1996] IRLR 25 where the restriction was limited to senior staff. See further *Dawnay Day & Co v. de Braconier d'Alphen* [1998] ICR 1068, 1111 where Evans LJ stated that "an employer's interest in maintaining a stable well trained workforce is one which he can properly protect within the limits of reasonableness." Also see *SBJ Stephenson v. Mandy* [2000] IRLR 233, 238-9.

<sup>65</sup> *Hannover Insurance Brokers v. Schapiro* [1994] IRLR 82 (Dillon LJ).

<sup>66</sup> *Stenhouse (Australia) Ltd. v. Phillips* [1974] A.C. 391 (Privy Council).

<sup>67</sup> *Herbert Morris v. Saxelby* [1916] 1 AC 688, 714.

<sup>68</sup> See *Thomas v. Farr* [2007] EWCA Civ 118 at para 39 where Toulson LJ noted that the word "property" was being used only in a general sense as it is established that (apart from any

It must be noted that even “legitimate interests” are entitled only to an adequate level of protection. Thus, if a restraint “goes further than to afford adequate protection to the party in whose favour it was granted” the restraint is *prima facie* void.<sup>69</sup> In assessing the reasonableness of “restraints of trade,” courts examine the type of restraint and its scope in terms of subject matter, duration and geographical reach.<sup>70</sup> Courts will not allow a “restraint of trade” if the employer’s interest can be adequately protected by a less restrictive covenant. Thus, a non-competition clause will not be permitted where less restrictive types of clauses such as a non-solicitation clause and a confidentiality obligation would offer adequate protection.<sup>71</sup> Courts will not enforce a restriction whose scope exceeds the operation of the employer in terms of customers<sup>72</sup> or territory.<sup>73</sup> That courts make a calibrated assessment is evident from the statement that “...as the time of the restriction lengthens and the space of its operation extends, the weight of the onus on the covenantee grows.”<sup>74</sup> This comment shows that the burden of justification borne by the employer increases in proportion to the level of restrictions that he seeks to impose on the employee. Courts’ strict scrutiny of the extent of protection sought by an employer benefits the former employees.

The *inter partes* analysis requires that thorough consideration be given to the circumstances and interests of both parties. This chapter is more interested in the protection the ROTD offers to restrained party. When judging whether the desired level of protection is reasonable *inter partes*, courts must be sensitive to the impact

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obligations undertaken by contract) the law relating to confidential information is an equitable invention and is not based on the concept of information as property.

<sup>69</sup> *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 300 (Reid L.J.).

<sup>70</sup> See *Allan Janes v. Johal* [2006] EWHC 286 where a six mile radius from a small solicitor’s office was found to be excessive because it included a large number of businesses which had not been clients of the employing firm.

<sup>71</sup> *Russ v. Robertson* [2011] EWHC 3470 (Ch) is a recent example.

<sup>72</sup> *Murgatroyd and Co v. Barry Purdy* [2005] IEHC 159.

<sup>73</sup> See *Greer v. Sketchley Ltd* [1979] IRLR 445 where it was decided that a restraint on an employee from entering new employment in “any part of the United Kingdom” when the employer was active only in part of the UK is excessive. It distinguished *Littlewoods Organisation* [1977] 1 WLR 1472 which is a majority decision of Court of Appeal enforcing a 12 month post-termination restraint on a senior executive which, if literally interpreted, could include very far flung employers. See also *Mulligan v. Corr* [1925] 1 IR 169, 175 where the Irish Supreme Court stated that “a restriction imposed to protect a business which was not in fact being worked and might never be set up was quite unreasonable.” Also, see *Allan Janes LLP v. Johal* [2006] EWHC 286 (Ch).

<sup>74</sup> *M&S Drapers v. Reynolds* [1957] 1 WLR 9, 12 (Hodson LJ).

of the provision on the former employee's interests. It is clear that courts can take a strict attitude when assessing whether the interest of the employer is a legitimate one that may be protected. How the ROTD's protective attitude to former employees may benefit persons who have agreed to "restraints of trade" in other types of contracts is next discussed.

#### 1.2.2.1.2 Personal Contracts other than Employment Contracts

Sometimes, when courts assess the reasonableness of a restraint in non-employment contracts, they treat the restrained individual as if he is an employee and thereby accord him a higher level of protection. For example, if a salaried partner is treated as an employee when assessing a restraint in the sale of business contract, it gives him greater protection than he would otherwise receive as a vendor of a business.<sup>75</sup> One licensee was even described in a judgment from the Court of Appeal as "a kind of "cross-breed" and the judge expressly assumed that he was an employee for the purposes of the case.<sup>76</sup>

In *Fleet Mobile Tyres Ltd v. Stone and Ors*, the High Court took an interesting approach when deciding how to regard a one year post-termination non-competition clause in a franchise.<sup>77</sup> The Court specifically stated that while the analogy of vendor and purchaser is helpful and, often, determinative, this particular franchise had features that showed it was not an "at arm's length" relationship.<sup>78</sup> In particular, the Court noted the franchisor's control over pricing, branding and re-branding and that he had treated franchisees as if they were "truculent employees."<sup>79</sup> On this basis, the Court found the franchise relationship to be more analogous to an employment relationship and expressly declined to follow earlier case law which had found a one year post-termination non-competition clause in a

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<sup>75</sup> *Briggs v. Oates* [1991] 1 All ER 405; *Clarke v. Newland* [1991] 1 All ER 397 and *Kerr v. Morris* [1987] Ch 90, [1986] 3 W.L.R. 662.

<sup>76</sup> See *Office Overload v. Gunn* [1977] FSR 39, 43 where Lawton LJ stated that "... he is like a labrador 'with a touch of white' -he may have had an ancestor who was a pointer, and therefore cannot be called a true labrador, but he looks like a labrador, and for the purposes of this case I am prepared to assume that the defendant is an employee and to apply the employee tests."

<sup>77</sup> [2006] EWHC 1947 (QB).

<sup>78</sup> Para 119.

<sup>79</sup> *ibid.*

franchise to be reasonable.<sup>80</sup> Even where the person is not expressly treated as an employee, courts may take account of his *de facto* weaker position in the relationship. In *Vendo plc v. Adams* the High Court in Northern Ireland (Girvan J.) noted that the franchisor set the price of the service, bore the risk of bad debts, negotiated with customers and passed their orders onto the franchisee, subtracted an administration fee from the payment by customer and insisted that the franchisee use products exclusively supplied at prices set by the franchisor.<sup>81</sup> Girvan J. refused to grant an injunction to enforce a post-termination non-competition clause.

There is evident concern for a relatively weaker contracting party in the judgments of the House of Lords in *Schroeder* deciding that the publishing house had failed to justify as reasonable its lengthy and “one sided” exclusive services contract.<sup>82</sup> These judgments will be analysed in Chapter Seven and, for this reason, this section makes only brief observations about their focus on the impact of the contract on the songwriter. Lord Diplock asked whether the bargain was “fair” and enquired whether the restrictions on the songwriter are “both reasonably necessary for the protection of the legitimate interests of the promisee [publishing company] and *commensurate with the benefits* secured” to the promisor songwriter.<sup>83</sup> Lord Reid stated that duration is an important factor when assessing reasonableness and noted there was no evidence as to why the lengthy duration period was necessary to protect the publishing company’s interests.<sup>84</sup> While the contract specified duration of five years, the Court noted it could be extended to ten years if the royalties exceeded a specified modest sum. The Court further noted that the songwriter would receive no payment (apart from an initial small sum) unless his work was published but the publishers were not obliged to publish. Additionally, it noted that he had no right either to terminate the contract or to get the re-assignment of

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<sup>80</sup> It expressly did not follow *Dyno Rod plc v. Reeve* [1999] FSR 149 where Neuberger J. had decided that the franchise was far more similar to a transfer of business agreement than to an employment agreement and, on that basis, allowed a one year post-termination non-competition clause.

<sup>81</sup> [2002] NI Ch D 95

<sup>82</sup> *A Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R.1308, 1315 (Lord Reid).

<sup>83</sup> *ibid*

<sup>84</sup> *A Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308, 1312.

copyright in the event of non publication. Finally, the contract assigned full copyright from the songwriter globally in every musical composition in which he would have an involvement.

It is important to note that the protection available under the ROTD is not confined to performers in the field of sport or entertainment and may extend to other professionals. The Court of Appeal in *Credit Suisse* expressly accepted the relevance of the case law on performers in a case involving restrictions on chartered accountants.<sup>85</sup> Self-employed professionals in the commercial sector have been protected by the ROTD. *Lapthorne v. Eurofi* involved a self-employed chartered accountant who entered a consultancy agreement which provided that if he provided services other than the “Services” to clients of the company, payment could only be made to the company [and to not the accountant].<sup>86</sup> The Court of Appeal found that the clause was too wide to protect “legitimate interests” of the company. It noted that the company was not obliged to provide the consultant with work, and the clause was not limited to clients with whom the consultant had contact during the course of providing services. The Court decided that the company’s legitimate interests could have been adequately protected by a suitably worded post-termination clause.<sup>87</sup> In *Marshall v. NM Financial Management Ltd*, the Court decided that a clause prohibiting the self-employed agent from engaging post-termination in any business or employment was impossible to justify as reasonable and decided that the business of the agent “including the goodwill arising from his reputation and connections was his own property.”<sup>88</sup> In *Berry, Birch & Nobel Financial Planning Ltd v. Berwick & Ors*, a company was denied an interim injunction against its former agents to enforce prohibition on dealing with the company’s 20,000 clients and other potential clients when the agents had dealings with a maximum of 1,500 clients.<sup>89</sup> The Court decided that the clause was “effectively a clause against competition” which would be too wide to be

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<sup>85</sup> *Credit Suisse Asset Management v. Armstrong* [1996] ICR 882, 893 where Neill LJ remarked on how persons have a “concern to work and a concern to exercise their skills” and that this applies not only to artists and singers who depend upon publicity but also to “skilled workmen and even to chartered accountants.” See further the remarks of Dillon C.J. in *Provident Financial Group v. Hayward* [1989] ICR 160, 168.

<sup>86</sup> [2001] EWCA Civ 993 (Tuckey L.J.).

<sup>87</sup> Para 28.

<sup>88</sup> [1995] 1 WLR 1461, 1465.

<sup>89</sup> [2005] EWHC 1803 (QB).



reasonable.<sup>90</sup> It also decided that the contract’s definition of “confidential information” was so broad as to encompass information that was trivial, and/or publicly available and to encompass “matters which are part of an agent’s general skill and knowledge which he is entitled to take away” with him.<sup>91</sup> These cases evidence two important points. Firstly, the protection of the ROTD is not limited to inexperienced persons in the entertainment world and, secondly, self-employed professionals can be protected by the ROTD.

The ROTD will not allow a restraining party to enforce “restraints of trade” contained in either employment or other contracts that are unreasonable in the interests of the restrained party. When deciding what is reasonable *inter partes*, courts examine the reality of the relationship as between the parties. The ROTD allows courts to take account of the extent to which the restrained person’s economic interests are intimately intertwined with and, in effect, determined by the restraining party. The reasonableness *inter partes* limb of the test protects parties in many circumstances because it specifically directs courts’ attention to ascertaining the impact of the impugned measure on the party, even if he is not an employee.

#### 1.2.2.2. Reasonable in the “public interest”

Where a “restraint of trade” is justified as reasonable in the parties’ interest, courts will not enforce it unless it is justified as reasonable in the “public interest.” The insistence that restrictions must be reasonable in the “public interest” may render some restrictions on professionals contained in personal contracts unenforceable. While the *inter partes* limb undoubtedly offers good protection, the “public interest” limb may, on occasion, also protect some restrained professionals who seek to resist a restriction.

A court may recognise a “public interest” in ensuring that the public enjoys unfettered choice when selecting their preferred provider of professional personal services. In *Sherk*, the Ontario High Court of Justice refused to enforce a restraint

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<sup>90</sup> Para 30.

<sup>91</sup> Para 15. The restriction was drafted so broadly that it would prevent the disclosure of information so trivial as, for example, the venue for the Christmas party.

against an obstetrician by his former employers.<sup>92</sup> In its view, pregnant patients who had consulted an obstetrician before he left the clinic were “part of the public who, having confidence in the defendant, are entitled to have the benefit of his continuing care.”<sup>93</sup> It noted how restrictive covenants between medical people tended to “further limit the right of the public to deal with a profession.”<sup>94</sup> In *Oswald Hickson Collier v. Carter-Ruck* the Court of Appeal examined a Partnership deed that prevented a departing partner from approaching or acting for any of the solicitor firm’s clients unless they had been introduced by him to the firm.<sup>95</sup> Lord Denning MR stated that the “client ought reasonably to be entitled to the services of such solicitor as he wishes.”<sup>96</sup> These judgments show how the scrutiny of the restriction through the “public interest” lens shifts attention on to the freedom or right of the public to have unrestricted access to their preferred professionals.

A restriction on a person’s political freedoms may be unreasonable from the perspective of the “public interest.” *Neville v. Dominion Canada News Co* involved an agreement not to report a financier’s financial matters in a particular newspaper in return for cancelling some of the newspaper owner’s debt to the financier.<sup>97</sup> Following the publication of material in violation of the agreement, the financier tried to sue for the debt. Lord Cozens-Hardy found the clause to be unreasonable. While the court did not refer expressly to the “public interest”, Buckley argues the clause could not be “regarded as otherwise than against public policy.”<sup>98</sup> The same reasoning may be taken to particular contractual obligations on professionals. For example, contracts between the Irish Health Service Executive (HSE) and medical consultants since 2008 reportedly include a “gag” clause that forbids new consultants to talk about the terms and conditions under which they treat public patients. It may be that such clauses that limit freedom of speech may not be reasonable in the “public interest.”

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<sup>92</sup> *Sherk v. Horwitz* [1972] 2 OR 451.

<sup>93</sup> *Sherk v. Horwitz* [1972] 2 OR 451, 458.

<sup>94</sup> *Sherk v. Horwitz* [1972] 2 OR 451, 456.

<sup>95</sup> [1984] 2 All ER 15.

<sup>96</sup> [1984] 2 All ER 15, 18.

<sup>97</sup> [1915] 3 KB 556 (CA).

<sup>98</sup> R.A. Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell, 2<sup>nd</sup> ed. 2009) 564.

These judgments show that, sometimes, the requirement that the clause must be reasonable in the “public interest” can lead to a restriction in a personal contract being declared unenforceable.

### *1.2.3 Conclusion on Personal Contracts*

Section 1.2 demonstrated how the ROTD offers protection to various professionals who are party to diverse “restraints of trade” contained in employment and/or other contracts. Essentially, the ROTD allows a restrained party to resist the enforcement of unreasonable contractual clauses. The ROTD’s protection stems, firstly, from the *basis* of its decisions on the scope of “restraint of trade.” The inclusive and effects-based attitude of the ROTD makes it widely available to various persons (not just employees) who wish to resist measures that negatively affect their economic interests. It is significant that the ROTD is available where the restrained party is relatively weaker and the terms are either unnecessary or capable of enforcement in an oppressive manner. Secondly, the ROTD’s protection stems from its test because it insists that “restraints of trade” must be justified as reasonable. In particular, the *inter partes* element of the reasonableness assessment is important as it requires discrete account to be taken of the restrained party’s interests. While most cases involving restraints on personal contracts are resolved under the *inter partes* limb, sometimes, the “public interest” limb may be useful for some professionals.

The key point is that *how* courts approach the ROTD’s scope and its test make it a valuable measure for professionals in diverse circumstance who are party to various types of restrictive personal agreements.

### 1.3. RULES & THIRD PARTY ARRANGEMENTS

This section examines how the ROTD may be applied to various clauses contained in measures that were not directly negotiated by the restrained person. Such a measure may be in either an arrangement made by third parties (for example rival employers) or in rules issued by an authoritative body.<sup>99</sup> Section 1.3, firstly, considers interpretations of “restraints of trade” and, then, examines how the “reasonableness” test has been applied.

#### 1.3.1 “Restraints of Trade”

Agreements by two parties that restrict the opportunities of others (third parties) to compete may come within the reach of the ROTD. For example, a mutual “non poaching agreement” between two rivals not to employ each other’s staff without each other’s written consent may be in “restraint of trade.”<sup>100</sup> In *Consultants & Designers, Inc v. Butler Service Group*, Butler agreed to supply skilled engineering and design persons to Tennessee Valley Authority (TVA).<sup>101</sup> The contract precluded employees who were contracted by Butler from working for TVA or for any other technical service firm on TVA projects for a specified period following the termination of Butler’s contract. When a rival (C& D) tried to hire Butlers’ employees for a TVA project, Butler obtained an injunction under the ROTD.

The first reported case of the ROTD applying to restrictive rules of an association involved prohibitions on any member from employing “any traveller, carman, or outdoor employee, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service.”<sup>102</sup> The association unsuccessfully sought to prevent an employer from employing an ex-employee of a fellow member. In *Gunmaker’s*

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<sup>99</sup> Trades union and trade associations are exempted from the ROTD for several purposes by s. 11 Trade Union and Labour Relations (Consolidation) Act 1992. See, for example, *Goring v. British Actor’s Equity Association* [1987] IRLR 122.

<sup>100</sup> *Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd.* [1959] Ch. 108.

<sup>101</sup> 720 F2d 1553 (11<sup>th</sup> Cir 1983) discussed by M. Glick, D. Glick and D. Hafe, “The Law and Economics of Post –Employment Covenants: A Unified Framework” [2002] 11 *Geo Mason L Rev.* 357.

<sup>102</sup> *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887) 36 Ch D 465.

*Society v. Fell*, the Society fined a member for breach of its rule which prohibited members either supplying gun barrels to non-members or stamping gun barrels on their behalf.<sup>103</sup> Trebilcock has described this case as a bridge between the old guild cases and the modern cases dealing with self-governing professions.<sup>104</sup> Binding provisions of commercial entities and collective organisations may be “restraints of trade.” In *McEllistram*, the House of Lords applied the ROTD to a cooperative scheme that altered its terms so that it penalised members who sold their milk other than to the cooperative and, moreover, did not allow membership to be terminated without permission.<sup>105</sup>

Courts have identified “restraints of trade” in third party measures (not only where there are express direct non-competition edicts) where there are *de facto* impediments to a professional working or competing as he wishes. For example, restrictions on hours of its members’ operations, conditions of employment (including wages) and resale prices of goods contained in byelaw of a Society established by a Royal Charter were “restraints of trade.”<sup>106</sup> The ROTD was applied to a prohibition in a code of conduct against registered architects practising as surveyors, real estate agents or valuers.<sup>107</sup> *De facto* restrictions on sports professionals contained in regulations have been found to be “restraint of trade.” In *Eastham v. Newcastle United Football Club Ltd and Ors*, Wilberforce J. applied the ROTD in an action against Newcastle United Football Club, the Football League and the Football Association because their “retain and transfer” system restricted players’ freedom to play with other clubs and, thus, was in “restraint of trade.”<sup>108</sup> In general, rules made by organisers of professional sports competitions which “seek substantially to restrict the area in which a person may earn his living in the capacity in which he is qualified to do so” may be in “restraint of trade.”<sup>109</sup> Even a partial restriction on freedom may, depending on its impact on the restrained persons, be in “restraint of trade.” In *Adamson*, the Australian High

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<sup>103</sup> *Gunmakers Society v. Fell* 125 E.R. 1227.

<sup>104</sup> M.J.Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: The Carswell Company, 1986) 201.

<sup>105</sup> *McEllistram v. Ballymacelliot Cooperative Agricultural and Dairy Society* [1919] AC 548.

<sup>106</sup> *Jenkin v. Pharmaceutical Society of Great Britain* [1921] 1 Ch 392.

<sup>107</sup> *Hughes v. Architects Registration Council of the United Kingdom* [1957] 2 QB 550.

<sup>108</sup> [1963] 3 WLR 574 (Ch).

<sup>109</sup> *Greig v. Insole* [1978] 1 W.L.R. 302, 345.

Court applied the ROTD to a complex “mechanism agreed by rugby clubs that limited the professional players’ freedom to play for their club of choice within Rugby League” competitions.<sup>110</sup> Other disqualification rules have been classified as “restraints of trade.” Examples include a change in rules which retrospectively disqualified cricketers if they played for rival promoter,<sup>111</sup> rules preventing member snooker players from joining a rival tour without written consent<sup>112</sup> and rules denying New Zealand players “clearance” to play abroad.<sup>113</sup> Rules prescribing qualifications may be “restraints of trade.” A residency requirement may be a “restraint of trade” if a professional player is prevented from playing for his club of choice.<sup>114</sup> This shows the ROTD’s concern to ensure not just a theoretical freedom to contract or to work but also to ensure real freedom of choice. In *Johnston v. Cliftonville*, Football League regulations which capped the maximum bonuses and wages payable by football clubs were held to be in “restraint of trade.”<sup>115</sup> This decision is interesting because it ensures the players’ opportunity to earn marketplace levels of income rather than artificially capped income.

The key point is that courts will recognise a “restraint of trade” even where the provision falls short of an express prohibition on competing. The concept of “restraint of trade” is interpreted inclusively by courts with a keen eye to identifying *de facto* negative impact on restrained persons’ interests and opportunities.

### 1.3.2 Test of Reasonableness

How the ROTD’s test can be interpreted and applied by courts in ways that protect persons who are restrained by third party measures is next examined. Under the ROTD, a “restraint of trade” contained in rules of associations or in third party

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<sup>110</sup>See *Adamson v. New South Wales Rugby League*. (1991) 31 FCR 24, para 29 where Gummow J. identified the “essence of the restraint is in the operation of the combination which controls the affairs of the League and the clubs.”

<sup>111</sup> *Greig v. Insole* [1978] 1 W.L.R. 302.

<sup>112</sup> *Hendry v. World Professional Billiards and Snooker Association Ltd. Sub.nom. Hendry v. WPBSA* [2002] U.K.C.L.R.5, [2002] E.C.C. 8 (Ch D).

<sup>113</sup> *Blackler* [1968] NZLR 547.

<sup>114</sup> *Avellino v. All Australia Netball Association Ltd* [2004] WL 366, 522.

<sup>115</sup> *Johnston v. Cliftonville Football and Athletic Club and Irish Football League Limited* [1984] 2 NIJB 9. For similar outcome in a New Zealand judgment see *Stiniato v. Auckland Boxing Association* [1978] 1 NZLR 1, CA (NZ).

contracts cannot be enforced unless it is justified as being reasonable *inter partes* and in the “public interest.” This test is next examined in three steps as follows: first, the requirement of *inter partes* reasonableness, then, reasonableness in the “public interest” and, thirdly, the level of justification required.

#### 1.3.2.1. Reasonableness *inter partes*

Although, the restrained person is not a strictly a “party” to restrictions in third party contracts or rules of an association, the ROTD may take account of his interests when assessing the reasonableness of “restraints of trade.” A player’s freedom to choose his club (especially where it is the prestigious one) has been recognised as an important interest under the ROTD.<sup>116</sup> How courts may focus on the impact of a restriction on the restrained professional is next highlighted.

In *Eastham v. Newcastle United Football Club Ltd and Ors*, Wilberforce J. emphasised that the *effect* of the transfer and retention scheme operated by football clubs was to prevent footballers from escaping the club league.<sup>117</sup> He stated that ROTD does not allow restrictions on sportsplayers using elsewhere skill acquired during training or from experience gained through membership of a club’s organisation.<sup>118</sup> In *Greig*, the Court recognised that restrictions on a professional cricketer would deprive him of the opportunity of “making his living in a very important field of his professional life.”<sup>119</sup>

Only “legitimate interests” of the restraining entity may be protected. If these interests are strictly defined the position of the restrained person is protected. In *Hendry*, the High Court accepted that the “legitimate interests” of the incumbent snooker promoter (WPBSA) included its broadcasting contracts and its support of a wider group of players than those which would interest the putative rival tour promoter (TSN) and also included a wider spread of prize money than newcomer

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<sup>116</sup> *Greig v Insole* [1978] 1 W.L.R. 302. See also *Adamson v. New South Wales Rugby League Ltd* (1991) 31 FCR 242.

<sup>117</sup> [1963] 3 WLR 574.

<sup>118</sup> See *Eastham v. Newcastle United Football Club and Ors* [1963] 3 WLR 574 (Ch) 431 where Wilberforce J. relied on *Leng v. Andrews* [1909] 1 Ch 763.

<sup>119</sup> *Greig v. Insole* [1978] 1 W.L.R. 302, 354.

TSN which was motivated solely by commercial profit.<sup>120</sup> Financial investment in training and in overseas tours were recognised as protectable interests of the New Zealand Rugby League which sought to protect them with a “clearance” system to ensure that players on whom the League expended money would make a contribution to the sport.<sup>121</sup> Stability of team membership and strength of team has been accepted by the High Court of Australia as “legitimate interests.”<sup>122</sup> The case law on the stability of sports teams may guide UK courts in relation to defining the interests of employers in protecting their employees in the financial services against poaching by departing colleagues.<sup>123</sup>

### 1.3.2.2 Reasonableness in the “public interest”

Sometimes, a broad attitude to defining the “public interest” may benefit restrained professionals. When assessing the reasonableness in the “public interest” of rules courts may take into account some cultural or other intangible criteria. For example, a New Zealand Court did not uphold a restriction on sportspersons playing overseas and noted that in a “young country it is necessary that its citizens should have the opportunity of gaining wider experience in their chosen field in the larger overseas countries.”<sup>124</sup> In *Macken v. O’ Reilly*, a showjumper challenged an official policy requiring Irish riders to use Irish bred horses when competing internationally.<sup>125</sup> Hamilton J. in the Irish High Court accepted that the policy inhibited an Irish showjumper’s efforts to maintain his position as one the “world’s leading showjumpers and if he fails to maintain that position *the public will be deprived of a great deal of pleasure.*”<sup>126</sup> In these cases, because a broad attitude is taken to defining the “public interest” the restriction is unenforceable and the restrained professional happens to benefit.

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<sup>120</sup> *Hendry v. World Professional Billiards and Snooker Association Ltd. Sub.nom. Hendry v. WPBSA* [2002] U.K.C.L.R. 139

<sup>121</sup> *Blackler* [1968] NZLR 547, 572. See also *Kemp v. New Zealand Rugby Football League Inc* [1989] 3 NZLR 17 and J.D. Heydon, *The Restraint of Trade Doctrine* (Sydney: Butterworths, 2nd ed. 1999) 206.

<sup>122</sup> *Buckley v. Tutty* 125 CLR 353.

<sup>123</sup> *Hannover Insurance Brokers v. Schapiro* [1994] IRLR 82, (CA). See also P.J. Sales, “Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade” (1988) 104 LQR 600

<sup>124</sup> *Blackler* [1968] NZLR 547, 555.

<sup>125</sup> [1979] ILRM 79.

<sup>126</sup> [1979] ILRM 79, 83 (emphasis added).



### 1.3.2.3 Justification

Professionals who are restrained by third party measures may be protected when courts take a strict attitude to the standard of *justification* expected from the restraining entity. When courts decide whether the restraining entity has adduced satisfactory evidence to justify a restriction, they may take account of the relative vulnerability of the restrained person. For example, a judge of the Australian Federal Court stated that where a professional sportsperson is *de facto* compelled by a scheme agreed by football clubs to join a club that is not of his choice, the level of justification for the restriction would have to be “extraordinarily compelling.”<sup>127</sup> In *Johnston v. Cliftonville*, the High Court of Northern Ireland decided that the Irish Football League had not adequately substantiated its claim that its caps on the maximum bonuses and wages payable by football clubs prevented the two wealthiest clubs from “capturing the best players by offering higher wages than the other clubs could afford.”<sup>128</sup> The Court decided that insufficient evidence was adduced to support the argument that the effect of a “free-for-all on wages” would lead to financial disaster for the smaller clubs. The Court took an exacting view of the level of evidence required. It decided that a general survey of the League clubs’ finances and not just those of Cliftonville would need to have been adduced.<sup>129</sup> These cases show that courts may take a stern attitude as regards the evidence needed to establish justification and, in this way, protect the restrained person’s interests.

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<sup>127</sup> See *Adamson v. New South Wales Rugby League*. (1991) 31 FCR 242, para 61 where Wilcox J. stated “[T]o restrain a person from entering the employment of a particular person, or from following a particular trade or occupation, so as to safeguard the interests of the covenantee by whom that person was once employed or to whom the covenantor has sold a business is one thing; to compel a person – on pain of surrendering his or her occupation altogether- to enter the service of someone whom he or she has not chosen is another. If the rule which has the latter effect can ever be said to be reasonable, the case in justification must be extraordinarily compelling.”

<sup>128</sup> *Johnston v. Cliftonville Football and Athletic Club and Irish Football League Limited* [1984] 2 NIJB 9.

<sup>129</sup> 21.

### 1.3.3 Study: *Dickson v. Pharmaceutical Society of Great Britain*

In order to give a deeper appreciation of how the ROTD may be applied to third party measures, this section studies one case in detail. *Dickson v. Pharmaceutical Society of Great Britain* was selected for this study because it is the first case in which the ROTD was applied to the regulatory type activities of a professional association in the UK.<sup>130</sup>

A motion was passed by a special general meeting of the Pharmaceutical Society of Great Britain. It provided that (except with Council approval) new pharmacies should be situated only in physically distinct premises and may sell only pharmaceutical professional and traditional goods. In addition, it prohibited existing pharmacies from extending the range of non-traditional products. This measure was successfully challenged by a director of Boots Pharmacy as being, *inter alia*, in “restraint of trade.” Pennycuick J granted a declaration and injunction.<sup>131</sup> His decision was unsuccessfully appealed to the Court of Appeal and, again, appealed unsuccessfully to the House of Lords.<sup>132</sup>

Pennycuick J. first had to deal with the question of the ROTD’s scope. It was argued that the Society’s motion itself was not enforceable in a court or before a tribunal and was at most a “statement of the views of the society to be taken into account by members in honour and by the statutory committee when considering whether a member has been guilty of misconduct.”<sup>133</sup> Pennycuick J. cited the test set down by Macnaghten J. in *Nordenfelt* which provides that “all interferences with individual liberty of action in trading” are in “restraint of trade.” Pennycuick J. decided that courts must look at the content of a given operation and “the steps which may be taken to carry it out” and if the measure interferes “with a liberty of action in trading, then it [is] a restraint of trade for the purposes of public policy.”<sup>134</sup> This approach to deciding what is a “restraint of trade” is an “effects”

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<sup>130</sup> *Dickson v. Pharmaceutical Society of Great Britain* [1970] AC 403(HL).

<sup>131</sup> [1967] Ch. 708. Pennycuick J.

<sup>132</sup> [1970] AC 403.

<sup>133</sup> [1967] Ch. 708. 719, Pennycuick J.

<sup>134</sup> [1967] Ch. 708. 717.

based test which takes account of commercial realities over form and, as such, benefits the restrained person. The Court decided that the Society's measure was a "restraint of trade." Thus, it fell to the Society to offer evidence to the Court that the measure was justified as being reasonable in the interest of parties and in the "public interest." However, the Society chose not to make this pleading and, on this basis, Pennycuick J. disposed of the case.<sup>135</sup>

In the Court of Appeal, Lord Denning MR appeared keen to subject the measure to the ROTD rather than to dispose of the case on a pleading point. He observed that the Society's measure was not agreed to by all members.<sup>136</sup> He further noted that professional associations, unlike trades union, do not have any statutory exemption from the ROTD. Although the Society chose not to plead justifications, Lord Denning MR expressly considered the three circumstances that it had "fully canvassed" before Pennycuick J.<sup>137</sup> These were, firstly, that selling non-traditional goods distracted pharmacists from proper pharmaceutical work and meant they could not supervise it properly; secondly, that selling non-traditional goods affected the number and quality of new entrants; and thirdly, that selling non-traditional goods negatively affected the status of a pharmacist. Lord Denning MR noted the absence of evidence to support these arguments and commented that the leaders of the profession in fact sold non-traditional goods such as photographic goods and wine. He decided that the rule was not reasonable in the interests of the members of the profession. This finding meant it was unnecessary to consider whether the measure was reasonable in the "public interest." Nonetheless, he expressed considerable doubt that the measure was reasonable in the "public interest" on the grounds that "if pharmacists are to be confined to traditional goods it may lead to fewer pharmacies available only at great distances."<sup>138</sup>

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<sup>135</sup> See [1967] Ch. 708,720 where Pennycuick J. expressed himself to be unhappy to decide the matter on an issue of pleading but noted it was the deliberate choice of defendants not to make the pleading.

<sup>136</sup> [1967] Ch. 708, 747. Of the 29,004 members only 5, 026 members cast votes. Of these only 1, 346 members voted in favour.

<sup>137</sup> [1967] Ch. 708, 748.

<sup>138</sup> [1967] Ch. 708, 749.

Sachs LJ., similarly, did not want the case to turn on a pleading point and dealt with the points “canvassed with exemplary care” before the lower court.<sup>139</sup> He agreed with Lord Denning MR’s assessment that the measures were not reasonable *inter partes*. Then, he further opined that the measure would be unreasonable in the “public interest” for three reasons. These are that the measure would; firstly, cause smaller pharmacies to close for economic reasons; secondly, lessen the profitability of pharmacies and increase dispensing charges to customers and, thirdly, tend against opening of new shops and expansion of existing to “meet the wishes” of the public. Sachs LJ expressed the view that these consequences outweighed any advantage to be gained by improving the status of pharmacists.

Taking a similar tack, Danckwerts L.J. observed that it is a convenience to the public to have the opportunity of buying many types of goods and it would be plainly contrary to the “public interest” if pharmacists “had to close down for financial reasons and it would obviously be against the interests of pharmacists if this should occur.”<sup>140</sup>

Although the Court of Appeal judgments can be criticised from procedural perspectives, they offer some interesting insights for this chapter. In particular, they show the eagerness of the Court of Appeal to apply the ROTD, on substantive grounds, even where the restraining entity refused to submit pleadings. This shows a determination to ensure that the ROTD’s broad scope and applicability was both secured and well understood. Their concern for the restrained professional’s freedom is notable. It seems clear that the Court of Appeal intended the ROTD to be an effective instrument for professionals whose freedom to trade in a desired mode was restricted by rules or regulations. The *dicta* in judgments on the “public interest” are also interesting. The perceived detriment to the public (decreased choice of shop) was confidently asserted by the judges notwithstanding the absence of any evidence in the form of economic studies of market impact. Without doubt, the effectiveness of the ROTD from the perspective of a restrained professional was enhanced by these judgments from the Court of Appeal

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<sup>139</sup> [1967] Ch. 708, 758.

<sup>140</sup> [1967] Ch. 708, 750.

The judgments delivered by the House of Lords in this case are also noteworthy for establishing stoutly how the ROTD applied to this type of restriction on professionals. They clearly addressed the scope of the ROTD by stating clearly that the measure was in “restraint of trade” and, thus, required justification.<sup>141</sup>

Lord Upjohn expressly rejected the argument that professional bodies are outside the ROTD and noted there is no exception in favour of professions.<sup>142</sup> Nonetheless, he said that professionals must submit to some rules because clients can expect from professionals “the highest standards of ethical conduct.”<sup>143</sup> In his view:

“a profession is a vocation of the highest standing: it calls on its members to serve (no doubt for reward) the public by offering them highly technical and always confidential advice and services which require a different standard of conduct from tradesmen.”<sup>144</sup>

Thus, in his view, certain restraints on professionals are justifiable “for they are not only necessary in the interest of the profession but of the public who trust to the peculiarly high standing and integrity of a profession to serve it well.”<sup>145</sup>

In Lord Wilberforce’s view, it was immaterial that the members were not bound contractually to observe the rule as the ROTD had never been limited to contractual arrangements. In support, he referred to Lord Macnaghten’s statement in *Nordenfelt* that the ROTD applies to all “interferences with individual liberty.”<sup>146</sup> This indicates a willingness to take a broad approach to defining the availability of the ROTD. Lord Wilberforce noted that the Society refused to plead justification and commented that Pennycuik J had correctly dealt with the case on that basis. He continued by remarking on how the Court of Appeal gave the Society the benefit of a position it did not take up and how this creates a difficulty for judging evidence. Lord Wilberforce was not prepared to accept unquestioningly arguments that were not supported by evidence that the restraints might cause a reduction in

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<sup>141</sup> [1970] AC 403. For Lord Reid’s view see p 420-1. Lord Morris of Borth-y –Gest found it “beyond argument” that compliance with the rule was in “restraint of trade” (p 426). Lord Wilberforce stated that the measure was plainly on its face in “restraint of trade” (p440).

<sup>142</sup> [1970] AC 403, 436.

<sup>143</sup> [1970] AC 403, 437.

<sup>144</sup> [1970] AC 403, 436.

<sup>145</sup> [1970] AC 403, 436-7.

<sup>146</sup> [1970] AC 403, 440. See *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535, 565.

the number of pharmacies.<sup>147</sup> Wilberforce LJ preferred to base his decision on a more certain ground which was that there was nothing “to displace the normal proposition that the public has, in the absence of countervailing considerations, an interest in men being able to trade freely in the goods they judge the public wants and that these restraints clearly, severely and arbitrarily restrict this freedom.”<sup>148</sup> In this way, Lord Wilberforce, robustly, cemented the wide ranging scope of the ROTD and the onus it places on restraining entities to justify restrictions that they seek to impose.

The *Dickson* case is notable for the clear insistence by the Courts, at each stage of the litigation, that the ROTD applies to restrictive measures on professionals’ businesses even if the professional is not a contracting party. Additionally, it is important to note that the judgments specifically focus on the potential negative impact of the measures on the professionals’ economic freedom and, in this way, protect the non-contacting parties’ interests.

#### **1.4 CONCLUSION**

This chapter showed that restrained professionals may call on the ROTD to resist many types of restrictive clauses whether contained in personal contracts (including but not limited to employment contracts) or in measures concluded by third parties such as an association. For presentational reasons, personal contracts are treated separately from third party measures. Nonetheless, there are threads or strands that are common to section 1.2 and section 1.3 regarding the protection offered by the ROTD to a professional irrespective of whether the restrictive measure is contained in a personal contract or a third party measure. These common strands pertain to: firstly, the type of provision that may be regarded as a “restraint of trade”; secondly, the types of “legitimate interests” that may be protected and, thirdly, the approach to the “public interest.”

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<sup>147</sup> See [1970] AC 403, 441 where Lord Wilberforce stated that he would require persuasion that it was proper to take such consideration into account under the ROTD (as opposed to proceedings in the Restrictive Practices Court) and moreover it would need to be evidenced rather than assumed.

<sup>148</sup> [1970] AC 403, 441.

The first common strand is that the scope of “restraint of trade” is broadly interpreted so that it captures not only express interdictions on competing but, also, *de facto* burdens/obstacles. From the perspective of a restrained person, this inclusive attitude to classifying “restraints of trade” is important as it ensures that the ROTD is available to protect professionals who are subject to practical shackles. The inclusive scope of the ROTD is secured when courts focus on the “practical workings of the alleged restraint rather than merely ... its legal form.”<sup>149</sup> This approach allows courts to go behind the express terms in order to appraise the potential impact on the restrained person. The result is that ROTD may apply to a wide variety of *de facto* restrictions whether contained in contractual or non-contractual measures even if they are not drafted in expressly restrictive terms. While this activism may be criticised for being paternalistic, the key point for this chapter is that the scope of “restraint of trade” is inclusive because it is informed by the impact of a clause on the restrained person’s economic interests and, consequently, the protection available under the ROTD is effective and valuable.

The second common strand is that restrained professionals are protected when courts recognise only some interests of the restraining party/entity as meriting protection. By strictly defining the “legitimate interests” of the restrainer under the *inter partes* examination, courts keep a rein on what may be protected. Moreover, the *inter partes* nature of the test protects the restrained professional’s freedom to choose another contracting party such as his manager or his employer.<sup>150</sup> The freedom of a professional to choose is closely connected with liberty to give his professional services (such as songwriting or sporting services) exclusively to a chosen entity. An analogous point can be made in relation to a professional’s freedom to decide how to trade without undue impediment from third party rules.

The third strand is that the ROTD flexibly accommodates diverse and intangible criteria under the umbrella of the “public interest.” This may be useful, sometimes, as protecting these interests may happen to benefit the individual restrained

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<sup>149</sup> *Petersville v. Peters (WA)* Carr J (1999) FCA 5 para 14. For a similar view expressed by the Irish High Court see *Finnegan v. JE Davy* [2007] IEHC 18.

<sup>150</sup> See *Warren v. Mendy* (1989) ICR 525 where the Court of Appeal refused to grant an injunction to a manager seeking to prohibit a rival manager from acting for a sports professional because this order, in reality, would compel the sports professional to keep the original manager.

professional. This may occur where the court identifies a public interest in enjoying the fruits of the services performed by the liberal professional (obstetrician/ lawyer) or sports person in an unrestricted way.

These three strands ensure that significant protection is available under the ROTD to professionals to resist enforcement of a wide variety of restrictions. The breadth and depth of the ROTD's protection is valuable. Moreover, its attention to the interests of the restrained person makes it a valuable legal instrument for professionals who may be in a wide variety of restrictive circumstances.



## HOW EU COMPETITION LAW TREATS THE INTERESTS OF RESTRAINED PROFESSIONALS

### 2.1 INTRODUCTION

This research argues that the interface between the ROTD and competition law is significant because restrained persons' interests are treated differently under each of these legal regimes. Chapter One showed that the interests of restrained persons are discretely considered and protected by the ROTD because it refuses to uphold "restraints of trade" unless they are justified as being reasonable both in the parties' interests and in the "public interest."

This chapter seeks to explain how the interests of restrained professionals may not be protected by EU competition law. To this end, it examines some determinations of the EU Courts and of the European Commission that certain restrictions on persons are not prohibited by Arts 101-2 TFEU. These determinations demonstrate that, in certain circumstances, EU competition law does not strike down particular restrictions on professionals even in situations where the person's freedom to compete is restricted. It is important to emphasise that the aim of this chapter is not to argue that EU competition law takes the wrong approach but, rather, to explore *why* it does not protect the interests of some restrained professionals. This chapter is a companion to Chapter One and, together, they seek to demonstrate that, from the perspective of restrained persons, the ROTD and competition law in the UK are significantly different legal instruments.

Section 2.2 provides an overview of Art 101. Section 2.3 analyses some determinations that restrictions contained in bilateral personal contracts are not prohibited by Art 101(1). Section 2.4 examines determinations that certain restrictions contained in rules are not prohibited by Art 101(1). Section 2.5

sketches how some restrictions on persons may be permitted by Art 101(3). Finally, section 2.6 briefly examines how Art 102 does not prohibit some restrictions on persons contained in rules of associations.

## 2.2 OVERVIEW OF ARTICLE 101

Art 101(1) prohibits some restrictions on competition and Art 101(3) exempts some restrictive provisions that are otherwise prohibited by Art 101(1). Specifically, Art 101(1) prohibits agreements and concerted practices between undertakings and decisions of associations of undertakings which have as their object or effect the distortion of competition and which may appreciably affect trade between Member States. If, following an objective assessment of a provision's aims, pursued in the given economic context,<sup>151</sup> a provision is found to have an anticompetitive *object*, then a finding that Art 101(1) is infringed can be made without further analysis.<sup>152</sup> However, where the object of a provision is not found to be anti-competitive, a determination of an infringement of Art 101(1) can be made only if the provision may produce an appreciable, actual or potential, restrictive effect on competition.<sup>153</sup> When assessing the effect of a provision, account must be taken of the actual economic and legal context. This contextual analysis includes examining the products/services covered by the agreement, the relevant market structure and the actual conditions of its operation.<sup>154</sup> Also, the state of competition that would exist in the absence of the particular provision can be taken into account in assessing the effect of the provision.<sup>155</sup>

This chapter is most interested in determinations that a restriction is either i) not prohibited by Art 101(1) or ii) is permitted by Art 101(3). The relationship between Art 101(1) and Art 101(3) has been much debated. The two main lines of argument

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151 Joined Cases 29/83 and 30/83 *CRAM & Rheinzink v. Commission* [1984] ECR 1679, para 262.

152 Joined Cases 56/64 and 58/64 *Etablissements Consten SA & Grundig Verkauf s GmbH* [1966] ECR 405 para 39. See also Case 45/85 *Verband der Sachversicherer v. Commission* [1987] ECR 405, para 39.

153 See Case 6/69 *Volk v. Vervaecke* [1969] ECR 295 para 7 where the Court of Justice states that Art 101(1) is not infringed if the arrangement's effect on competition is not significant "taking account of the weak position which the parties concerned have on the market."

154 Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 234, 249-50.

155 Case 42/84 *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission* [1985] ECR 2545.

can be summarised as follows:<sup>156</sup> The traditional view of the European Commission is that restrictions of competition infringe Art 101(1) and are void under Art 101(2) unless they satisfy the criteria of Art 101(3).<sup>157</sup> However, the EU Courts (and sometimes the European Commission) have decided that certain restrictions on competition do *not* infringe Art 101(1). Determinations that a measure is not prohibited by Art 101 [either paragraphs (1) or (3)] are significant for restrained persons because their interests are not safeguarded by these determinations. In such situations, the interface between Art 101 and the ROTD is crucially important because of the possibility that the interests of restrained persons may be better treated by the ROTD.<sup>158</sup>

### **2.3 ARTICLE 101(1) and PERSONAL CONTRACTS**

To date, there is relatively little case law on the application of Art 101 on restraints on professionals contained in personal contracts. The paucity is, perhaps, due to the requirement to establish an appreciable effect on interstate trade before Art 101 becomes applicable.<sup>159</sup> That said, it is important to note that the interstate effect requirement is not insuperable in light of, firstly, the expansive interpretations accorded to this requirement by the EU Courts and, secondly, the easily traversed border between certain Members States. Consumers readily travel from Ireland to avail themselves of professional services (such as dentistry) in Northern Ireland. Thus, the applicability of EU competition law to restraints on professionals in other types of bilateral contracts such as consultancy agreements, quasi-employment agreements and exclusive services contracts is not fanciful. In any event, as will be demonstrated in Chapter Three, EU competition law deeply affects the interpretation of domestic competition law in the UK.

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156 A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2nd ed. 2004) 258.

157 *White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (now Articles 101 and 102 TFEU) [1999] C 132/1, para 57.

158 The interfaces between the ROTD and competition law are examined in Chapters Four and Five.

159 Case 6/69 *Volk v. Vervaecke* [1969] ECR 295.

Some determinations under Art 101(1) that do not prohibit restrictions on persons are next examined. The aim of the examination is to explore the reasoning of these decisions because of their negative implications for restrained persons.

### 2.3.1 Art 101(1) and Franchises

Franchises were selected as an example of personal contracts for two reasons. The first reason is that a franchise agreement is a viable business structure for various professionals such as optometrists, pharmacists and providers of veterinary and dental services.<sup>160</sup> The second reason is that, as Chapter One showed, the ROTD specifically examines any negative implications for franchisees and ex-franchisees and it may render some post-termination restrictions unenforceable. For example, in *Fleet Mobile Tyres Ltd v. Stone and Ors*, the High Court applied the ROTD and decided that a one year post-termination non-competition clause was unreasonable because it prevented the ex-franchisee from carrying out his “occupation for a long time in so many places.”<sup>161</sup> The extent to which Art 101(1) specifically recognises and vindicates the interests of franchisees is next explored.

The Court of Justice considered the applicability of Art 101(1) to restrictions in a distribution franchise in *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*.<sup>162</sup> It decided that Art 101(1) prohibits market sharing provisions and restrictions on price competition as between franchisees.<sup>163</sup> However, from the perspective of a restrained franchisee, the Court took a narrow view of what constitutes “restrictions on competition for the purposes of Art 101(1).”<sup>164</sup> Crucially, the Court of Justice expressed the view that Art 101(1) does not prohibit provisions that are “essential” to avoid the risk that the franchisor’s “know-how” and assistance benefits, even indirectly, his rival(s).<sup>165</sup> Additionally, the Court of

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160 Specsavers is an example of a well known franchise for optometrist services and products. Vetfranchise.com and easyvets.com are examples of veterinary franchises. The website www.franchisemall.com lists many medical, optical and dental related franchises.

161 [2006] EWHC 1947 (QB) para 120. Also see *Vendo v. Adams* [2002] NI Ch 3 where the High Court of Northern Ireland expressed concern for the negative impact of the restrictions on the ex-franchisee’s ability to earn a livelihood.

162 Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] E.C.R. 353.

163 Para 23.

164 Para 16.

165 Para 16.

Justice decided that Art 101(1) does not prohibit provisions that establish the control “*necessary*” for “maintaining the identity and reputation of the network.”<sup>166</sup> The Court of Justice’s approach, in this judgment, to Art 101(1) is significant because it does not assist franchisees who are subject to certain post-termination non-competition prohibitions and/or exclusive purchasing obligations in particular circumstances. The lynchpin of the *Pronuptia* test is the standard of “necessity.” It is interesting to explore how the “necessity” test operates when Art 101(1) is applied to restrictions in other types of agreements before returning to appraise its use in the *Pronuptia* judgment.

In *Reuter/BASF*, the European Commission decided that a non-competition clause restraining a research chemist in an agreement for the sale of his business did not infringe Art 101(1).<sup>167</sup> The Commission took this view because it specifically recognised that the restriction was essential to secure the transferred worth of the undertaking where the sale included not only material assets but also goodwill (including relations with customers) and know-how.<sup>168</sup> It emphasised that any such restriction must be limited in its material scope and duration to attaining the legitimate object of the agreement which is to secure for the purchaser the full commercial value of the transfer.<sup>169</sup> It is important to highlight the Commission’s view that “[C]ompliance by the seller with such non-competition clause means no more than he must respect his obligation under the agreement to transfer the full value of the undertaking.”<sup>170</sup>

The *Reuter/BASF* Decision was expressly followed by *Nutricia* where the European Commission decided that Art 101(1) did not prohibit non-competition clauses in an agreement for the transfer of material assets and goodwill of two subsidiaries.<sup>171</sup> It repeated its view (expressed earlier in *Reuter/BASF*)<sup>172</sup> that restrictions against

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166 Para 17 (emphasis added).

167 Decision 76/743/EEC, *Reuter/BASF* [1976] 2 CMLR D44.

168 Para 3. The Commission further noted at para 3 that “[W]hen the material assets of a business are sold it is not normally necessary to protect the purchaser by imposing a prohibition on competition on the seller. In the present case, however, the sale included goodwill and know-how; indeed these items constituted a substantial part of the assets transferred.”

169 Para 3.

170 Para 3.

171 Decision 83/670/EEC *Nutricia*[1983] OJ L 376/22.

172 Decision 76/743/EEC, *Reuter/BASF* [1976] 2 CMLR D44, para 3.

“competition by the seller is a legitimate means of ensuring the performance of the seller’s obligation” to transfer the full value.<sup>173</sup> It emphasised that the “protection accorded to the purchaser cannot be unlimited. It must be kept to the minimum that is objectively necessary for the purchaser to assume by active competition, the place in the market previously occupied by the seller.”<sup>174</sup> On appeal, *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission*, the Court of Justice agreed that some non-competition clauses in a transfer of business agreement might not be prohibited by Art 101(1).<sup>175</sup> It stated that “in order to have that *beneficial effect on competition*, such clauses must be *necessary to the transfer concerned* and their *duration and scope must be strictly limited to that purpose*.”<sup>176</sup> Some words are emphasised by this author in order to convey the narrowly based stipulation that justifies the “necessity” approach which is to produce a beneficial effect on competition with a strictly limited restriction. The *Pronuptia* judgment is a worrying application of the “strictly necessary” standard that was expressed in *Remia* to deal with sale of business contracts.<sup>177</sup> It is worrying (from the perspective of a franchisee) because the Court of Justice in *Pronuptia* apparently envisages a rather low standard of “strictly necessary.”

In *Pronuptia*, the Court of Justice expressed the view that Art 101(1) does not prohibit two types of restrictions on franchisees.<sup>178</sup> The first of these involves restrictions that are “essential” to prevent rivals benefitting from the franchisor’s “know-how.”<sup>179</sup> On this view, Art 101(1) does not prohibit a ban on the franchisee either “opening a shop of the same or of a similar nature in an area where he may compete” with another member of the network for a “reasonable period” after the franchise ends or transferring his shop to another party without the prior approval

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173 Decision 76/743/EEC, *Reuter/BASF* [1976] 2 CMLR D44, para 26.

174 Decision 76/743/EEC, *Reuter/BASF* [1976] 2 CMLR D44, para 27.

175 Case 42/84 *Remia BV and NV Verenigde Bedrijven .Nutricia v. Commission* [1985] ECR 2545, para 20.

176 *Ibid* (emphasis added) .

177 See V. Korah, “*Pronuptia* Franchising: The Marriage of Reason and the EEC Competition Rules” [1986] 8(4) EIPR 99, 120 where the author comments that if the clauses in *Pronuptia* can be justified even if the main transaction does not restrict competition then the Court of Justice went “a trifle further” than it did in *Remia*.

178 The Court concluded that Art 101(1) prohibits franchisors from imposing resale price maintenance on franchisees.

179 Para 16.

of the franchisor.<sup>180</sup> It is important to highlight that the extent of post-termination restriction on the franchisees that is permitted by the *Pronuptia* approach can be considerable. The *type* of protection is absolute as it allows a ban on engaging in competing business and extends not only to *secret* know-how but includes *commercial* know-how.<sup>181</sup> However, the judgment did not stipulate that, when deciding whether the post-termination restrictions were really “necessary,” courts must tease out whether the franchisors’ interests could be protected by measures that place a lesser restriction on the franchisees. The judgment does not insist on an inquiry as to whether the franchisors’ interests could have been adequately protected by lighter proscriptions on the franchisees such as, for example, stipulations against him passing himself off as a franchisee and/or against disclosing commercially sensitive information.

Secondly, the Court of Justice stated that Art 101(1) does not prohibit restrictions on franchisees to create the control “*necessary*” to maintain a franchise network’s identity and reputation.<sup>182</sup> On this basis, the Court of Justice specifically accepted that obligations on the franchisee “to sell only products supplied by the franchisor” (or his nominee) may be considered “*necessary*” for the protection of the network’s reputation in circumstances where it may be “*impractical*” (for retail fashion items) to set down objective quality specifications or “*too expensive*” to ensure that the standards are observed, for example, where there is a large number of franchisees.<sup>183</sup> From the perspective of the restrained franchisee, the criteria of “*impractical*” and “*too expensive*” appear to be unduly indulgent views of what constitutes “*necessary*.” This view means that Art 101(1) will not assist the franchisee to challenge various exclusive purchasing obligations that restrict his opportunity to source goods (complying with the acceptable standard) elsewhere and, thereby, improve his competitive position. The Commission, in oral argument, had conceded that exclusive purchase obligations would allow the franchisor to foreclose the supply of other manufacturers’ products and, therefore, amounted to

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180 Para 16.

181 See J. Venit, “Competition and Industrial Property- *Pronuptia*- Ancillary Restraints or Unholy Alliances?” [1986 ]11(3) ELR 213, 217 where the author draws attention to the privileged status granted by this judgment to commercial as opposed to secret know-how.

182 Para 17 (emphasis added).

183 Para 21 (emphasis added).

non-competition clauses.<sup>184</sup> The standard of “necessary” in *Pronuptia* does not offer protection to a restrained franchisee (and some third parties) against the negative consequence of the restriction. The Court of Justice accepted the exclusive purchase type of restriction because by “means of the control exerted by the franchisor on the selection of goods offered by the franchisee, the *public* is able to obtain goods of the same quality from each franchisee.”<sup>185</sup> Arguably, the term “public” aggrandises the scale of the beneficiaries and they would be more accurately described as potential purchasers of the *Pronuptia* bridal paraphernalia.

Restrained persons are disadvantaged if the “necessity” approach is applied to agreements which differ, in key aspects, to agreements for the transfer of non-material assets. For this reason, it is important to examine how the “necessity” approach treats restrictions in contracts for transfer of such assets before assessing its use in relation to franchises.

Restrictions such as non-competition clauses in contracts for the transfer of *non material assets* (such as goodwill) raise particular considerations. The Court of Justice has rightly recognised that following these agreements there is a risk that the vendor:

“with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. *Against that background*, non competition clauses incorporated in *agreements for the transfer of an undertaking* in principle have the merit of ensuring that *the transfer has the effect intended.*”<sup>186</sup>

This quotation reveals that the Court of Justice’s view of the restriction is shaped by the need to ensure that the purchaser of goodwill gets what he bargained and paid for and, also, that he is protected against any subsequent raids on the goodwill by the already remunerated vendor. A properly negotiated and compensated

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184 See J. Venit, “Competition and Industrial Property- *Pronuptia*- Ancillary Restraints or Unholy Alliances?” [1986]11(3) ELR 213.

185 Para 21.

186 Case 42/84 *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission* [1985] ECR 2545 para 19 (emphasis added).



restriction on the vendor may benefit both parties.<sup>187</sup> The vendor gets a higher price because he agrees to a restriction and the purchaser gets the benefit of protection. Thus, there may be some convergence of the economic interests of both parties that is not undermined by the restriction.

However, parties to other types of agreements have a different type of relationship. There are, at least, two key differences between restrained franchisees and restrained vendors of assets. These are, firstly, the balance of financial reward between the parties and, secondly, the commercial threat existing between the parties.

Firstly, the financial relationship between the parties is different in a franchise agreement compared to an agreement for the transfer of business assets. It is “a virtual truism” that competition law does not prohibit limited restraints on vendors on the grounds that the buyer should receive what he has purchased.<sup>188</sup> This is accepted because the restrained person is the *vendor* and accepts the restriction in order to inflate the price he receives. By contrast in a franchise, it is the *restrainer* and not the restrained person who receives the direct financial reward of the franchise entry fee and the ongoing royalty payments. Moreover, in a franchise, the restrained franchisee bears considerable financial risk within the relationship. The franchisee, at his own financial risk, sells the franchisor’s goods in premises bearing the franchisor’s name and symbol. The franchisor, of his own volition, offers the use of his know-how in return for both financial payments (initially and during the currency of the contract) and, additionally, the benefit of other restrictions on the franchisee during and after the contract. The franchisor bears comparatively less financial risk because he grants “independent traders, for a fee, the right to establish themselves in other markets using its business name and methods...”<sup>189</sup> This relationship has been described by the Court of Justice as a

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187 Advocate General Tesouro in Case C-250/92 *Gottrup-Klim Grovwareforening and Ors v. Dansk Landbrugs Grovvarereskab AmbA* [1994] ECR I-5641 offered exclusive supply brewery agreements as another example of a restraint supporting convergent interests.

188 See J. Venit, “Competition and Industrial Property- *Pronuptia*- Ancillary Restraints or Unholy Alliances?” [1986] 11(3) ELR 213, 219.

189 Para 15.

“way for an undertaking to derive financial benefit from its expertise without investing its own capital.”<sup>190</sup>

The second important difference between franchises and agreements for the transfer of assets involves the balance of power in the parties’ dealings *after* the contract is concluded. A post-termination non-competition clause in a sale of business cushions the initial operation of the buyer at a time when he is most vulnerable to the recent vendor of goodwill. A post-termination restriction in a franchise excludes the ex-franchisee from competing when he no longer has the right to use the “know-how.” The ex-franchisee, in contrast to a recent vendor of the goodwill of a business, is far less equipped to be a competitive threat in the period just after the relationship is concluded.

Following the *Pronuptia* approach, Art 101(1) does not prohibit certain restrictions on franchisees although the restrictions may negatively impact on the competitive position of third parties. For example, in an optometrist franchise, an exclusive purchase obligation of spectacle frames restricts the commercial freedom of the franchisee to source competing products from third party producers. Thus, the restrictions may affect competition not just between the parties or between the optometrist franchisor and his rivals but also competition among producers of spectacle frames who cannot sell to the franchisees.

The term “ancillary restraints” is not expressly mentioned in the decisions and judgments of either *Remia* or *Pronuptia*.<sup>191</sup> However, this term has been used by some commentators to describe the approach taken in some cases.<sup>192</sup> For example, Venit comments that *Pronuptia* applies the “ancillary restraint” doctrine in the

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190 Para 15.

191 See *Métropole Television v. Commission* [2001] ECR II 2459, [2001] 5 CMLR 1236, para 104 where the General Court described an ancillary restraint as one that is “directly related and necessary to the implementation of a main operation” and cited the Commission’s *Notice on Ancillary Restraints* OJ [1990] C 203/5 (which has since been replaced).

192 See J. Venit, “Competition and Industrial Property- *Pronuptia*- Ancillary Restraints or Unholy Alliances?” [1986]11(3) ELR 213. There is debate over whether the term “ancillary restraints” doctrine is the correct one to use in relation to what occurs under Art 101. See G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007) 35-6 where the author suggests that “collateral restraint” is a better label for the EU practice and identifies a suggestion in the case law that “a restraint is ancillary when it concerns the behaviour of the parties outside the framework of the agreement (*e.g.* the agreement is about the sale of a business, the non-compete clause is about restricting the seller’s activities).”

sense of “identifying the legitimate purpose of the contractual arrangements and then excluding from the prohibition on restrictive agreements all contractual provisions that are reasonably related to the successful realisation of these legitimate purposes.”<sup>193</sup> He argues that the Court in *Pronuptia* went further than the European Commission’s traditional approach which would have found the exclusive purchasing and post-termination non-competition clauses to infringe Art 101(1) and then, most probably, to satisfy the criteria in Art 101(3).<sup>194</sup>

There is debate about how this doctrine is employed under Art 101. For example, Jones and Sufrin argue that the “ancillary restraint” doctrine is difficult to accept because it relies on an alleged distinction between proportionate restraints objectively necessary to the implementation of a main non-restrictive operation (which are ancillary and fall outside Art 101(1)) and, on the other hand, restraints which are indispensable to achieve efficiencies which offset anti-competitive effects of the transaction which can be assessed only under Article 101(3).<sup>195</sup> In their view, the “ancillary restraints” doctrine separates the main transaction from restraints.<sup>196</sup> This chapter does not attempt to resolve this debate and is interested in the “ancillary restraints” doctrine only as a grid for conducting an analysis of how the interests of restrained persons are treated by Art 101. The doctrine is useful as a structural grid to isolate what interests are analysed under each paragraph of Art 101. This grid highlights the level of protection that is offered to restrained professionals under Art 101(1) and (3). The grid is also useful because it attaches importance to whether the determination (that the restriction is not prohibited) is made under Art 101(1) or under Art 101(3).

This chapter’s interest in the debate regarding the relationship between Art 101(1) and Art 101(3) is narrowly focussed on *where within* Art 101 the interests of restrained persons are considered. In *Pronuptia*, when the Court of Justice took the

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193 See J. Venit, “Competition and Industrial Property- *Pronuptia*- Ancillary Restraints or Unholy Alliances?” [1986]11(3) ELR 213, 219.

194 This is the approach envisaged under the then applicable EU Regulation 1983/83.

195 A. Jones & B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 4th ed. 2011) 232.

196 See *ibid* where the authors state that the ancillary restraints view is “hard, if not impossible to square with the view that pro-competitive effects cannot be weighed against anti-competitive effects identified” in the context of Article [101](1).

perspective of a prospective franchisee, it accepted that he may not wish to invest his own money (“paying a relatively high entry fee and undertaking to pay a substantial annual royalty”) without his prospect of profitability being enhanced by some degree of protection against competition by the franchisor and other franchisees. This consideration, however, according to the Court of Justice, “is relevant only to an examination of the agreement in light of the conditions in Art 101(3).”<sup>197</sup> Notably, the Court did not envisage these interests being addressed when Art 101(1) is applied. Thus, it seems that Art 101(1) need not pay great attention to the impact of the restrictions *on the restrained franchisee*.

However, Art 101(1) takes care to understand and protect the interests of the franchisor and his network of franchisees. Art 101(1)’s attitude to franchisees may be explained by the view that franchises are valued business mechanisms that are encouraged in order to enhance market competition. In *Pronuptia*, the Court of Justice described franchisees as fortunate “traders who do not have the necessary experience” who gain access to methods which they could not have learned without considerable effort and who benefit from the reputation of the franchisor’s business name.<sup>198</sup> This view suggests that franchisees, in order to receive the benefits of involvement in a franchise, must accept some restrictions that protect the intellectual property of the franchisor. Art 101(1)’s permissive approach to some restrictions can be explained by a desire to make franchises an attractive business method to potential franchisors and thereby encourage new entry and promote competition for the benefit of consumers.

The European Commission, too, takes the view that, in general, vertical restrictions may produce benefits such as efficiencies and the creation of new markets.<sup>199</sup> Some negative effects of vertical restraints have been recognised and debated.<sup>200</sup> Notably,

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197 Para 24.

198 Para 15.

199 See Commission *Guidelines on Vertical Restraints* OJ [2010] C 130/1, para 6 which states “[V]ertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies” and para 107 which sets out nine (non-exhaustive) arguments in favour of vertical restraints.

200 For example, see *Green Paper on Vertical Restraints in Competition Policy*, COM (96) para 54 which states “[E]conomists are becoming more cautious in their assessments of vertical restraints with respect to competition policy and less willing to make sweeping generalisations, and vertical

in the main, any negative effects are so classified on the grounds of their impact on consumers<sup>201</sup> and on the integration of the market<sup>202</sup> rather than on their negative impact on the economic freedom of the *restrained party*.

### 2.3.2 Conclusion on Art 101(1) and Bilateral Contracts

From the perspective of a restrained person, Art 101(1) takes a lenient approach to certain restrictions in personal contracts. This is understandable when the restrained person is a vendor of non-material assets. However, from the perspective of other types of restrained persons, such as franchisees, this approach to Art 101(1) fails to safeguard their interests.<sup>203</sup> It is clear that Art 101(1) may determine that a restriction is necessary to give effect to a particular contract and reach this determination without taking fullest account of the restriction's impact *on the restrained person's interests*. In practice, even onerous restrictions on franchisees may be seen as being "necessary" because alternatives are either impractical or too expensive for the franchisor. Thus, the "necessity" approach to Art 101(1) does not thoroughly safeguard the interests of some restrained professionals.

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restraints cannot all be regarded as per se beneficial for competition." See also R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Book 1978 reprinted in 1993)

201 See W.S. Comanor "Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy" [1985] 98 Harv LR 983. 992-3 where the author states that "the mere fact that the services are profitable for the manufacturer is not sufficient evidence that all-or even most- consumers benefit from their supply....Economic theory alone cannot predict whether the imposition of vertical restraints .... will benefit consumers and enhance efficiency."

202 For example, see *The Green Paper on Vertical Restraints in Competition Policy*, COM (96) 721 para 7 which states that "market integration enhances competition in the Community. Companies should not be allowed to recreate private barriers between Member States where State barriers have been successfully abolished." Also see *Guidelines on Vertical Restraints* OJ [2010] C 130/1, para 100 which lists four negative effects on the market that may stem from vertical restraints including "the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose."

203 See Case 26/96 *Metro SB –Grossmaerkte v. Commission* [1977] ECR1875, [1978] 2 CMLR 1 where Art 101(1) did not prohibit restrictions in a selective distribution agreement. See also Case 258/78 *LC Nungesser KB v. Commission* [1982] ECR 2015, [1983] 1 CMLR 278 where Art 101(1) did not prohibit restrictions in open exclusive licences of plant breeders' rights.

## 2.4 ARTICLE 101(1) and RULES

This chapter treats the application of Art 101(1) to rules separately from its application to bilateral contracts, not just to match the layout of Chapter One (which is important) but also because, in practice, rules receive a particular treatment under Art 101(1). The Treaty (unlike competition legislation in some Member States and in other jurisdictions) does not make express provision to temper the application of competition law to rules of professional associations. While the EU Courts and the European Commission have declined to exclude rules of professionals from the remit of Art 101, they interpret Art 101(1) on a case by case basis.<sup>204</sup> Art 101(1) does not prohibit some restrictive rules, in some circumstances, even where they impede a professional's capacity to offer innovative competition that is undesired by the restraining entity. Three cases where restrictive rules imposed on members were found not to infringe Art 101(1) are next examined.

### 2.4.1 Selected Cases

The first analysis is of *Gottrup Klim* and it shows that Art 101(1) does not prohibit certain restrictions contained in the rules of a commercial cooperative.<sup>205</sup> This case is interesting because it influenced the reasoning adopted in the other two examined cases that involve restrictions on professionals (namely patent agents and lawyers). The common focus of the analyses in the three cases is on how the interests of the restrained members were treated by Art 101(1). This focus or inquiry is sharpened by highlighting where the analyses take greater care of interests other than those of restrained persons.

In *Gottrup-Klim*, the Court of Justice stated that Art 101(1) does not invariably prohibit rules of a purchasing cooperative that prohibit concurrent membership of

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204 See T- 144/99 *Institute of Professional Representatives v. Commission* [2001] ECR II- 1087, para 64, where the General Court refused to accept that "rules which organise the exercise of a profession fall as a matter of principle outside the scope of Article [101](1) merely because they are classified as rules of professional conduct by the competent bodies." (Emphasis added).

205 Case C-250/92 *Gottrup-Klim Grovvareforening and Ors v. Dansk Landbrugs Grovvareseskab AmbA* [1994] ECR I-5641.

rival entities.<sup>206</sup> The Court accepted that dual membership of a competing cooperative would “jeopardise both the *proper functioning of the cooperative* and its *contractual power* in relation to producers.”<sup>207</sup> Notably, the Court of Justice sought to protect the proper functioning of the cooperative which was a wholly voluntary commercial venture that individuals chose to join and abide by its mandatory rules which were designed to maximise its profitability for their benefit. The cooperative had no public law status or role either in law or in reality. It could be argued that safeguarding the cooperative’s “proper functioning” has the effect of enhancing its purchasing strength. From another perspective, the restrictive rule placed the cooperative’s members “off limits” for rival cooperatives and, also, prevented the members from the benefits of concurrent membership of another cooperative. In this case, the unsuccessful challenge under Art 101(1) came from a potential new entrant that sought to compete with the incumbent cooperative which enjoyed a monopsonistic position. It is plausible that a restrained member may wish to challenge this kind of rule.<sup>208</sup>

In the next two cases that are selected for study, Art 101(1) did not prohibit certain restrictions in rules binding professionals. The first case is *Institute of Professional Representatives European Patent Office* which arose following the notification to the European Commission of a Code of Conduct for patents agents.<sup>209</sup> The second case is *Wouters* which is an Art 267 TFEU preliminary reference judgment following a challenge to the rules of the Dutch Bar by a restrained lawyer. These cases were chosen for analysis because they demonstrate how poorly Art 101(1) may protect the interests of professionals whose freedom to offer innovative competition is restrained by rules of a professional body. The important point is that, in these cases, justifications or excuses for the restrictions prevailed and, consequently, no protection was available under Art 101(1) to the individual professionals. Two types of justifications or excuses were accepted. The first type of justification arises where Art 101(1) is construed within an “*overall context*” which admits broad ranging and somewhat “public interest” type excuses. The

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206 C-250/92 [1994] ECR 5641, [1996] 4 CMLR 191.

207 Para 45(emphasis added).

208 An analogous situation arose in *Hendry v World Professional Billiards & Snooker Association Ltd* [2002] UKCLR 5 where snooker players tied to one organiser wanted to play in tournaments run by a rival organiser. This case is studied in Chapter Three.

209 IV/36.147, Dec 1999/267 *EPI Code of Conduct* [1999] OJ L 106/14.

second type of justification arises when it is accepted that the “*proper functioning*” of the restraining association merits protection. Arguably, by accepting these types of justifications, Art 101(1) does not protect the interests of the restrained professionals but, in effect, subjugates them to the interests of the restraining entity.

In *Institute of Professional Representatives European Patent Office* the European Commission assessed heavily amended notified versions of the European Patents Institute’s (EPI) Code.<sup>210</sup> Every European patent agent or representative is a member of the EPI, a non profit organisation set up by the European Patent Office (EPO), itself an inter-governmental entity, to collaborate with the EPO on matters of discipline and qualifications and “to promote compliance by its members with the rules of professional conduct.”<sup>211</sup>

The Commission decided that Art 101(1) does not prohibit restraints that are *necessary*:

“in view of the *specific context of this profession* to ensure impartiality, competence, integrity and responsibility on the part of representatives, to prevent conflicts of interest and misleading advertising, to protect professional secrecy or to guarantee the proper functioning of the EPO.”<sup>212</sup>

This is a list of justifications based on non-economic and non-competition criteria that are not expressed in Art 101(1). As such, the list gives an indication of the priorities pursued under Art 101(1) which, it must be noted, do not include the interests of restrained professionals.

Specifically, the Commission decided that Art 101(1) does not prohibit a ban on a patent agent representative approaching a client of another representative when the client is involved in a case being handled by another representative.<sup>213</sup> This means that Art 101(1) does not strike down a restriction on a professional’s freedom to seek out customers with a live involvement with a rival professional. Furthermore, the Commission did not strike down the Code’s prohibition on members charging

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210 Amendments included the removal, after receipt of the Statement of Objections, of the ban on individual advertising and the ban on supply of unsolicited services and the deletion of the requirement to charge fees that were reasonable and sufficient to maintain independence.

211 The EPO was set up by the Convention on the Grant of European Patents signed in 1973. The worldwide recipients of the services comprise business or individual inventors (seeking to protect their work or to challenge the grant of a patent) or patent agents from non contracting states.

212 Para 38 (emphasis added).

213 Para 37.



fees related to the outcome of the service: a higher fee if the application is successful or lower fee if unsuccessful. This decision is noteworthy because it seems to collide with the Commission's conventional view that professionals' merit and the quality of services are essential elements of competition. For example, the Commission has expressly stipulated that competition among liberal professionals should additionally cover "elements such as fees and advertising."<sup>214</sup> Nonetheless, in this case, the Commission decided that the Code's "restriction on members' freedom of commercial action must be viewed in the *overall context* by which the EPO grants patents, a system which is one of the major factors of *economic growth*."<sup>215</sup> This broad economic vision emphasises the importance of patents to the entire economy and this view is, apparently, accepted as justification for Art 101(1) not prohibiting a rule restricting fee rivalry among individual professionals. The Commission decided that:

"[E]ven if in other circumstances it might constitute a restriction on competition to prohibit fees from being determined according to outcome, it is *necessary in the economic and legal context specific to the profession in question in order to guarantee impartiality on the part of the representatives and to ensure the proper functioning of the EPO*."<sup>216</sup>

In this case, the Commission identified three risks that might arise in the absence of the restriction. Firstly, there may be a temptation for representatives to take on cases offering good short-term prospects rather than cases with a long-term outcome. Secondly, there could be lengthy uncertainty about the eventual fee payable by the client and, thirdly, representatives may initiate procedures for "purely commercial motives."<sup>217</sup> Similar risks could be identified in respect of other professional fields (for example, in law or arbitration) and, consequently, a significant range of professionals could find themselves in the same impotent position as the patent agents if their professional association adopted similar restrictions. In other words, other professionals could be precluded from depending on Art 101(1) to prohibit restrictions on their freedom to compete on price where the restrictions in rules are seen as necessary to ensure professionals' impartiality and the association's proper functioning. The reasoning in this case seems to give

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214 *Report on Competition in Professions*, COM (2004) 83 final.

215 Para 35 (emphasis added).

216 Para 35(emphasis added).

217 Para 36.

greater weight, on the one hand, to the interest of the public and the restraining association than, on the other hand, to the economic interests of the restrained professional in competing vigorously on price.

The next judgment selected for examination is *Wouters* where the Court of Justice stated that Art 101(1) does not prohibit certain rules of the Dutch Bar Association.<sup>218</sup> The contested rules prohibited contracts between lawyers practising in the Netherlands and accountants which provided, in any way, for shared decision making, profit sharing or for the use of a common name.<sup>219</sup> The questions referred by the national tribunal stated that the measures aimed to safeguard the independence and duty of loyalty to clients of lawyers providing legal assistance.<sup>220</sup> The Court of Justice decided that Art 101(1) does not inevitably prohibit this type of rule because the association “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” in the Netherlands.<sup>221</sup> Because the Court of Justice delivered a judgment that has been described as “surprising and controversial,”<sup>222</sup> “puzzling”<sup>223</sup> and “difficult”<sup>224</sup> it is illuminating to consider, first, the Opinion of the Advocate General because he adopted a different approach than that subsequently taken by the Court of Justice.

In a lengthy Opinion, Advocate General Léger details how courts in the U.S.A. developed the “ancillary restraints” doctrine because the Sherman Act 1890 does not make any provision for exemptions. Under the “ancillary restraints” approach, restrictions of competition *necessary* to the performance of an agreement (that is lawful in itself) are not prohibited by the 1890 Act. Advocate General Léger noted that this approach prevailed until the US Supreme Court adopted the “competition

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218 Case C-309/99 *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913.

219 In effect, this rule renders any form of effective partnership with accountants difficult. See para 18 where Advocate General Léger noted that lawyers had been authorised to enter into partnership with “notaries, tax consultants and patent agents.”

220 Case C-309/99 *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, para 39.

221 Para 100 (emphasis added).

222 R. Whish, *Competition Law* (London: Lexis Nexis Butterworths, 5th ed. 2003) Preface.

223 D.G. Goyder, *EC Competition Law* (Oxford: Oxford University Press, 4th ed, 2003) 94. See also Vossestein, Casenote on *Wouters* (2002) 39 CMLRev 841.

224 A. Jones and B. Sufrin, *EC Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 2nd ed. 2003) 227.

balance-sheet method.”<sup>225</sup> In his view, judgments such as *Remia*, *Pronuptia* and *Gottrup Klim* show that the “rule of reason” approach in EU law is “strictly confined to a *purely competitive* balance-sheet of the effects of the agreement.”<sup>226</sup>

The Advocate General stated:

“[W]here taken as a whole, the agreement is capable of *encouraging competition* on the market, the clauses *essential* to its performance may escape the prohibition laid down in Article [101](1) of the Treaty. The *only legitimate goal* which may be pursued in accordance with that provision is therefore exclusively *competitive* in nature.”<sup>227</sup>

Advocate General Léger’s Opinion portrays a narrowly based version of the “ancillary restraints” doctrine. It may be described as narrow because it specifies that the “ancillary restraints” doctrine only applies where i) the type of agreement was “capable of encouraging competition,” ii) the restrictive clause was “essential” and iii) the only legitimate goal was an “exclusively competitive” one.

After summarising the Court of Justice’s approach, Advocate General Léger applied it to the case at hand. He opined that the ban obstructed the emergence of “associative structures capable of offering integrated services for which there exists potential demand on the part of consumers.”<sup>228</sup> He further opined that multi-disciplinary partnerships between lawyers and accountants would accord to each profession both qualitative and quantitative improvements.<sup>229</sup> He detailed advantages for professionals and consumers including economies of scale for the providers of an integrated service and potential savings (in time and money) for consumers.<sup>230</sup>

It is important to emphasise that Advocate General Léger stoutly refused to consider under *paragraph (1)* of Art 101 any arguments (made by the Commission and interveners) that went beyond the “competition balance-sheet” approach. In his view, any arguments that the ban protected aspects of the legal profession such as independence and client loyalty involved an attempt to introduce considerations

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225 Para 101.

226 Para 104 (emphasis in original).

227 Para 104 (emphasis added).

228 Para 121.

229 Paras 117-118.

230 Para 119.

“linked to the pursuit of a *public-interest* objective.”<sup>231</sup> In his firm view, Court of Justice case law allowed account to be taken of “the particular nature of different branches of the economy, social concerns and, to a certain extent considerations connected with the pursuit of the *public interest*” only under Art 101(3) and not under paragraph (1) of Art 101.<sup>232</sup>

Advocate General Léger’s approach is good for restrained persons because it does not readily excuse restrictions from Art 101(1). His view is that only competition criteria should be assessed under Art 101(1) and this focus, arguably, may allow account to be taken of harm to the *competition* interests of the restrained professionals.

Unfortunately for restrained persons, the Court of Justice adopted an entirely different approach to Art 101(1) and decided that Art 101(1) did not prohibit the ban. Notably, the Court specifically accepted that the one-stop advantages of combining complementary accountancy and legal expertise to offer a wider range of services to satisfy “needs created by the increasing interpenetration of national markets and consequent necessity for continuous adaptation to national and international legislation” supported the conclusion that the rules prohibiting absolutely all forms of cooperation restricted competition.<sup>233</sup> It is interesting that the Court’s negative view of an absolute ban is not based on the injury to the *professional’s* freedom to earn livelihood. Instead, its view is shaped by the consequences of an absolute ban in terms of preventing the emergence of a new business structure which would benefit *consumers*. In other words, the problem was formulated in terms of injury to *users* rather than of injury to the potential *providers* of professional services.<sup>234</sup>

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231 Para 105 (emphasis added).

232 Para 13 (emphasis added).

233 Paras 86- 87.

234 This point is made as an observation about how the interests of *restrained persons* are treated and it is not necessarily a criticism of how competition law is interpreted.

For this chapter, the key passage of the *Wouters* judgment is contained in paragraph 97 which is next reproduced (with added emphasis) before it is analysed.

The Court of Justice stated:

“.. however, not every agreement between undertakings or every 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 [101](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. More particularly account must be taken of *its objectives* which are here connected with the need to make rules relating the *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* (see to that effect Case C-3/5 *Reiseburo Broede* [1996] ECR I -6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are *inherent* in the pursuit of those objectives.”

Each of the above sentences is next appraised, from the standpoint of a restrained professional, in order to highlight its implications. The first sentence refers to the freedom of the “parties or of one of them.” The term “parties” obscures the reality that the restrained members were not really *parties* in the sense of negotiators but were more like *subjects* to the rules. The second sentence insists that account be taken of the “overall context in which the decision of the association of undertakings was taken or produces its effects.” This calls for a Janus-like assessment of the “overall context” because it has two foci. One focus is retrospective (taking of the decision) and the other focus is prospective (effects of the decision). Crucially, the retrospective focus admits justifications concerning the operation of the restraining association. Moreover, the second focus (on effect) does not specify that attention must be paid to the effect *on the restrained*. It seems that the respective interests of the restrainers and restrained are not being considered on a parity basis. The third sentence directs that particular account be taken of the “objectives” of the restraint. This focus skews the assessment towards *justifications* in favour of the restriction. To this end, the Court lists objectives that are framed in terms of the needs of the restrainer (including organisation and supervision) and of the public/consumers (including qualifications, ethics, liability and the sound administration of justice). Finally, the Court articulated a test

explicitly based on *inherency* and consequential restrictions. This test leans in favour of accepting a restriction and the focus on *inherency* ignores the negative effects on restrained persons. The slant in favour of allowing restrictions is further bolstered by the later sentence stating that the restraining association “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” in the Netherlands.<sup>235</sup> Under this test Art 101(1) does not prohibit some admittedly anti-competitive restraints. It is clear that the interests of the restrained professional are not vindicated by this approach to Art 101(1). Plainly, Art 101(1) did not assist the lawyer in the Netherlands seeking to offer innovative competition contrary to the restrictive provisions of the Dutch Bar.

This judgment has been criticised by commentators on various grounds, such as, for example, its departure from previous case law and its failure to respect the distinction between determinations under Art 101(1) and (3).<sup>236</sup> The interest of this chapter in this judgment lies in highlighting how it treats the interests of restrained professionals. To this end, it is interested in the types of justifications that were accepted by the Court under Art 101(1). Whish points out that the judgment significantly extends “previous law, since it explicitly allows for the balancing of non-competition criteria against restrictions of competition when determining whether Art [101](1) is infringed; in doing so it would seem to allow arguments to be raised in defence of agreements (or rules) which would not be available under Art 101(3).”<sup>237</sup> Jones and Sufrin note how, at first sight, the Court of Justice went further than the US courts because it “seemed to weigh the anti-competitive effects of the agreement against *benefits which were not economic benefits*” under Art 101(1).<sup>238</sup> These views rightly point up the Court of Justice’s acceptance of non-competition criteria to justify or excuse the restriction. The wider the range of excuses/justifications accepted under Art 101(1), the correspondingly greater the

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235 Para 100 (emphasis added).

236 See D.G Goyder, *EC Competition Law* (Oxford: Oxford University Press, 4th ed. 2003) 95 where the author identified a conflation of Art 101(1) and 101(3) which he regarded as a possible foretaste of the, then, future post-May 2004 scenario and vehemently denied that it entailed a “rule of reason” approach. Also see G. Monti, “Article 81 EC and Public Policy” (2002) 39 CMLRev 1057 who commented that this judgment entailed a European style” rule of reason.”

237 R. Whish, *Competition Law* (London: Lexis Nexis Butterworths, 5th ed. 2003) 123.

238 A. Jones and B. Sufrin, *EU Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 4th ed. 2011) 237.

threat that is posed to restrained persons. This occurs because the increases in the pool of excuses occur without any countervailing increase in the number of objections that can be taken to the restriction when Art 101(1) is applied. From the perspective of the person challenging the restriction, the assessment becomes imbalanced when a greater number and range (including non-competition type considerations) of excuses are deemed acceptable.

For this chapter, the interesting point about the interpretation of Art 101(1) in *Wouters* is that it does not safeguard the interests of the restrained professional but allows Art 101(1) to give considerable protection to the interests of the restraining entity and to the general public (even if they are not consumers) even if their interests are not directly connected to *competition* criteria. Thus interpreted, Art 101(1) does not prohibit a restriction whose objectives promote the non-competition interests of others to the detriment of restrained professionals' freedom to offer innovative competition. The final interesting point about this judgment for restrained persons is its allusion to the *necessity* of the restriction. Jones and Sufrin cast doubt as to whether the particular ban was really ancillary in the sense of being "directly related and necessary" on the grounds that equivalent Bar associations in other Member States do not have this restriction.<sup>239</sup> It seems that a lax view was taken of the standard of "necessary" as it falls below the standard of being *essential*. This judgment means that restrained professionals cannot rely on Art 101(1) to strike down measures that are admittedly restrictive of competition where they are believed by the restraining entity to be inherent and "necessary" ( but not essential).

The next crucial question is whether *Wouters* can be safely treated as an aberration or is more widely applicable? Restrained persons would be better protected if the *Wouters* judgment was limited, for example, to regulatory type entities that consider the interest of the public and if the judgment did not extend to protect wholly private organisations such as some sports bodies.<sup>240</sup> Which offers the term

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239 A. Jones and B. Sufrin, *EU Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 4th ed. 2011) 238 in footnote 214.

240 Some sports associations adopt a "regulatory" role without any statutory basis, for example, the World Professional Billiards & Snooker Association in *Hendry v World Professional Billiards & Snooker Association Ltd* [2002] UKCLR 5. Whether the *Wouters* judgment may extend to a "purely

“regulatory ancillarity” to describe the Court of Justice’s approach in *Wouters* and suggests that this term could be

“useful in first demonstrating a continuity with the earlier case law, through the common use of ‘ancillarity’ while also capturing the difference between the first two situations by distinguishing commercial and regulatory cases.”<sup>241</sup>

However, Whish notes that the *Wouters* judgment does not limit itself to deontological rules or to the liberal professions and suggests it could apply to some (proportionate) regulatory rules adopted to protect consumers and offers examples in the fields of banking, environment, safety and integrity of sporting events.<sup>242</sup> The case of *Meca Medina* suggests that the *Wouters* approach to Art 101(1) may be quite widely deployed.<sup>243</sup>

The dispute in *Meca Medina* involved the compatibility of the International Olympic Council’s (IOC) anti-doping rules with Art 101. One section of the Commission’s decision accepted that the contested rules may restrict the athletes’ freedom of action but noted that such a limitation is not necessarily a restriction of competition in the sense of Art 101(1) because it may be *inherent* in the organisation and proper conduct of sporting competition.<sup>244</sup> In its view, the rules were intimately linked to the proper conduct of sport, *necessary* to combat doping and that the limitation of athletes’ freedom of action did not go beyond what is necessary to attain that objective and, thus, not prohibited by Art 101(1).<sup>245</sup> This type of analysis appears to be faithful to the *Wouters* rubric.

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private regulatory system where there is no public law component at all” has been described as an “intriguing question” by R. Whish and D. Bailey *Competition Law* (Oxford: Oxford University Press, 7th ed. 2012).

241 See R. Whish, *Competition Law* (London: Lexis Nexis Butterworths, 5th ed. 2003) 121-2 where the author comments that “[W]hat is of interest about *Wouters*, however, is that the restriction in that case was not necessary for the execution of a commercial transaction or the achievement of a commercial outcome in the market; instead it was ancillary to a regulatory function.”

242 R. Whish, *Competition Law* (London: Lexis Nexis Butterworths, 5th ed. 2003) 122. In support, Whish notes the Commission’s rejection of a complaint about restrictions on ownership of teams designed to protect integrity of competitions (see Press Release IP/02/942 27 June 2002) and similar rejection of complaints against an IOC ban on swimmers (IP/02/1211 9 August 2002).

243 C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

244 Para 42.

245 Para 55 (emphasis added).



The Court of Justice heard a twofold plea from the athletes that the Commission had misapplied the *Wouters* criteria. They argued that the anti-doping rules, firstly, are not inherent in the objectives of safeguarding the integrity of competitive sport and athletes' health but, instead, protect the IOC's own economic interest and, secondly, are excessive in nature and go beyond what is necessary to combat doping.<sup>246</sup> The Court of Justice declined to assess the compatibility of contested rules with competition law in the abstract. It stated that not every decision:

“which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition of Article [101](1). 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 specifically, of its *objectives*. It has then to be considered whether the consequential effects restrictive of competition are *inherent* in the pursuit of those objective (*Wouters* para 97) and are proportionate to them.”<sup>247</sup>

This quotation endorses the *Wouters* approach as it cites criteria such as “overall context” and the “inherent” nature of restrictions when determining whether Art 101(1) prohibits the contested measure. It is significant that the *Wouters* approach to Art 101(1) has been taken in an area outside the field of restrictive rules prohibiting specified market strategies within the liberal professions. *Meca Medina* confirms that the *Wouters* schema is not an exceptional or marginal approach that is confined to prohibitions of professional associations regarding specified business practices.

In *Meca Medina*, the Court of Justice stated that penalties are in principle *inherent* in anti-doping rules because they are *necessary* to ensure enforcement and that anti-doping rules are “justified by a *legitimate objective*.”<sup>248</sup> Such a limitation [on the athletes' freedom of action] is *inherent* in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.”<sup>249</sup>

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246 Para 40.

247 C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, para 42 citing Case C-250/92 *Gottrup-Klim Grovwareforening and Ors v. Dansk Landbrugs Grovvarereskab AmbA* [1994] ECR I-5641.

248 Para 44 (emphasis added).

249 Para 45(emphasis added).

As regards the magnitude of the penalties, the Court of Justice specifically acknowledged their capacity to adversely affect:

“competition because they could, if penalties were ultimately to prove unjustified, result in an athlete’s unwarranted exclusion from sporting events and, thus, in the impairment of the conditions under which the activity at issue is engaged in.”<sup>250</sup>

It stated that penalties must be limited to what is necessary to ensure proper conduct of competitive sport and, in this case, there was insufficient scientific evidence that the threshold for the prohibited substance was set at too low a level. That Art 101(1) does not prohibit the imposition of penalties is significant. This is because a penal sanction, such as a lengthy ban on entering professional competitions, is a potentially far more restrictive and serious measure than the types of restrictions contained in the rules of the Dutch Bar in *Wouters* or by the cooperative in *Gottrup Klim*.

As regards the justifications in *Meca Medina*, commentators have remarked on how it is “unclear by what criteria the condition of legitimate objective will be determined in borderline cases but it seems unlikely that the concept will be extended to purely commercial considerations.”<sup>251</sup> On the other hand, the readiness of the Court of Justice in *Gottrup* to accept wholly commercial justifications for a ban on dual membership may encourage courts to accept commercial justifications. Imagine, for example, a rule where a sporting organiser imposes restrictions on players’ commercial activities (for example, a ban on sports persons wearing sponsors’ logos on clothing) being accepted as “necessary” to secure the commercial viability of the sporting event.<sup>252</sup> Another possible example would be limitations imposed by organisers of one sporting tournament on players participating in tournaments organised by rival organisers.<sup>253</sup> That these two

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250 Para 47.

251 D. Bellamy & Child (Ed. P. Roth and V. Rose), *European Community Law of Competition* (Oxford: Oxford University Press, 6th ed. 2008) 2.116.

252 This example is inspired by the facts of the dispute in *Adidas-Salomon v. Draper et al* [2006] EWHC 1318 (Ch). See para 36 where the High Court commented on how it is not essential for “playing a game of tennis that the player's shirt should not identify its maker but it may well be necessary to the maintenance of the economic value of the tournament as a whole.”

253 This scenario happened in *Hendry v World Professional Billiards & Snooker Association Ltd* [2002] UKCLR 5. This case is discussed in Chapter Three.

possible examples of commercial justifications for restrictions were inspired by real world disputes makes them plausible.

Art 101(1) applies to but does not prohibit certain restrictions on professionals that are contained in rules of an association or other regulatory type body. The reason why Art 101(1) does not prohibit the restrictions is due to the Court of Justice accepting a range of excuses from the restraining entity and these excuses are not limited to competition criteria. From the perspective of a restrained person, the increase in excuses or acceptable “legitimate objectives” under Art 101(1) is a negative development as it tilts the scales away from prohibiting the restriction.

## **2.5. CONCLUSION ON ARTICLE 101(1)**

In order to show the low level of protection available to some restrained professionals under Art 101(1) the foregoing sections examined why and how Art 101(1) does not prohibit certain restrictions. It was suggested that their interests may be poorly protected in comparison to other interests, such as those of the market, the restraining entity, the public and consumers. The reason for the relatively weak protection of restrained persons is due, it was argued, to the combined effect of i) a lax standard of “necessary” and ii) an accepting attitude to wide-ranging justifications.

Art 101(1) has been interpreted so as not to prohibit certain “necessary” restrictions in personal contracts or in rules without keen attention being paid to the impact of the restriction on the interests of restrained persons. When assessing the *necessity* of a restriction in a bilateral contract or in rule of association, the applied standard in practice falls short of being *essential*. Thus, Art 101(1) might not prohibit certain restrictions on the grounds that they make operations easier or cheaper for the restraining party or association even where the competition interests of a restrained person are injured. This approach to Art 101(1) does not safeguard vigorously the interests of restrained persons.

The second strand of the explanation as to why Art 101(1) is not protecting restrained persons is due, it is suggested, to the types of excuses that it accepts. It is significant that the excuses for restrictions in rules are grounded deliberately within criteria such as the “overall contexts” and “proper” functioning of the restraining entity. Restrictions in contracts and in rules have been accepted on the grounds of commercial considerations (*Pronuptia, Remia, and Gottrup*), some presumed benefit to the public (*Pronuptia, Institute of Professional Representatives, Wouters, and Meca-Medina*) and benefit to the operations of the restraining entity (*Pronuptia, Institute of Professional Representatives, Gottrup, and Wouters*). It may be argued that there is a too ready acceptance of restrictions that purport to ensure that individual professionals conduct themselves properly (*Institute of Professional Representatives, Wouters and Meca-Medina*). Even entities which are not “regulatory” type but are wholly commercial (*Gottrup*) may benefit from this indulgent approach to restrictions under Art 101(1). There is no dedicated space under the Art 101(1) analysis that takes specific account of the damage to the restrained person while space has been created for considering the interests of the restraining party or entity.

The “necessary” test and the acceptance of justification based on broad grounds combine to create a very imbalanced assessment of restrictions if examined from the perspective of the restrained professional. These two strands (loose definition of “necessary” and wide ranging justifications) reduce the range of restrictions on professionals’ freedom to compete that are prohibited by Art 101(1).

## **2. 6 ARTICLE 101(3)**

A provision that infringes Art 101(1) may be permitted under Art 101(3) where it satisfies the four conditions specified in that paragraph.<sup>254</sup> No type of arrangement is, *a priori*, precluded from benefitting from Art 101(3).<sup>255</sup>

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254 See further *Guidelines on the Application of Art [101](3) of the Treaty* (“Art 101(3) Guidelines”) OJ [2004] C 101/97.

255 T-17/93 *Matra Hachette v. Commission* [1994] ECR II -595, para 85. Also see T- 168/01 *GlaxoSmithKline Services Ltd v. Commission* [2006] ECR II 2969, para 233.

Some restrictions benefit from an automatic exemption under a block exemption regulation. Of these, the most likely such regulation for the restrictions studied in this research is Regulation 339/2010 which covers vertical arrangements. Pursuant to this Regulation, a franchise may contain a one year post-termination non-competition clause which is limited to the premises and land from which the buyer has operated during the contract and is indispensable to protect know-how transferred by the supplier to the buyer.<sup>256</sup>

Since May 2004, Art 101(3) may be applied, in individual cases, as a directly applicable exception by national courts (and by some national competition authorities). Previous Decisions of the European Commission granting individual exemptions to notified restrictions provide useful non-binding guidance, subject to the following observations. Commission Decisions to refuse or grant exemptions for a finite period (either with or without conditions) were issued following detailed examination and, sometimes, significant amendments. As such, Art 101(3) operated, for decades, as the Commission's unique and administratively convenient mechanism for balancing various interests, including the wider interests of the whole Community/Union.<sup>257</sup> There is debate over whether Art 101(3) should be interpreted narrowly or more broadly so that non-competition criteria are taken into account.<sup>258</sup> The General Court has stated that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest."<sup>259</sup> For this research, the interesting issue is how the interests of restrained persons may fare under Art 101(3).

The first two conditions of Art 101(3) specify the positive benefits that the arrangement must produce. Under the first condition, it must "contribute to improving production or distribution of goods or promoting technical or economic progress."<sup>260</sup> Although there is no mention of "services" in Art 101(3) it is likely

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256 Article 5(3) EU Regulation 339/2010.

257 G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) 34.

258 R. Whish and D. Bailey, *Competition Law* (Oxford: Oxford University Press, 7th ed. 2012) 156-7. Also see G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) chapter 4.

259 Case T-528/93 *Métropole Television SA v. Commission* [1996] ECR II-649 para 118.

260 See Joined Cases 56/64 and 58/64 *Etablissements Consten SA & Grundig Verkaufs GmbH* [1966] ECR 405. Essentially, this condition requires the establishment of "appreciable objective

that such improvements would come under the heading of “technical or economic progress.” A broad attitude may be taken to interpreting this condition. In *Remia*, the Court of Justice accepted that “the provision of employment comes within the framework of the objectives to which reference may” be made pursuant to Art 101(3) “because it improves the general conditions of production, especially when market conditions are unfavourable.”<sup>261</sup> To satisfy the second condition, the arrangement must bestow a fair share of benefit on “consumers.” In practice, the term “consumer” is interpreted very broadly so as to include persons who are not direct purchasers and those who may not even acquire the product.<sup>262</sup> That these two conditions are interpreted generously increases the likelihood of restrictions being permitted.

The third and fourth conditions are framed in negative terms. According to the third condition, any restriction must be indispensable for the attainment of the efficiencies identified under the first condition. This condition entails a weighing exercise to assess whether the scope or extent of restriction in terms of geography, duration or subject matter is indispensable. Before May 2004, it was possible for notifying parties to offer amendments to make the arrangement more palatable to the European Commission. For example, a reduction in the duration of a ten year non-competition clause to a period of three years was accepted in *Television par Satellite*, notably on the grounds that it reduced the negative consequences for the market (rather than for concern for the restrained parties.)<sup>263</sup> It is important to emphasise that the criterion of “indispensability” is conceptually different from the weighing exercise conducted under the “ancillary restraints” doctrine.<sup>264</sup> The “indispensability” standard entails questioning the necessity of, firstly, the type of arrangement and, secondly, the particular restriction(s).<sup>265</sup> The fourth condition provides that competition must not be substantially eliminated. Protecting rivalry is

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advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.”

261 Case 42/84 *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission* [1985] ECR 2545, para 42.

262 *Phillips Osram and KSB/Goulds/Iowara/Itt* [1990] OJ L 19.

263 *Re Télévision par Satellite (TPS)* [1995] 5 CMLR 168 346, paras 100-109.

264 See *Article 101(3) Guidelines* para 30.

265 See *Article 101(3) Guidelines* para 73 et seq.

the priority.<sup>266</sup> It is significant that not one of the four conditions in Art 101(3) expressly adverts to the impact of a restriction on the restrained person. This silence means that Art 101(3) may be applied without squarely addressing the effect of the restriction on the restrained person's interests.

It is possible that structural or institutional factors encouraged the Commission (perhaps inadvertently) to apply Art 101(3) to an individual notification of rules in a way that caused the interests of the restrained person to be relatively sidelined. Restrictions contained in rules were usually notified by the restraining entity and, as such, the notifier readily got the opportunity to participate in any discussions with the Commission regarding the amendment of particular restrictions. Perhaps this interactive process affected the Commission's attitude to the restriction. In particular, the question arises as to whether the process steered Commission officials towards achieving the most achievable "cure" to a competition problem? Did interactions with a restraining entity (such as a professional association) temper the Commission's ambition to secure a perfect outcome in the short term because it took a pragmatic view that a second best outcome was more readily achievable by consent within the notification process? If so, then there was a risk that the interests of the restrained professionals were unduly marginalised.

These questions are prompted by the Commission's Decision in *Institute of Professional Representatives European Patent Office*.<sup>267</sup> Following many amendments to the notified Code of Conduct, the Commission exempted, for a defined period, the EPO's ban on comparative advertising and its ban on approaching former clients of other representatives by exchanging views on that case.<sup>268</sup> The Commission stated that this profession's long tradition of the "virtually total prohibition of individual advertising and supply of unsolicited services" was "unquestionably" anti-competitive, but, nonetheless, the Commission accepted the need for a transition period.<sup>269</sup> It took the view that a sudden

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<sup>266</sup> Article 101(3) Guidelines para 105. See para 115 for a list of the factors that could be taken into account including entry barriers and minimum efficient scale.

<sup>267</sup> Dec 1999/267, IV/36.147 *EPI Code of Conduct* [1999] OJ L 106/14.

<sup>268</sup> For example, the removal of the ban on individual advertising, the ban on supply of unsolicited services and the deletion of the requirement to charge fees that were reasonable and sufficient to maintain independence.

<sup>269</sup> Para 46.

transformation to total freedom risked confusing the public and it accepted that the advantages could not be achieved by means other than having a short transition period. Perhaps a similar managerial attitude existed in other cases towards rules that were amended following Commission “representations.”<sup>270</sup> Consider the case of *Piau* where, the Commission rejected the complaint of a restrained players’ agent, on the grounds, *inter alia*, that the most important restrictions had been removed by amendments to FIFA’s original regulations.<sup>271</sup> When the Commission’s Decision to reject the complaint was challenged by the agent (*Piau*) before the General Court, the Commission submitted to the General Court that the “most important restrictions had been removed in the amended regulations. Any persistent effects of the original regulations can be regarded as transitional measures.”<sup>272</sup> The point is that, in these two cases, the Commission, by allowing “unquestionably” anti-competitive restrictions for a transition period, acted as a manager or sort of regulator seeking a viable and mediated outcome for the market. The problem, from the perspective of the restrained professional, is that this process risks marginalising the safe-guarding of his interests. The *process* also results in some restrictions being accepted rather than prohibited.

The Decision in *Piau* is also interesting because it shows the Commission’s attitude to restrictive rules that are contested by a restrained person after the rules were amended following a Statement of Objections.<sup>273</sup> The amended regulations maintained the requirement that players’ agents be licenced, take a written examination and hold either insurance policy or deposit a specified sum in a bank. It mandated that written contracts be concluded with players and be for a maximum period of two years (renewable). In its Decision rejecting the complaint from the agent, the Commission stated that the “licence requirement could be justified” and

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270 See T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 19 where the General Court noted a letter to *Piau* stated that its “representations to FIFA” had resulted in the removal of the “main restrictive aspects” of the Regulations.

271 *PIAU COMP /34 124 15 April 2002* para 29.

272 T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 59.

273 The Commission initiated proceedings following a complaint from a Danish undertaking. In 1996, Multiplayers International Denmark complained under competition rules. Mr *Piau*’s complaint in 1998 did not specify the competition law articles. In 1996 and 1998 the European Parliament declared admissible petitions from German and France nationals. T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209 involved the appeal against the Commission Decision to reject the complaint. See Case C-171/05 P *Laurent Piau* [2006] ECR I -37 where Court of Justice decided that the appeal was manifestly unfounded.



the remaining restrictions could enjoy an exemption under Art 101(3).<sup>274</sup> Apparently, the Commission took the view that the *licence requirement* was not prohibited by Art 101(1).<sup>275</sup> By contrast, the General Court, without analysing the provision's "object or effect" under Art 101(1), crisply stated that the:

"actual principle of the licence which is required by FIFA and is a condition for carrying on the occupation of players' agent, constitutes a barrier to access to that economic activity, and therefore necessarily affects competition. It can therefore be accepted only insofar as the conditions set out in Art [101] (3) are satisfied."<sup>276</sup>

This quotation is important as it shows the General Court did not apply the "necessity" rubric but, instead, concluded that paragraph (1) of Art 101 was infringed and, consequently, that the provision could only be saved by Art 101(3). The General Court heard opposing submissions from Piau and the Commission regarding Art 101(3). Piau argued that the introduction of a compulsory licence for his profession eliminated any competition, because only FIFA is authorised to grant a licence. The Commission submitted that the amended regulations satisfied the conditions in Art 101(3). It stated that they are:

"intended to raise professional and ethical standards and are proportionate. Competition is not eliminated. *The very existence of regulation promotes better operation of the market and therefore contributes to economic progress.*"<sup>277</sup>

This quotation shows the Commission's confidence in the advantages of the regulation of professionals by an association and its belief that this is a factor that is relevant to the analysis under Art 101(3). The General Court noted that the agents did not constitute a profession with its own internal regulation, that their past practices had the potential to harm clubs and players (financially and professionally) and FIFA's submission that the licence's dual objective was to raise professional and ethical standards for agents to protect players who have short careers.<sup>278</sup> The General Court specifically rejected Piau's argument that competition was eliminated because the Court viewed the new system as

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274 T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 22.

275 See T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 61 where the General Court summarised the view of the Commission as follows : "rules of professional conduct, which can be justified by the general interest are proportionate and compatible with Community law... the binding nature of the regulations and the sanctions provided for therein are inherent in the existence of rules."

276 T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 101.

277 Para 62 (emphasis added).

278 Para 102.

qualitative selection (“appropriate for the attainment of the objective of raising professional standards”) rather than a quantitative restriction on access to the occupation.<sup>279</sup> It must be noted that a restrained professional faces an uphill task when trying to challenge a decision of the Commission given the limited nature of the judicial review process, *in casu*, a rejection of a complaint.<sup>280</sup> The General Court decided that the Commission did not *commit manifest error of assessment* by “considering that the restrictions stemming from the compulsory nature of the licence might benefit from an exemption.”<sup>281</sup>

Art 101(3) does not insist that the interests of restrained persons be considered. Some determinations convey some sense that the objective of Art 101(3) when applied to rules of professionals has regulatory-type dimension. The problem with any “regulatory” focus is that it can tilt the analyses in favour of permitting the restriction once it does not damage the market and/or the public unduly. In other words, the regulatory lens is not as deeply concerned with the possible injury to interests of the restrained person.

## 2.7 ARTICLE 102

Restrictions contained in the rules of an association may infringe Art 102 which prohibits the abuse of a dominant position by one or more undertakings. How Art 102 deals with restrictions on professionals and, in particular, the account it takes of their impact on restrained persons is next explored.

The classic definition of “abuse” is:

“an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking... the degree of competition is weakened and which, through recourse to methods different to those which condition normal competition in products or services... has

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279 Para 103.

280 The Court allows a sizeable margin of discretion to the decision-maker under Art 101(3) and takes a narrow view of its own role. See Joined cases 56/64 and 58/64 *Etablissements Consten SA & Grundig Verkauf s GmbH* [1966] ECR 405 and see T- 168/01 *GlaxoSmithKline Services Ltd v. Commission* [2006] ECR II 2969.

281 T- 193/02 *Laurent Piau v. Commission* [2005] ECR II -209, para 104 (emphasis added).

the effect of hindering the maintenance of degree of competition still existing in the market or the growth of that competition.”<sup>282</sup>

There is very little case law specifically dealing with restrictions on professional persons that constitute an “abuse” of dominance. Art 102(a) contains an illustration of an “abuse” which may be relevant to some restrained persons because it refers to the “imposition of unfair terms or conditions.” The verb and adjective may capture some situations involving restrictive rules of a professional entity or another party. In general, “abuses” have been classified into three (sometimes overlapping) groups.<sup>283</sup> One group is of “exclusionary abuses” where existing rivals are marginalised or barriers to new entrants are raised.<sup>284</sup> “Exploitative abuses” arise where a dominant undertaking acts unfairly towards undertakings that are not independent of the dominant undertaking. Thirdly, “reprisal abuses” entail an element of punishment.<sup>285</sup>

If the conduct may be objectively justified, it is not an “abuse” in the sense proscribed by Art 102. In *Piau*, the General Court considered whether Art 102 prohibited FIFA’s requirement that players’ agents obtain a licence. It found that an “abuse” had not been established because FIFA’s requirements did not impose “quantitative restrictions on access to the occupation.... that could be detrimental to competition but qualitative restrictions that may be justified in the present circumstance.”<sup>286</sup> The Court criticised the Commission’s finding that FIFA did not hold a dominant position. In its view, the Commission’s finding that “the most restrictive provisions of the regulations had been deleted, and that the licence system could enjoy an exemption decision under Art [101](3) would accordingly lead to the conclusion that there was no infringement under Article [102]”<sup>287</sup> This quotation is interesting as it shows how the General Court linked Art 101(3) with Art 102 which is surprising since an exception under Art 101(3) does not provide an automatic protection vis-à-vis Art 102. It is clear that restrained persons are not

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282 Case 85/76 *Hoffmann La-Roche v. Commission* [1979] ECR 461.

283 A. Jones & B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 4th ed. 2011) 364.

284 *Guidance on the Commission’s Enforcement Priorities in Applying Article [102] of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* [2009] OJ C 45/2.

285 J. Temple Lang, “Reprisals and Overreaction by Dominant Companies as an Anti-Competitive Abuse under Article 82(b)” (2008) ECLR 11.

286 Para 117.

287 Para 119.

protected if the possibility of satisfying Art 101(3) precludes the possibility of establishing an infringement of Art 102.

## 2.8 CONCLUSION

This chapter highlighted how competition law treats some restrictions on restrained professionals. It examined determinations that EU competition law did not prohibit certain restrictions that were contained in either personal agreements or in rules. It showed how EU competition law can be applied in ways that do not safeguard the economic interests of restrained professionals. This point was made by highlighting the interests that are protected and promoted by the selected cases. The examined decisions and judgments protected consumers and, sometimes, the public.

This chapter does not argue that EU competition law takes the wrong approach with its concern for consumers. Consumers should benefit from competition. Protecting consumer welfare is a key goal, if not, the goal of EU competition policy.<sup>288</sup> In 2001, Mario Monti stated that:

“the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.”<sup>289</sup>

The beneficiaries of vibrant competition are depicted by economists in terms of the overall maximisation of society’s welfare due to productive and allocative efficiencies.<sup>290</sup> Whish and Bailey point out, while the consumer welfare standard is currently to the fore, other policy objectives have been pursued as goals of competition law in the past and some were not founded in “notions of consumer

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288 See *Guidelines on Vertical Restraints* OJ [2010] C 130/1 para 7 which states that “[T]he protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient allocation of resources.” For a more recent statement see *European Commission Report on Competition Policy 2011*, COM (2012) 253 final {SWD (2012) 141 final}, section 2.1 entitled “How Competition Enhances Consumer Welfare.”

289 Speech by M. Monti, “The Future for Competition Policy in the European Union” London July 9th 2001. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=0&language=EN&guiLanguage=en>.

290 L Peepkorn and K. Mehta “The Economics of Competition” in J. Faull & A. Nikpay, *The EC Law of Competition* (Oxford: Oxford University Press, 2nd ed. 2007).

welfare in the technical sense at all, and some were plainly inimical to the pursuit of allocative and productive efficiency.”<sup>291</sup>

This chapter does not aim to elucidate the “correct” goals of EU competition law. Its aim is to demonstrate convincingly that EU competition law does not make a meaningful space for assessing the impact of restrictions *on the restrained person* while showing that it does take account of other interests including the market, some restraining parties (e.g. franchisors and some professional associations), consumers and the public. This point is important as it evidences the claim (made throughout Part I of this thesis) that the ROTD and competition law take significantly different approaches to some restrictions on professionals. For clarity, this chapter focussed only on competition law and postponed making direct contrasts with ROTD. The next chapter draws closer contrasts between the ROTD and competition law by presenting analyses of judgments that applying both the ROTD and competition law to the same restriction.

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291 R. Whish and D. Bailey, *Competition Law* (Oxford: Oxford University Press, 7th ed. 2012).

## CHAPTER THREE

# ROTD AND COMPETITION LAW TREAT RESTRICTIONS DIFFERENTLY

### 3.1 INTRODUCTION

Building on Chapters One and Two, this chapter seeks to demonstrate concisely that a restriction may be treated differently by ROTD than by competition law in the UK. To this end, it examines some judgments that apply the ROTD and competition law (either EU and/or UK) to the same restriction. This examination shows that, even where the outcomes under the ROTD and competition law are not different, there are significant differences in the reasoning and processes under each legal regime. That they are different provides the foundation for the later argument that the delineation of their interface is a matter of importance for some professionals in the UK.

This chapter argues that a restriction receives different treatment under the ROTD and competition law because the legal measures do not pursue the same approach. Their differences may make the ROTD a more attractive legal measure than competition law for some professionals. On this basis, it is argued that it is a problem if (as demonstrated in Chapters Four and Five) the ROTD is ousted by the applicability of competition law.

In order to explain fully and illustrate how UK domestic competition law applies to restrictions on professionals, section 3.2 details why UK competition legislation is so tightly aligned with EU competition law.<sup>292</sup> It also presents a detailed study of

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<sup>292</sup> Understanding the depth of influence exerted by EU competition law on domestic competition law in the UK is additionally important for Chapter Six which highlights the possible expansion of

one case to illustrate how intentionally closely UK competition law follows EU competition law determinations. Section 3.3 illustrates that the ROTD and competition law in the UK take different approaches to restrictions by presenting studies of two cases.

### **3.2 UK COMPETITION LAW ALIGNMENT WITH EU COMPETITION LAW**

The influence exerted by Arts 101 and 102 on the substantive prohibitions of the Competition Act 1998 is deliberate and is ongoing.<sup>293</sup> The EU provisions of Art 101 and 102 were intentionally chosen as a template by the Act's drafters of the prohibitions in Chapters I and II. In addition, the Act makes express provision to ensure that it is interpreted consistently with EU competition law developments.

#### *3.2.1 EU Template for Competition Act 1998*

With the Competition Act 1998, Parliament chose to enact legislative prohibitions closely modelled on Arts 101 and 102.<sup>294</sup> Chapter I, s.2 (subject to specific exclusions) prohibits agreements, concerted practices of undertakings and decisions of associations of undertakings which may affect trade within the UK and whose object or effect is the prevention, restriction or distortion of competition in the UK. S.9 allows individual exception in terms that are almost identical to Art 101(3).<sup>295</sup> Chapter II, s.18 prohibits the abuse of a dominant position in terms that are similar to Art 102.

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UK competition law, following expansive interpretations of "undertakings" in EU competition law, to include some professionals in employment.

<sup>293</sup> There are patent differences in the domestic institutional framework enacted by the Competition Act 1998 and, further, in the Enterprise Act 2002 compared to the EU institutional architecture.

<sup>294</sup> "Europeanisation" is a political science term that may describe the process. It has been used to describe an imitative attitude voluntarily taken by Parliament and the ongoing influences of EU measures on the interpretation and operation of domestic provisions and policy. See further Buller, Evans and James, Editorial, (2002) 17(2) Public Policy & Administration.

<sup>295</sup> See HL Committee 13 Nov 1997 (col 279) and again 25 Nov 1997 (col 962) where Lord Simon expressed his expectation that the s. 9 criteria would be interpreted similarly to those in Art 101(3).

Nonetheless, there are two relevant divergences from the EU model which must be noted here because they explain why some restraints on professionals only recently came within the reach of the domestic competition legislation.<sup>296</sup> The first such situation involves the exclusion of “designated professional rules”<sup>297</sup> from the Chapter I prohibition which persisted until April 2003.<sup>298</sup> The second divergence involves the “special treatment” provisions of s.50<sup>299</sup> which provided the basis for an Order excluding vertical agreements.<sup>300</sup> This exclusion ended in May 2005.<sup>301</sup>

### *3.2.2 Interpreting UK Law Consistently with EU Competition Law*

This section examines the extent to which the UK organisations (comprising courts, tribunals and administrative authorities) applying national competition law *must* follow EU competition law interpretations. The Competition Act 1998 is highly susceptible to following interpretations made under EU competition law.<sup>302</sup> Its susceptibility to EU competition law is due both to its “open” style of drafting and to the express provision in s. 60 linking its interpretation to EU competition law.

The drafting style and format of the 1998 Act departs dramatically from preceding restrictive practices and fair trading legislation. For example, the Restrictive Trade Practices Act 1956 was so detailed that it specified not only the practices within and without the statutory requirement to register but, additionally, the grounds upon which the Restrictive Practices Court (RPC) could make decisions. Its intricate and comprehensive drafting stemmed from Parliament’s resolve to remove

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296 Why these divergences occurred is discussed in Chapter Four which traces the evolution of the interface between the ROTD and domestic competition legislation.

297 The “designated” professional rules were those that are listed in Schedule 4 Part II and which were notified to and designated by the Secretary of State for Trade and Industry. These include legal services, medical, dental, ophthalmic, veterinary, nursing, midwifery, physiotherapy, chiropody, architectural, accounting and auditing, insolvency, patent agency, Parliamentary agency, surveying, engineering, educational and religious professional services.

298 Schedule 4 was repealed by s.207 of the Enterprise Act 2002 with effect from April 1 2003

299 S.50 allowed the Secretary of State “to provide by order for a provision of the 1998 Act Part 1 to apply with modification.”

300 *Vertical Exclusion Order* SI 2000 No 310.

301 The *Vertical Exclusion Order* was repealed with effect from May 1st 2005 by the *Competition Act 1998 (Land Agreements Exclusion and Revocation) Order* 2004 SI 2004 No. 1260.

302 Understanding the extent of the influence of EU competition law is important also for Chapter Six which considers the implications of expansive interpretations of the concept of “undertaking” to include perhaps some professionals in employment.



any opportunity for the RPC to engage in policy-type decision making.<sup>303</sup> The 1998 Act, by copying the EU tests, is drafted in a style that is looser and more receptive to EU influences.

Additionally, there is express provision in s.60 of the Act that tightly ties interpretations of the Act to EU competition law. S.60, as the “governing principles”<sup>304</sup> provision, applies to all UK authorities involved with the administration and enforcement of the Act.<sup>305</sup> According to Whish, s.60 *enables* the UK competition authorities when acting under the UK Act to apply EU competition law.<sup>306</sup> The extent to which it *obliges* them to copy EU competition law is next considered.

S.60 contains three subsections. The first subsection sets out its aim and the remaining two subsections impose duties of consistency.

According to s.60(1), its purpose is:

“to ensure that so far as possible (having regard to any relevant differences between the provisions concerned) questions arising under this Part, in relation to competition within the United Kingdom, are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.”<sup>307</sup>

This provision describes its aim as the consistent treatment under UK and EU competition law of corresponding questions after having regard to any relevant differences. Coleman and Grenfell have noted that the duty of consistency extends to questions “in relation to competition” rather than in relation to competition *law* and suggest that this could include questions of fact so that a finding by the European Commission that no collusion had occurred would preclude the national

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303 R.A.O Wilberforce, A. Campbell, *The Law of Restrictive Trade Practices and Monopolies* (London: Sweet and Maxwell 1966) 153.

304 It was termed by some as the “El Dorado” clause because it was expected to provide a goldmine for lawyers for at least a decade according to Lord Fraser of Carmyllie, 23 Feb 1998, col. 510. See P.R. Willis, “Procedural Nuggets from the Klondike Clause: The Application of s.60 of the Competition Act 1988 to the Procedures of the OFT” [1999] 20(6) ECLR 314, 314 for its description as the “Klondike” clause.

305 OFT *Guidelines 401*, para 2.3.

306 R. Whish, *Competition Law* (London: LexisNexis Butterworths, 2003, 5th ed.) 351 (emphasis added).

307 S. 60(1).

competition authority from reaching a different conclusion.<sup>308</sup> If their view is correct, it means that a finding by the Commission, for example, that a particular measure of a UK professional association does not have the object of restricting competition could prevent a national court from finding, under national competition law, that the same measure had the object of restricting competition.

S. 60 (2) imposes specific positive obligations on the national courts. It provides that:

“at any time when the court determines a question arising under this Part, it must act (as far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between:

(a) the principles applied, and decisions reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.”

Middleton argues that this provision represents a significant change in approach to statutory interpretation as it obliges courts to follow the “practice of teleological interpretation.”<sup>309</sup> The Court of Appeal has accepted that s.60(2) imposes a “particular responsibility” on courts and litigants “to identify clearly what in the jurisprudence of the European Union is truly a principle or decision.”<sup>310</sup> This subsection actively orients parties towards drawing on EU competition law in their litigation under national competition law. There is a clear Parliamentary intention to keep domestic competition law abreast of EU competition law developments.

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308 M. Coleman and M. Grenfell, *The Competition Act 1998: Law and Practice* (Oxford University Press 1999) 46. See *Crehan v. Innpreneur Pub Co CPC* [2004] EWCA Civ 637, paras 83 and 92 for expression by the Court of Appeal of the duty of deference that further supports this view.

309 K. Middleton “Harmonisation with Community Law: The Euro Clause” in B. Rodger and A. MacCulloch (eds.), *The UK Competition Act: A New Era for UK Competition Law* (Oxford: Hart Publishing 2000) 31.

310 *Napp Pharmaceuticals Holdings Limited v Director General of Fair Trading* [2002] 4 All ER 376 Court of Appeal para 14.

The phrase “*as applicable at that time*” clearly anticipates and addresses situations where EU competition law develops or evolves. This phrase intends to make:

“clear that if there is a decision of the European Court which conflicts with the latest interpretation of the point by the UK courts, those applying the prohibition must follow the EU interpretation. It is also the case that if the jurisprudence of the ECJ changes over time it is the latest decision which prevails.”<sup>311</sup>

The *dynamic* nature of this underpinning to s.60(2) is crucial to appreciating fully the on-going significance for UK competition law of developments in EU competition law. This subsection makes the EU cases highly influential *vis-a-vis* the UK prohibitions. In particular, how Art 101 has been interpreted and applied in cases such as *Remia*, *Pronuptia*, *Gottrup* and *Wouters* comes within the duties in s.60(2).

S.60(3) obliges the national bodies to “have regard to any relevant decision or statement” of the European Commission.<sup>312</sup> While the cogency of this obligation is less than that under subsection 2, its material scope is broader because it extends beyond legally binding measures. When the High Court was faced with opposing interpretations in a recent case, it expressly decided to adopt the approach set out in Commission Guidelines.<sup>313</sup> Notably, although s.60 does not make any mention of Opinions of Advocates General, the Court of Appeal has paid some attention to

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311 See Lord Simon of Highbury col 962 speaking against Amendment 255 that sought to delete the reference to the relevant EC principles and decisions applicable at the time the UK decision is being taken.

312 See K. Middleton “Harmonisation with Community Law: The Euro Clause” in B. Rodger and A. MacCulloch (eds.), *The UK Competition Act: A New Era for UK Competition Law* (Oxford: Hart Publishing 2000) 41 for the suggestion that this provision was included following views expressed by the Competition Law Association. See further J. Scholes “The Draft Competition Bill: Comments by the Competition Law Association” [1998] ECLR 32.

313 *Bookmakers Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), [2009] UKCLR 547, para 438. More surprisingly, some courts have even referred to non-binding letters from the European Commission to notifying parties or complainants, see *Qualifying Insurers subscribing to the ARP and Capita London Market Services Ltd v. Ross & Co and the Law Society* [2004] EWHC 118 (Ch).

them.<sup>314</sup> A receptive attitude of courts to Opinions is very significant because of their *de facto* potential to spur developments in EU law.<sup>315</sup>

Coleman and Grenfell note that reading s. 60(3) alone suggests that UK organisations are relatively more at liberty to depart from Commission decisions (assuming that there is no Treaty or EU Court case law on the issue).<sup>316</sup> However, they rightly further point out that if subsection (3) is considered in the light of subsection (1), the UK authorities' discretion to depart from relevant Commission decisions and statements is more limited, because subsection (1) obliges them:

“so far as possible to ensure consistency of treatment between questions arising under Part I of the Act and corresponding ones under EU law. It is clear that Commission Decisions are part of [EU] law and, thus, the consistency obligation is likely to apply in relation to such decisions.”<sup>317</sup>

Parliamentary debates emphasise that subsection (2) was deliberately “very tight” and that “those applying and interpreting the prohibitions must always act with the purpose set out in subsection (1) in mind: that is consistency with the [EU] approach. Subsections (2) and (3) must therefore be read as a package together with the purpose in subsection (1).”<sup>318</sup> This quotation starkly reveals Parliament's determination to ensure the highest feasible degree of consistency between the EU and national competition law provisions.

It is clear that s.60 trammels the interpretation of UK competition law tightly in line with EU competition law as the latter evolves. Some UK courts have expressly noted the obligations they face under s.60.<sup>319</sup> Some UK judgments are very deeply influenced by Art 101 case law. To illustrate this point, one case is now analysed closely.

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314 *Napp Pharmaceuticals Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796; [2002] 4All E.R. 376, para37 where it expressly reserved the issue as to whether Opinions come within s.60 but noted that they are “important and authoritative” and are “respectfully viewed by this court.” *Intel Corporation v. VIA Technologies Inc* [2003] ECC 16, [2002] EWCA Civ 1905 para 43

315 Chapter Six considers the jurisdictionally dynamic view of Advocate General Jacobs on the possible classification of some employees as “undertakings.”

316 M. Coleman and M. Grenfell, *The Competition Act 1998: Law and Practice* (Oxford University Press 1999) 52.

317 *Ibid.*

318 Lord Simon 25 Nov 1997 Col 961.

319 *Hendry v World Professional Billiards & Snooker Association Ltd* [2002] UKCLR 5, para 25.

### 3.2.3 Study: *Bookmakers' Afternoon Greyhound Services*<sup>320</sup>

While the case of *Bookmakers' Afternoon Greyhound Services (BAGS)* does not deal directly with restrictions on professionals, the High Court judgment is interesting in two respects. These are, firstly, its deferential treatment of a variety of EU sources and, secondly, its views on the “ancillary restraints” doctrine.

In this case, licenced betting offices (LBOs) challenged new collective arrangements among thirty one racecourse operators to establish a joint venture (AMRAC) in order to sell their media rights *collectively* to the LBOs. The LBOs were unhappy that AMRAC sought higher overall prices than its predecessor.<sup>321</sup> They challenged the AMRAC arrangements by arguing that they amounted to price fixing and/or closed collective exclusive selling of LBO rights that foreclosed the market. A highly contentious issue was whether either the object or effect of the arrangements was anti-competitive? The High Court (Morgan J.) concluded that their object was not to fix prices but was to sponsor AMRAC's entry into the pre-existing monopsonistic market for LBO media rights of racecourses. Because the arrangement and alleged restriction are not ones that typically involve professionals, this chapter does not delve into the substantive arguments surrounding the particular arrangements. Instead, its focus is placed on the High Court's *attitude* to EU competition law sources and, additionally, its understanding of the EU approach to “ancillary restraints.”

This case shows the closeness of the relationship between the substantive prohibitions in the Act and Art 101. In the High Court Morgan J. stated that the domestic and EU provisions are “very similar” and expressly confined himself to “addressing the requirements” of Art 101 “without on every occasion repeating that the same requirement exists in the parallel provisions of sections 2 and 9 of the 1998 Act.”<sup>322</sup> Later, in the same dispute, the Court of Appeal went so far as to say that “it is common ground that there is no difference between the article and the

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320 *Bookmakers' Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), [2009] UKCLR 547; on app [2009] EWCA Civ 750, [2009] UKCLR 863

321 Previously, one distributor (SIS) managed these rights of all sixty racecourse operators and only he dealt with the LBOs.

322 *Bookmakers' Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), para 298.

national legislation, so reference need only be made to the article.”<sup>323</sup> These comments from the High Court and the Court Of Appeal provide a striking illustration of how deeply the interpretation of the domestic competition legislation is affected by Art 101.

The High Court judgment contains very lengthy overviews and summaries of EU competition law. Notably, Morgan J. drew heavily from non-binding sources such as Commission Guidelines (especially *Guidelines on Article [101](3)*) and from textbooks. In particular, he cited the views of Faull & Nikpay that whether an agreement involves a restriction by object is “predominantly a question of policy for the Community institutions.”<sup>324</sup> Morgan J. remarked that this would leave:

“little room for a national court to expand the scope of restrictions, which are regarded as restrictions by object, beyond those explicitly identified as such by the European Courts and case law and by the Commission in its notices and guidelines.”<sup>325</sup>

This quotation gives an interesting insight into the national judge’s perception of the minimal scope under UK competition law for manoeuvre outside the approach taken by EU institutions to Art 101.

Morgan J. summarised the EU courts doctrine of “ancillary restraints” as providing that clauses which restrict “rivalry between the parties and/or third parties fall outside Article [101](1) if they are directly related and necessary to the implementation of a legitimate purpose.”<sup>326</sup> Notably, he continued to remark that the “legitimate purpose” may be commercial (and cited *Gottrup Klim*) or it “may relate to a public interest such as the case involving the Bar of the Netherlands” (and cited *Wouters*).<sup>327</sup> In addition, the judge quoted, at length, the description of the “ancillary restraints” doctrine contained in the *Commission Guidelines on Art*

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323 *Bookmakers’ Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), para 23.

324 Para 31.

325 Para 324.

326 Para 332.

327 Para 332.

[101](3) and expressly adopted its approach.<sup>328</sup> These *Guidelines* state, *inter alia*, that:

“[I]f on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction *would be difficult or impossible* to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it.”<sup>329</sup>

It is significant that Morgan J. stated that the concept of “necessity” may be:

“satisfied by something which is not strictly essential. The concept of necessity has some flexibility and in an appropriate case can be satisfied by facts which show that it would be *difficult to achieve the commercial objective* without the presence of the restriction.”<sup>330</sup>

The High Court clearly intended to copy the EU approach of the standard of “necessity” and understood it to provide a relaxed rather than a strict standard like that of being essential. The other point of note is the readiness of the High Court to cite and accept *non-binding* EU sources, such as Commission Guidelines.

Morgan J. stated that not every restriction on conduct amounts to a restriction on competition and decided to apply the EU case-law on “ancillary restraints” and commercial necessity. The Court of Appeal agreed with the High Court that the object of the arrangement was to establish a rival new operator which needed to get exclusive rights from a minimum number of courses.<sup>331</sup> A crucial issue was whether it was *necessary* to sell the media rights of racecourses on an *exclusive* basis. The Court of Appeal specifically stated that it was “obviously *necessary* that the new entrant would have to be promoted by .. a number of racecourses and that it would need to be protected, at the stage of its establishment, from competition from the incumbent.”<sup>332</sup> This statement confirms that the test of “necessary” is not a strict one in the sense of being “essential.” In this author’s view, as all the parties were based in the UK they did not face significant legal or linguistic impediments and, therefore, *collective* selling was not strictly “necessary” but was, rather, more

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328 *Commission Guidelines on the Application of Article 81(3) of the Treaty* [now Art 101(3)] [2004 OJ C 101/97].

329 Para 21-2(emphasis added).

330 *Bookmakers’ Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), para 452(emphasis added).

331 *Bookmakers’ Afternoon Greyhound Services v. Amalgamated Racing Ltd* [2009] EWCA Civ 750.

332 Para 85.

convenient. However, the Court decided, in effect, that a measure may be “necessary” because it makes the business easier to manage in practice.

The judgments in *BAGS* illustrate two relevant points. Firstly, the High Court and the Court of Appeal judgments exhibit a high level of fidelity to EU competition law when applying national competition law. They treat UK competition law as being a domestic equivalent of EU competition law. Moreover, the High Court drew heavily from textbooks and non-binding Commission Guidelines. This may indicate the judge found the primary EU Court sources more difficult or it may just indicate the increasing influence of European Commission materials on national courts. In any event, the judgment takes account of sources of EU law such as Commission Guidelines to a degree that far exceeds the stipulations of s.60. The second key point is that the High Court and Court of Appeal did not insist on a strict standard when deciding what was “necessary.” The High Court expressly accepted that a measure is “necessary” if it solves a business difficulty. It determined that the EU approach to the “necessity” standard is less rigorous than the standard of “essential” and faithfully interpreted UK competition law in that light rather than looking to other areas of UK law for inspiration. This makes the test a rather easy one for a restraining party to satisfy. Consequently, restrictions that are merely convenient (from an operational standpoint) may not be prohibited.

The foregoing shows the inclination of UK competition law to take EU aligned approaches. It showed how, in practice, both systems may be viewed as applying equivalent tests (apart, of course, from the inter-state trade effect requirement under EU competition law.)

Having shown the closeness between UK and EU competition law, the next step is to contrast their approach with the approach taken by the ROTD. The next section demonstrates how some restrictions on professionals may be treated differently by competition law in the UK (comprising domestic and EU law) than by the ROTD.



### 3.3 ROTD AND COMPETITION LAW ARE NOT THE SAME

Chapters One and Two explored how the ROTD and EU competition law have been applied to some restrictions on professionals. This chapter draws together strands from these foundational chapters in order to demonstrate concisely that the ROTD and competition law in the UK (comprising UK competition law and EU competition law) do not take the same approach to some restrictions. In order to highlight the differences in the approaches of the ROTD and competition law in the UK, this section examines judgments where the High Court considered and applied both the ROTD and competition law (EU and/or UK) to a provision. It discusses, firstly, some differences that stem from their different substantive tests and, secondly, some differences surrounding their processes.

#### 3.3.1 Different Substantive Tests

The differences in the tests of the ROTD and competition law cause courts to take different approaches when applying each legal regime to the same provision. This will be illustrated by discussing two judgments. The first judgment (*Days Medical Aids*) shows that different outcomes may be produced under competition law and the ROTD. The second judgment (*Hendry*) shows that the ROTD and competition law, even where they do not produce a different outcome, take different considerations into account when assessing the same restriction. The aim of this section is to explain why a restrained party might prefer to have the ROTD applied instead of competition law.

The High Court judgment in *Days Medical Aids Ltd. v. Pihsiang* demonstrates how a restriction that is not prohibited by Art 101(1) may fall foul of the ROTD. Days Medical Aids (DMA) sought damages from Pihsiang for the allegedly wrongful repudiation of a distribution contract.<sup>333</sup> DMA had been appointed as the exclusive wholesale distributor for Pihsiang's products. Pihsiang undertook to supply the products only to DMA and not to supply customers or other distributors. Pihsiang

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<sup>333</sup> Damages may be awarded by an English court to a party to an illegal contract, see Case C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297; [2001] 5 CMLR 28; [2002] QB 507.

also contracted not to allow its distributors located outside the contract territory to sell into the territory. DMA undertook to distribute only Pihsiang's products. The contract did not contain any restrictions on prices or any post-termination restrictions. The distribution contract was concluded for an initial period of five years. Clause 10 gave DMA a right to renew which extended to all subsequent five year periods on the same basis "for as long as permitted by law."<sup>334</sup> Pihsiang argued that the provision for renewals was void under both the ROTD and Art 101.

The applicability of the ROTD depended on the how the renewal clause was construed. Langley J. decided that if the clause provided for only one renewal, the ROTD would not apply.<sup>335</sup> However, he further expressed the view that:

"if the Agreement is to be construed as one entitling DMA to renew it every five years for the rest of time... I think the conclusion that it not only contained a restraint of Pihsiang's freedom to trade in the UK (as well as continental Europe) but did so in a manner which was unusual or exceptional is almost unavoidable. The Agreement would then be subject to the doctrine and so require to be justified as reasonable between the parties."<sup>336</sup>

Only DMA enjoyed the right to renew and when exercised, this right imposed a positive duty on Pihsiang to supply the goods to DMA, at all times, and at the lowest price payable by any distributor.<sup>337</sup> Langley J. expressly declined to follow case law (*Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd*) which allows a dispensation from justification if a clause has passed "into the accepted and normal currency of commercial or contractual .....relations..."<sup>338</sup> This meant that DMA would have to justify the restraint as being reasonable in the parties' interests.

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334 Clause 10 provided: "On expiry of the first five year term of this agreement provided that DMA has discharged its obligations under the agreement and is maintaining a sales level of not less than 5000 units per annum, DMA shall have the right to renew the agreement for another five years on the same basis as herein, except that the amount payable each year under Clause 2 shall be \$20,000. This right of renewal shall extend to all subsequent five year periods on the same basis for as long as permitted by law."

335 Paras 223 and 267.

336 Para 224.

337 Para 224.

338 *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* [1968] AC 269, 331. This case is examined in detail in Chapter Seven.

Langley J. accepted that DMA was entitled to protect its investment and to reap the rewards of success. However, he stated that:

“if the agreement is to be construed as entitling DMA to renew every five years for the rest of time, that *goes much further than any legitimate interest DMA could have or was entitled to protect*. It would be tantamount to imposing a lifetime restriction and potentially a way of avoiding the consequences of the greater legal distaste for restraints which apply after an agreement has ended.”<sup>339</sup>

The High Court weighed the interests of the parties when assessing the reasonableness of the provision. This approach allowed the Court to consider and to protect the interests of the restrained party as it led to the conclusion that the provision for unlimited renewals fell foul of the ROTD.

The focus of the analysis under competition law was different as it assessed economic criteria and market conditions. It was agreed that Art 101(1) prohibited a vertical agreement if the exclusivity created substantial market foreclosure.<sup>340</sup> One expert witness framed the question as follows: “[D]oes the fact that Pihsiang is obliged to supply its products only to DMA remove opportunities to other competing top-tier distributors to such an extent that they are unable to compete effectively in the marketplace?”<sup>341</sup> The undisputed expert economic evidence was that competition in the wholesale market was strong, effective and increasing, that entry was neither foreclosed nor difficult and that prices were decreasing. In this light, as Langley J. put it, there was “no evidence, at all, that any potential market entrant was deterred by the existence of the agreement.”<sup>342</sup> He concluded that the renewals clause did not have an anti-competitive object or effect and, thus, was not prohibited by Art 101(1).<sup>343</sup> At the relevant time, vertical agreements were excluded from the equivalent prohibition in the Competition Act 1998 but it may be assumed that a similar conclusion would have been reached under UK competition law.<sup>344</sup>

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339 Para 225 (emphasis added).

340 Para 238.

341 Para 239.

342 Para 240.

343 Para 243.

344 *Vertical Exclusion Order* SI 2000 No 310.

The contractual clause was not prohibited by competition law but was one that could be resisted by the restrained party under the ROTD (assuming that the interface rules allowed the ROTD to be applied). It is important to highlight the different focus that was taken when applying each legal regime. When applying ROTD, the Court followed the traditional analysis of assessing whether the provision was justified as being reasonable in the parties' interests. This entailed paying specific attention to the effect of the measure on the restrained party. Under the competition law analysis, the focus was on the market and, in particular, on whether the clause could adversely affect new entry by rivals. Each legal regime pursued a different focus and the ROTD took greater account of the restrained party. Thus, the restrained person would prefer the ROTD to be applied in the place of competition law.

The High Court judgment of *Hendry v. World Professional Billiards & Snooker Association Ltd* was selected for discussion because it illustrates that while a measure may fall foul of both the ROTD and competition law, this similar outcome is reached by means of different analytical approaches.<sup>345</sup> In this case, professional snooker players challenged some restrictive rules of the World Professional Billiards and Snooker Association Ltd (WPBSA). In particular, they challenged Rule A5<sup>346</sup> (and other policies<sup>347</sup>) that limited the tournaments which WPBSA

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345 [2002] UKCLR 5.

346 It provides "5.1 Members shall not enter or play in any snooker tournament, event or match without the prior written consent of the Board other than: 5.1.1 Any snooker tournament event or match (both qualifying and final rounds) owned and staged by World Snooker; and/or 5.1.2 Any snooker tournament, event or match (both qualifying and final rounds) sanctioned by the Board in accordance with the principles set out in the sanctioning policy document of 12 March 2001.5.2 Members shall not require the consent of the Board to enter and play in any exhibition, promotional, testimonial event or match provided that such event or match will not be arranged: 5.2.1 until the dates for tournaments events or matches owned and staged or sanctioned by World Snooker have been fixed for the relevant season; 5.2.2 so that it adversely affects any tournament event or match owned and staged or sanctioned by World Snooker."

347 For example, paragraphs 4 and 5 of the policy document. These are as follows: "4. To ensure the proper working, organisation and administration of the sport of snooker as a whole and to ensure that Members give a degree of priority to World Snooker organised tournaments (which are part of the ranking system or which are significant representative tournaments such as the Champions Cup and the Nations Cup) as is necessary to organise and run the sport, World Snooker will not normally sanction a tournament on dates and at times which conflict with the dates and times for such World Snooker tournaments involving players who are participating in such World Snooker tournaments. 5. Notwithstanding the principle set out in paragraph 4, for the benefit of the sport of snooker as a whole World Snooker needs to maximise revenue from the audio-visual exploitation of its organised tournaments. Accordingly World Snooker will not normally sanction a tournament, the audio-visual rights to which will be transmitted at the same time and within the same territory (either live or on a

would recognise (or sanction). The players wished to play in tournaments organised by TSN that were not sanctioned by WPBSA. The High Court (Lloyd J.) decided that the sanctioning policy was void under both EU and UK competition law and, also, opined that it was void under the ROTD. How the Court conducted different *analyses* under each legal regime is next highlighted.

Lloyd J. recited the defence argument that a restriction may fall outside the prohibition in Art 101 only on either one of two bases. The first basis is that the restriction does not have a significant anti-competitive effect. The second basis is where “if on balance, the economic advantages of the agreement are seen as pro-competitive overall, any restrictions which are necessary to the performance of the agreement are not affected by the provisions.”<sup>348</sup> However, the claimants (restrained sportspersons) argued that this second approach may be used only in relation to “ancillary restrictions, subordinate to the main object of the agreement, and then only to those which are really necessary for the purposes of the main agreement” and referred, in particular, to *Gottrup-Klim*.<sup>349</sup> Lloyd J. decided that the object of the rule was not anti-competitive but that its effect was anti-competitive.<sup>350</sup> He defined the affected market in economic terms for the purposes of ascertaining whether there was an infringement of Art 101 (or s.2 of the Competition Act 1998) and/or Art 102 (or s.18 of the Competition Act 1998). He defined the relevant market as being between snooker players and the promoters of snooker tournaments.<sup>351</sup> He evaluated the market power of WPBSA by considering factors such as its market share and barriers to entry and drew heavily on expert economic evidence on markets. Lloyd J. characterised the parties in terms of buyers and sellers of services by applying tests of demand substitutability.<sup>352</sup> While

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delayed basis within as limited a window as World Snooker can secure by agreement with its broadcasters) as rights to any World Snooker organised tournament are being transmitted live.”  
348 Para 27.

349 Ibid. Case C-250/92 *Gottrup-Klim Grovvareforening and Ors v. Dansk Landbrugs Grovvarereskab AmbA* [1994] ECR I-5641, in particular, paras 35-40.

350 Para 112.

351 Para 89.

352 See further para 88 where the judge found there was no substitute “as far as the players are concerned, for the services of promoters. As between broadcasters and promoters, on the other hand, I am satisfied by the evidence that broadcasters do have close substitutes for snooker tournaments, namely other sporting events, even if I disregard, as not being a really close substitute, other entertainment material. It seems to me that the same is true of sponsors as well.”

conceding that analogies between goods and services could be misleading, he highlighted two particular aspects of the market. These were namely:

“the acquisition of the ingredients or raw materials, and the sale of the product: as ‘buyer’ the tournament organiser is in a market in relation to players; as ‘seller’ it is in a market in relation to broadcasters, sponsors and other advertisers, and the paying public who attends events.”<sup>353</sup>

The language employed in the competition law analysis is rooted in economic terminology, centres on the market and is somewhat impersonal when discussing the restrained persons.

After Lloyd J. decided that the restriction was prohibited by competition law, he said it was not necessary to consider the ROTD. This conclusion raises a highly important point about the interface between the ROTD and competition law (which will be addressed in Chapters Four and Five). For this chapter, the relevant point is how Lloyd J. viewed the sanctioning policy when he applied the prism of the ROTD. Lloyd J. applied the classic ROTD test by asking whether the policy was justified as reasonable in the parties’ interests? He queried specifically whether the sanctioning policy was no more than reasonably required to protect a “legitimate interest” of WPBSA? Lloyd J. accepted that WPBSA had a “legitimate interest” in spreading the prize money more widely than its rival TSN (which, he noted was motivated solely by profit). Lloyd J. expressed some sympathy for WPBSA in the face of TSN’s attempts to “cream off” some star players while TSN “incurred no expense on training and preparing for stardom, with a view to exploiting their talents for commercial profit.”<sup>354</sup> Lloyd J. was not convinced that WPBSA’s interest could “only sensibly be protected by a rule” such as Rule 5 and opined that it could not be upheld by the ROTD.<sup>355</sup> The timbre of the judges’ observations under the ROTD contrasts with his more impersonal economic evidence based comments in the competition law analysis.

The High Court judgment in *Hendry* shows that a measure may fall foul of the tests under the ROTD and under competition law but that the two legal provisions do not approach the same measure in the same way. The competition law focus is on the market and the analysis is more scientific as it is based on economic evidence.

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353 Para 87.

354 Para 115.

355 Para 114.

By contrast, the ROTD takes closer account of the reality of the relationship as between the restrained professionals and the association. Most importantly, the impact of the restriction on the parties' interests is specifically taken into account under the ROTD.

The analyses of the two judgments above show that courts take different considerations into account when applying ROTD and competition law. The impact on the restrained party of a contested measure is a more significant factor under the ROTD analyses than under competition law judgments.

### *3.3.2 Different Processes under ROTD and Competition Law*

It is next suggested that, in some cases, a restrained professional may find it easier to litigate a restriction under the ROTD than under competition law on account of differences in their processes or proceedings.

An injunction may be more easily obtained under the ROTD than under competition law on account of the nature of the evidence required to establish an infringement of competition law. Kamerling and Osmann expressed the view that:

“ ... in interlocutory proceedings it will be considerably easier to show that a clause on its construction is unreasonable, rather than to try and argue that the object or effect of an agreement on competition means that it is void under Article [101](1) and should not benefit from an exemption under Art [101](3) - an economic assessment which national judges post-May 2004 will increasingly be called upon to do, but are unlikely to relish.”<sup>356</sup>

Using similar reasoning, the ROTD may be a more effective legal instrument when defending an application by a restrainer to dismiss an action on the grounds that there is no serious issue to be tried. For example, in *Meridian VAT Reclaim UK Ltd v. Lowendahl Group*, Gross J. was reluctant, in the absence of detailed economic evidence on the definition of markets, to conclude that there was a serious issue to

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<sup>356</sup> See A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell 2004) preface xvi.

be tried under competition law, but easily reached that conclusion under the ROTD by simply examining the express terms of the restriction.<sup>357</sup>

In proceedings under competition law, the restrained party as plaintiff must discharge the evidential burden to establish that the restriction has an anti-competitive object or effect. Complex and detailed economic evidence is often required in competition law litigation that may be expensive and/or difficult to present. In any event, before a court will find an infringement of competition law the evidence adduced must be “commensurately cogent and convincing.”<sup>358</sup>

When a case is argued under the ROTD, the restrained person may face a relatively easier task than under competition law. The restrained person enjoys a fundamental advantage due to the ROTD’s presumption that all “restraints of trade” are void and must be justified by the restrainer before he may enforce the restriction.<sup>359</sup> This presumption not only makes for a hostile starting point for the analysis but, also, places a greater evidential burden on the side seeking to enforce the restriction. The party seeking to rely on the restriction first has to establish, to the court’s satisfaction, that the restriction is reasonable *inter partes*.<sup>360</sup> Moreover, if the restriction is contained in a standard contract, the restrained party gets the benefit of the *contra proferentem* rule against those who draft a measure.<sup>361</sup> If the restriction is justified as reasonable *inter partes*, the restrained party may argue that the restriction is not reasonable in the “public interest.”<sup>362</sup> This argument may be substantiated, in some cases, relatively easily. It has been suggested that any economic analysis conducted by courts under the ROTD’s “public interest” limb is

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357 [2002] EWHC 1066. Lowendahl had entered into a confidentiality agreement which included a non-solicitation clause as part of a pre-sale due diligence exercise.

358 *Attheraces v. BHRB*, Etherton J. [2005] EWHC 3015 (Ch) para 126 citing *re H* [1996] AC 563, 586-7 (Lord Nicholls), *Aberdeen Journals Limited v. OFT* [2002] CAT 11 citing *Napp Pharmaceuticals Ltd v. DGFT* [2002] CAT 1, at para 109.

359 *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535, 565.

360 *Herbert Morris Ltd v. Saxelby* [1916] 1 AC HL 688, 700, 707, 715 per Lords Atkinson, Parker of Waddington, and Shaw of Dunfermline. Also see *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd* [1968] AC 269, 319 (Lord Hodson).

361 *Arbuthnot v. Rawlings* [2003] EWCA Civ 518.

362 *Herbert Morris Ltd v. Saxelby* [1916] 1 AC HL 688, 700, 707, 715 per Lords Atkinson, Parker of Waddington, and Shaw of Dunfermline. Also see *Texaco Ltd v. Mulberry Filling Station* [1972] 1 WLR 814, 822 where Ungood Thomas J. stated that “the onus of proving reasonableness in the interests of the parties lies on the covenantee, and the reasonableness of the public on the covenantor.” See further *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd* [1968] AC 269, 319 Lord Hodson .



less sophisticated than that conducted under competition legislation because it tends to focus on the concentrated nature of the market and, without more, conclude that the clause is against the “public interest.”<sup>363</sup> Another difference concerns the time frame of the analysis. The ROTD examines the restriction’s reasonableness at the time the restriction was agreed.<sup>364</sup> This focus confers an advantage to senior professionals who seek to challenge restrictions that were concluded years earlier when they were at comparatively junior level. Competition law examines the actual and potential anti-competitiveness of the clause at the time of the litigation.<sup>365</sup> Thus, because of these differences in the processes, some restrained persons may prefer to litigate under the ROTD than under competition law.

### 3.4 CONCLUSION

This chapter showed that competition law in England and Wales (comprising EU competition law and UK competition law) does not approach the interests of restrained persons in the same way as the ROTD does. It discharged this task by taking a two stage approach.

Firstly, this chapter detailed the close alignment between UK competition law and EU competition law. It showed how national competition law is applied in line with EU competition law. It highlighted the readiness of the High Court to accept EU sources, far in excess of the obligations imposed by s.60 and, thus, take account of non-binding Opinions of Advocates General, White Papers and European Commission Guidelines. The aim was to show the ongoing influence of developments and practices in EU competition law for the interpretation of UK competition law. This is important because it explains why domestic courts will follow EU approaches such as “ancillary restraints” doctrine and accept

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363 See Glick, Bush and Hafen, “The Law and Economics of Post-Employment Covenants: A Unified Framework [2002] 11 *Geo Mason L. Rev* 357, 373 where the authors state that “.the courts have typically not undertaken any sophisticated antitrust analysis to make this determination, instead relying on the number of practitioners as a rule of thumb.”

364 *William Stuart Young v. Evan Jones & Saunders* [2001] EWCA Civ 732.

365 *Proactive Sports Management Ltd v. Wayne Rooney, Colleen Rooney et al* [2010] EWHC 1807 (QB) Judge Hegarty QC 651, para 715.

justifications based on commercial convenience when applying UK competition law.

Taking this EU inspired approach to restrictions on professionals could disadvantage some individual professionals in the UK. Consider, for example, where a professional association with *de facto* mandatory membership restricts members' capacity to deal individually with a third party (such as an insurance company) in order that the association concludes an exclusive agreement with the insurance company based on a ban on its individual members concluding insurance agreements with other insurance companies. It is possible for the professional association to argue that the collective deal was *commercially necessary* to achieve a critical mass in order to obtain lower cost of professional insurance cover from insurance companies and, on that basis, obtain a decision that the restrictions did not infringe competition law. The point is that accepting commercial reasons as justification for a collective action can damage the freedom of individual professionals to choose a preferred insurance company. UK competition law follows Art 101(1) closely and does not scrutinize the implications of restrictions for the restrained party.

Secondly, this chapter directly juxtaposed the approaches taken by the ROTD and competition law when dealing with the same restriction by presenting some analyses of cases. The analyses showed that the competition law analysis is grounded in the language and concepts of economics, is market focused and relatively impersonal. The ROTD's focus on the parties' interests renders it generally more hostile to restrictions on persons and ensures attention is always paid to implications of restrictions for restrained persons. Unlike the ROTD, Art 101(1) (or s.2 Competition Act 1998) does not fillet out, for particular scrutiny, restrictions on the grounds that the restrictions were either not truly negotiated or are capable of being enforced oppressively. There are also differences as between the processes under the ROTD and under competition law.

It is clear, from the foregoing, that the ROTD and competition law are different. Their different tests and foci mean that different considerations are taken into account when appraising the legality of a particular restriction. The main

difference, stemming from their different tests, is that the interests of restrained persons are not central to the competition law analyses.

Some restrained professionals prefer to rely on the ROTD rather than on UK competition law. In such circumstances, the interface question as to whether competition law prevails over the applicability of the ROTD is a most important one. As the ROTD and competition law are different, an acute problem arises in situations where they concurrently apply to the same restriction on a professional. The interfaces between the ROTD and competition law are examined in the next chapters.

***PART II***

***INTERFACES and OVERLAP***

CHAPTERS FOUR to SIX

## CHAPTER FOUR

# INTERFACES BETWEEN ROTD and UK COMPETITION LAW

### 4.1 INTRODUCTION

Part I (Chapters One to Three) showed that the ROTD and competition law are different legal regimes and that, for this reason, their interface is a matter of importance for some restrained persons. Part I laid the foundation for Part II (Chapters Four, Five and Six) which identifies and discusses how the interfaces between the ROTD and competition law in England and Wales may be delineated in ways that are problematic for some restrained persons.

Chapter Four examines the interfaces between the ROTD and domestic competition law.<sup>366</sup> It pinpoints the difficulties that may arise where both the ROTD and UK competition law are *prima facie* applicable to the same restriction. There is an interface problem if a restrained person is precluded from relying on the ROTD to void an unreasonable (but not anti-competitive) restriction.

In order to understand the extent of this interface problem, this chapter portrays fully the context and the nature of, firstly, historical and, secondly, current interfaces between the ROTD and competition legislation. Section 4.2 examines some legislation enacted in the period preceding the Competition Act 1998. This examination shows that the legislations' interfaces with the ROTD were unproblematic because a restriction could be resisted under the ROTD even where it was not prohibited by the legislation. The historical analysis also identifies some operational shortcomings of the legislation in order to highlight the particularity of

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<sup>366</sup> Chapter Five examines the interface between the ROTD and EU competition law. Chapter Six explores future problematic interfaces.

the problems that Parliament intended to remedy with the enactment of domestic competition law modelled on EU competition law. Section 4.3 examines the applicability of current UK competition law to restrictions on professionals. It argues that the general rules on the interface between legislation and the common law are unsatisfactory for restrained persons because they apparently permit the ROTD to apply only in a residual manner (*i.e.* where competition law does not apply). It queries whether the 1998 Act was truly intended to muzzle the ROTD's applicability to restrictions which also come within the reach of the competition legislation. It suggests that the current interfaces between the legislation and the ROTD occurred incidentally following the enactment of an EU-style model that intended to cure particular operational problems under the previous legislation which were not related to its interfaces with the ROTD.

#### **4.2 LEGISLATION FROM 1948 TO 1990s**

In order to appreciate the context of the current interface problem, some of the legislation enacted between 1948 and the 1990s needs to be examined. This analysis is important for three reasons. Firstly, it shows that there was no interface problem with the ROTD before the 1998 legislation came into effect. Secondly, the analysis reveals the operational shortcomings of the legislation which, it will be argued, explains why it was repealed and replaced with a domestic version of the EU model. Thirdly, the historical account may explain why certain restrictions on professional services were excluded initially from the key prohibition of anti-competitive arrangements in the 1998 Act.

In the period 1948-1997, the most relevant enactments comprised the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, Restrictive Trade Practices Act 1956, Monopolies and Mergers Act 1965, Restrictive Trade Practices Act 1968, Fair Trading Act 1973, Restrictive Trade Practices Acts 1976 and 1977 and the Competition Act 1980. These Acts constructed, in an *ad hoc* fashion, two discrete models to deal with market practices.<sup>367</sup> One model, established by the 1948 Act, was an investigative one. The other model, instituted by the 1956 Act,

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<sup>367</sup> Agreements within the 1956 Act were excluded from the application of the 1948 Act .

was a compulsory registration model. The key features of each model are next sketched in order to show how they treated some restrictions on professionals.

#### 4.2.1 Investigation Model

The investigation model began under the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. From today's perspective, the model appears tame and has been described as "cautious and pragmatic."<sup>368</sup> It allowed references to be made by the Board of Trade requiring the Monopolies and Restrictive Practices Commission (MRPC) to investigate and report.<sup>369</sup> The MRPC had no competence to act unless and until the Board of Trade made a reference to it. It could receive either limited or general references. In a limited reference, it could investigate and report whether particular conditions prevailed. A general reference concerned specified classes of restrictive practices in an industry. A MRPC report had to state whether the conditions operated or might be expected to operate against the "public interest."<sup>370</sup> Only the "competent authority" (Board of Trade or a Minister) could make an Order.<sup>371</sup> An Order could declare particular practices unlawful but it could not alter the structure of the industry. The 1948 Act was limited to goods but the Monopolies and Mergers Act 1965 allowed for the investigation model to be extended to some services and some mergers.<sup>372</sup> Also, the 1965 Act renamed the MRPC as the Monopolies and Mergers Commission (MMC). It gave the Board of Trade, with the consent of Parliament, power to order divestiture following an MMC Report that an agreement was against the "public interest." The Fair Trading Act 1973 created the Office of Fair Trading (OFT) and the independent Director General for Fair Trade (DGFT). It gave the DGFT power to publish advice and

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368 R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 60. See further S. Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: Manchester University Press, 1999)13.

369 The Board of Trade is the predecessor of the Department of Trade and Industry.

370 The concept of "public interest" was not statutorily defined.

371 Not every reference culminated with an Order.

372 See further D.M. Rabould and A. Firth, *Law of Monopolies, Competition Law and Practice in the USA, EEC, Germany and the UK* (London: Graham & Trotman 1991) 435 where the authors cite the third annual report in 1963 of the Registrar of Restrictive Trade. For discussion of the report and the data see J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 121. Also see T. Frazer, *Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, European and America* (Brighton: Wheatsheaf 1988) 136-7.

guidance and to refer “monopoly situations”<sup>373</sup> to the Commission for investigation which could recommend “structural” remedies. The DGFT got responsibility for negotiating “undertakings” with businesses as well as the duty to encourage trades associations to prepare codes of conduct.<sup>374</sup> The Competition Act 1980 allowed the DGFT to investigate practices of particular firms instead of industries and to assess practices rather than products.<sup>375</sup> The Secretary of State could request the negotiation of “undertakings” to be given to the DGFT.<sup>376</sup> The DGFT could refer the firm and the practice to the MMC which could decide whether the firm had engaged in anti-competitive practice against the “public interest.” The Secretary of State had power to make an Order prohibiting the practice.

In 1976, a statutory instrument moved many services to the registration model. However, many *professional* services were not so moved and, thus, remained within the investigation model. Over many years, the statutory institutions issued reports on professional services. For example, the MMC issued a general report on Professional Services in 1970. Reports criticising specific restrictions on professionals included one on scale fees<sup>377</sup> and one on the two counsel requirement.<sup>378</sup> Although the MMC upheld restrictions on advertising by barristers, it expressed criticism of them in respect of other professions.<sup>379</sup> Some Reports

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373 The power to initiate merger references was retained by the Secretary of State and the DGFT could only make recommendations to the Secretary about referring mergers to the Commission. See J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 4 where the author expresses surprise that the DGFT was not given this power.

374 S.124(3) Fair Trading Act 1973.

375 This Act was preceded by many reports, the most influential of which was the second Liesner report Cmnd 7512 (1979). See further R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) chapter 4 and see 119 for analysis of the relationship between the Fair Trading Act 1973 and the Competition Act 1980.

376 See R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 108 for discussion of “undertakings” given to DGFT following preliminary investigation under 1980 Act.

377 *Estate Agents HCP* (1968-69); *Architects’ Services HCP* (1977-78); *Surveyor’s Services HCP* (1977-98).

378 *Barristers’ Services HCP* (1975-76); *Advocates Services HCP* (1975-76).

379 *Stockbrokers Cmnd* 6571 (1976); *Veterinary Surgeons Cmnd* 6572 (1976); *Accountancy Services Cmnd* 6573 (1976); *Services of Solicitors in England and Wales HCP* (1975-76); *Services of Solicitors in Scotland HCP* (1975-76); *The Law and Economics of Professional Advertising: An Overview* (1985); *Civil Engineering Consultancy Services Cm* 564 (1989); *Services of Medical Practitioners CM* 582 (1989); *Services of Professionally Regulated Osteopaths Cm* 583 (1989). MMC received reference on private medical fees in 1992.



brought about change to professional practices.<sup>380</sup> In 1986, the DGFT published four Reports on professions.<sup>381</sup> The MMC published a report in 1994 on NHS Consultants<sup>382</sup> and, in 1997, on Solicitors Estate Agency Services in Scotland.<sup>383</sup>

The types of activity that were undertaken in relation to restrictions on professionals were sketched above in order to show how the legislation operated in practice. This is important because of their implications for the legislative interfaces with the ROTD. The investigative and reporting functions did not create unclear or problematic interfaces with the ROTD. If an Order was made, it could, *inter alia*, end agreements to fix and control prices, or prohibit refusals to supply and prevent take-overs. In such a case, the reach and effect of any Order made was clear because it was *prohibitory* and specific. For example, an Order prohibiting scale fees followed from the Report on Estates Agents.<sup>384</sup> Reports from institutions such as the MMC and OFT did not affect the operation of the ROTD. The interface between the common law and the investigation model was not problematic because the legislation did not interfere with the applicability of the ROTD. In particular, the ROTD could be called on to resist unreasonable “restraints of trade” which also came within the reach of the legislative investigation model.

#### 4.2.2 Registration Model

The compulsory registration model was established by the Restrictive Trade Practices Act 1956. If the Board of Trade made an Order specifying classes of agreements, such agreements containing restrictions on trade in goods had to be registered with the Registrar of Restrictive Trade Agreements before the restriction

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380 Reports criticising advertising restrictions on professionals caused professional bodies to amend their codes/regulations *e.g.* *Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* (1975-76) HCP 557.

381 *The Advertising and Charging Rules of the Professions Serving the Construction Industry* (March 1986); *Restrictions on the Kind of Organization through which Members of the Professions may Offer their Services* (August 1986); *Review of Restrictions on the Patent Agent's Profession* (September 1986) and *Advertising by the Professions: A Review of the Remaining Significant Restrictions* (October 1986).

382 *Private Medical Services: Report of Agreements and Practices Relating to Charges for the supply of Private Medical Services by NHS Consultants*- CM 2452 1994.

383 Cm 3699.

384 HCP (1968-69) *Restriction on Agreements (Estate Agents) Order* 1970 SI 1970/1696. Also *Specialised Advertising Services* CM 280 (1988) was followed by *Restriction on Conduct (Specialized Advertising Services) Order* 1988 SI 1989/2390.

took effect. The Registrar referred agreements to the Restrictive Practices Court (RPC). The Act expressly presumed that a registered restriction was against the “public interest.”<sup>385</sup> An agreement was not allowed unless it came within one of the seven (or later eight) “gateways” and the “tailpiece.” The Restrictive Trade Practices Act 1968 rendered unregistered agreements void and unenforceable. It introduced more severe fines where a registrable agreement was not registered. It also gave a person harmed by the operation of restrictions in an unregistered agreement a cause of action as a breach of statutory duty. After the Fair Trading Act 1973 the DGFT took over the functions of Registrar.<sup>386</sup> Later legislation consolidated many aspects of this model.<sup>387</sup>

Many restraints on professionals did not come within the registration requirement. It is important to understand the limited scope of the legislation’s applicability *vis-a-vis* common restrictions of professionals for two reasons. Firstly, it means that the interface between the registration legislation and the ROTD was not extensive. Secondly, it may explain why many professional services were placed (initially) by Parliament outside the Chapter I, s.2 prohibition of the 1998 Act.

The 1956 Act was limited to goods, but the 1973 Act allowed for some services to be brought by means of statutory instrument into the registration model.<sup>388</sup> This occurred, to some extent, with the *Restrictive Trade Practices (Services) Order 1976*.<sup>389</sup> However, in practice, many restrictions on professionals’ services were not required to be registered. This is significant because it meant that there was only a limited interface with the ROTD. Moreover, in practice, many restrictions did not have to be registered due to either i) express curtailments or exclusions specified in the legislation and/or ii) their failure to satisfy the highly precise

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385 S. 21.

386 See S. Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: Manchester University Press, 1999) 40 for a discussion of the redesign of the implementation machinery.

387 The Restrictive Trade Practices Court Act 1976 consolidated earlier provisions and, itself, was later amended by the Restrictive Trade Practices Act 1977.

388 S. 107 (1) in Part X. entitled “Extension of Act of 1956 to agreements relating to services.” Specifically, the Act allowed for agreements between “two or more persons carrying on business” within the UK “in the supply of services brought under control” by the Order.

389 SI 1976/98 came into operation on March 22nd, 1976.

specifications for compulsory registration. How professional services were treated by the registration model is next considered.

Professional services came within the scope of carrying on business.<sup>390</sup> The Act expressly provided that “services” included “engagements (whether professional or other) which for gain or reward are undertaken or performed.”<sup>391</sup> It did not include services rendered to an employer under an employment contract.<sup>392</sup> That employment contracts did not come within the reach of the legislation precluded a significant interface arising with the ROTD.

As noted earlier, many professional services were, in effect, excluded from the requirement to register by the *Restrictive Trade Practices (Services) Order 1976*. This Order covered agreements between two or more persons carrying on business in the supply of any services under which restrictions in respect of the matters specified in Art 3(2) of the Order were accepted in relation to “designated services.”<sup>393</sup> Art 3(2) specified matters such as charges, terms or condition of supply, forms in which and persons to whom or from whom “designated services” are to be supplied. However, “designated services” were defined as all services *except those* described in Sch. 4 of the 1973 Act.<sup>394</sup> This list of exceptions enumerated fifteen paragraphs of categories of liberal professionals.<sup>395</sup> Some services were defined simply (*e.g.* “medical services” and “ophthalmic services”) and others by statutory definition (*e.g.* “any services falling within the practice of dentistry within the meaning of the Dentists Act 1957”).<sup>396</sup> Some services were defined more clumsily by referring to professionals “acting in their capacity as such.” Legal services were defined as “the services of barristers, advocates and solicitors in their capacity as such.” The study in section 4.3.3 will show that the

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390 S.117(2) “In this Part of the Act and in the modifications made by it ‘business’ includes a professional practice.”

391 S. 117(1).

392 Contract of employment was defined by S.137(1) as “ a contract of service or of apprenticeship, whether it is express or implied, and (if it is express) whether it is oral or in writing.”

393 S.107(3) 1973 [later S 11of 1976].

394 Later Sch. 1 of the 1976 Act.

395 Later, the Insolvency Act 1985 in S. 217(4) added insolvency services to the list that could not be designated.

396. See para 50 of *The Royal Institution of Chartered Surveyors v. DGFT* [1981] ECC 587 RPC.

phrase (“capacity as such”) caused difficulty in determining whether chartered surveyors came within the exception to the registration requirement.

The legislation made express provision for exclusions from compulsory registration. Of these, the most relevant ones for this research were vertical agreements<sup>397</sup> and agreements for certain licences, patents and certain know-how exchange agreements. Additionally, it specified that certain restrictions must be “disregarded” which meant that a “blue pencil” approach was taken to them. Such listed restrictions included exclusive dealing agreements approved by the Board of Trade<sup>398</sup> and some restrictions affecting workmen.<sup>399</sup> Wilberforce suggested that the wide definition of “workmen”<sup>400</sup> could exempt agreements, for example, to supply only chemists who employ qualified staff.<sup>401</sup>

Some restrictions on professionals fell outside the registration model not because of express exclusions/exemptions (detailed above) but because they did not come within the precisely stipulated terms of the requirements to register. The next paragraphs examine two examples of strict definitions that, in practice, put many restrictions on professionals outside the requirement to register.

The first example stems from the stipulation that a restriction be accepted by at least *two parties*. Agreements between two professionals in partnership were not registrable because two partners were treated as *one* person.<sup>402</sup> Moreover, only restrictions accepted by *both* parties had to be registered. This stipulation is highly relevant because it meant that restrictive rules of a professional association inhibiting its members’ freedom to compete with each other were not inevitably registrable.<sup>403</sup> In *Fisher*, the distinction was drawn between a multilateral agreement (one between considerable numbers of persons) and a series of bilateral agreements in which each of a number of persons makes an agreement with a

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397 S.8(3) and later Sch. 3, para 2 of 1976 Act.

398 S.7(1).

399 S.7(4) later s.9(6).

400 Any person who has entered into or works under a contract with an employer.

401 R. O Wilberforce, A. Campbell, *The Law of Restrictive Trade Practices and Monopolies* (London: Sweet and Maxwell 1966), 301.

402 S.43(2) of the 1976 Act.

403 Also see *Royal Institution of Chartered Surveyors Application* [1985] ICR 330 discussed later in this chapter.

single party but not amongst each other.<sup>404</sup> Fisher unsuccessfully sought a declaration that the agreements between persons licensed by the National Greyhound Racing Club<sup>405</sup> were registrable.<sup>406</sup> While it was agreed before the RPC that the rule contained a restriction on services, the crucial issue was “whether by becoming a licensee of the NGRC and subjecting himself to the Rules of Racing of the club, the licensee merely made a bilateral agreement with the club or also made an agreement with others licensed by the NGRC on the same terms so that multilateral agreements were thereby created giving rise to mutual obligations *inter se*.”<sup>407</sup> The Court of Appeal was not prepared to imply mutual obligation and upheld the RPC’s decision that there was no registrable agreement.

The second example of a highly precise requirement (that excluded many restraints on professionals in practice) was the strict segregation of agreements relating to *goods* from those relating to *services*. If a particular restriction did not fall definitively within either the goods or the services stream it was not registrable. For example, because the RPC decided that granting a lease was neither the supply of a service nor a good, a lease was not registrable unless there was a trading nexus between the landlord and tenant.<sup>408</sup> Whish suggests that an agreement between landlords to price-fix would not come within the registration model.<sup>409</sup> In addition, mixed or “crossover” situations fell outside the model and Whish offers two such examples.<sup>410</sup> These are, firstly, an agreement between a person in goods business and a person in services business, and, secondly, an agreement made by two persons carrying on business in goods who accepted restriction as to services.

On account of the express exclusions and the particularity of the requirements for registration, many restrictions relevant to this research fell outside the registration

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404 *Fisher v. DGFT* [1982] ICR 71 83G.

405 A limited company which, *inter alia*, acts as the judicial body for discipline and conduct of greyhound racing in Great Britain and licences greyhound racecourses, trainers and officials.

406 Moccato J. March 27 1980.

407 The “mere existence of a structure of rules, which bind persons who voluntarily engage in activities covered by the rules” would not in itself allow the inference that all the persons bound by the rules have also made an arrangement between themselves.

408 *Ravenseft Properties Ltd’s Application* [1978] QB 52, [1977] 1 All ER 47.

409 R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 152.

410 *ibid*.

model. Thus, in such cases, there was no interface with the ROTD and, consequently, no problem.

Even in cases where the legislation applied to a “restraint of trade” the interface was not inevitably problematic. *Registering* a “restraint of trade” did not, in itself, have any effect on the applicability of the ROTD. A restrictive measure became unlawful only when the RPC declared that it was contrary to the “public interest.”<sup>411</sup> The ROTD remained applicable unless and until the RPC declared that the restriction was against the “public interest” and, consequently, void.<sup>412</sup> If the RPC declared that a particular “restraint of trade” was not against the “public interest,” the ROTD was applicable. A restriction that did not fall foul of the “public interest” test in the Act could be void under the ROTD as the tests differed.<sup>413</sup> In practice, this may be a moot point. Whish notes that of the almost 10,000 agreements registered between 1956 and the end of 1991, only 11 succeeded in penetrating one of the “public interest” gateways.<sup>414</sup>

The foregoing discussion of the pre-1998 legislation showed that restrictions on professionals were not comprehensively subjected to scrutiny under the investigation or registration models. The significance of the legislations’ limited coverage is that the applicability or availability of ROTD was not affected by the legislation. Even where the legislation applied, the ROTD could be applied by a court to void a “restraint of trade” even if the particular restriction was not prohibited by the legislation. Thus, the interface between the ROTD and restrictive

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411 S. 20. The RPC could order the parties not to give effect to the restrictions or prohibit them making an agreement to like effect. S.2(2)1976. S3 of the 1976 Act allowed the DGFT to seek an interim injunction. In *Re Institute of Independent Insurance Brokers* [1991] ICR 822, RPC, the DGFT obtained an interim injunction following the Institute’s recommendation that its members boycott General Accident which implemented a free insurance scheme to purchasers of certain cars. The injunctions were obtained before the Institute’s recommendation was due to come into effect. 412 S 2(2) 1976.

413 See R. O Wilberforce, A. Campbell, *The Law of Restrictive Trade Practices and Monopolies* (London: Sweet and Maxwell 1966) 14 for the suggestion that an agreement initially declared not to be against the “public interest” could be declared contrary to the public policy based ROTD on the basis that the declaration under the Act “deals only with certain specific interests of certain classes of the wider public (e.g. consumers, persons employed in the trade, persons seeking to enter the trade), and there are issues of public policy which it does not cover, and in particular the freedom to contract and, to some extent, freedom to trade.”

414 R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 161. See J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 120 for a discussion of some early cases.

practices and fair trading legislation before 1998 was not a problem from the perspective of a restrained person seeking to rely on the ROTD.

#### *4.2.3 Operational Shortcomings: A Study*

It is important to appreciate that the interface between the ROTD and the legislative models was not regarded as a problem which needed to be remedied by enacting the Competition Act 1998. That begs the question as to what prompted its enactment? It is suggested that various operational and enforcement shortcomings of the investigation/registration models provide the explanations for their replacement with the EU style model contained in the 1998 Act. In order to convey graphically some of the shortcomings of the registration model in practice, one case is next analysed in detail. The case concerns the measures of a professional association (Institution of Chartered Surveyors) and it emphatically demonstrates the complexity and undue formalism of the registration model.

The protracted period required to resolve the dispute involving the Institution of Chartered Surveyors is remarkable. The Institution registered its Charter, byelaws and regulations in 1976 on a “fail safe basis.”<sup>415</sup> It applied in December 1978 to the RPC for an Order to rectify the register by removing the registered documents. In November 1980, the DGFT applied to strike out or stay this application to rectify. At the hearing in February 1981, the Institution got leave to amend its notice. The RPC judgment in March 1981 dismissed the DGFT application on the basis that the Institution’s case was, at least, arguable.<sup>416</sup> The RPC made observations on certain unargued points and points which did not fall directly for decision. On this basis and following a Court of Appeal judgment in another case,<sup>417</sup> the Institution reformulated the grounds for its application. In December 1983, when granting leave to re-amend, Mc Neill J. ordered that three preliminary questions arising out of the re-amended application be determined before the final hearing of the application.<sup>418</sup> His findings on these three questions were appealed by the Institution to the Court of Appeal which heard the appeal in January and February

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415 Without making any admission but in order to avoid any penalty if registration was required.

416 [1981] ECC587 Slade, Pearson and Waller JJ.

417 *Fisher v. DFGT* [1982] ICR 71 .

418 [1985] ICR 330, 1984 WL 562915 (ChD) (RPC) Mc Neill J.

1986.<sup>419</sup> Both the longevity and convoluted nature of the above proceedings evidence the complexity of the registration model. Some of the most relevant contentious issues are next detailed.

The first contentious point concerned the scope of the exemption from registration as regards services provided by chartered surveyors acting in their “*capacity as such*.”<sup>420</sup> The Institution argued that all services provided by its members came within this exemption while the DGFT argued that services provided by members in valuation, management of property, auctioneering and estate agency did not come within the exemption. When seeking to strike out the Institution’s application to rectify the register, the DGFT argued that the definition did not include services relating to the sale and/or valuation of personal property/chattels. In the RPC, Slade J. noted that no authority was cited to assist the interpretation of the phrase “*capacity as such*.”<sup>421</sup> The RPC accepted that the legislation could not simply refer to “*surveyor*” because that would include surveyors of, for example, weights and that the legislator had to include qualifying words. Nonetheless, it did not “necessarily follow that a broad interpretation cannot properly be attributed to the additional, definitive words, or that they should be narrowly construed as applying to persons whose sole concern is with land or buildings.”<sup>422</sup> Slade J. suggested that the phrase (“*capacity as such*”) intended “to exclude those surveyors who do not fall within this broad description than to draw a rigid distinction between those surveyors whose primary concern is with land and those whose concern, by way of specialisation, is more with personal property of one kind or another.”<sup>423</sup> The divergence of views as to the construction of this fundamental phrase (“*capacity as such*”) neatly evidences the difficulty in understanding whether particular professionals’ services were required to be registered.

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419 *Royal Institution of Chartered Surveyors v. DGFT* [1986] ICR 550, CA.

420 The Schedule to the Act provided: “The services of surveyors (that is to say, of surveyors of land, of quantity surveyors, of surveyors of buildings or other structures and of surveyors of ships) in their capacity as such surveyors.”

421 Para 53.

422 Para 54.

423 Para 55.



In this case, there were also divergent views on whether restrictions on members' conduct contained in the Byelaw 24 had to be registered.<sup>424</sup> The DGFT argued that Bye-law 24(2),(8)(b) and (12) contained restrictions on members which concerned services which had nothing to do with the capacity of surveyors of land of quantity surveyors or surveyors of buildings or other structures.<sup>425</sup> The RPC conceded that the construction of Byelaw 24(8)(b) or 24 (12) was not clear but felt that it was arguable that the restrictions were intended to apply only in relation to the activities of surveyors carried out in that capacity.<sup>426</sup>

The above analysis of this case demonstrates some of the fundamental difficulties in applying the registration model to professional services. This case is just one example of the difficulties surrounding the application of the registration model.<sup>427</sup>

#### *4.2.4 Reasons for Reform*

There was much criticism of the registration model. Some criticism pointed to its compression of "economic diversity into a system of legal forms - abstract, analytical, forms devised to deal with legal issues, not with economic issues."<sup>428</sup> The formal nature of the criteria in the registration system attracted acute criticism for, *inter alia*, imposing unnecessary burdens on companies to register some agreements even though their effect was not clearly anti-competitive.<sup>429</sup> Moreover,

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424 Byelaw 24 (1) provided that "No member shall be connected in any way with any occupation or business which is incompatible with membership of the Institution."

425 Byelaw 24(8) provided " ..no member shall with the object of securing instructions or supplanting another member of the surveying profession knowingly attempt to compete on the basis of fees and commissions. 24(12) provided "... Every member shall ensure that the form, content and method of publication and distribution of any advertisement.... or other publicity material of any kind whatsoever published... by him are neither misleading to the public nor such as to prejudice his professional status or the reputation of the Institution."

426 Para 59.

427 See R. Whish, *Competition Law* (London:Lexis Nexis Butterworths, 5th ed. 2003) 306 for a more general comment that the restrictive trade practices legislation was "enormously complicated and often caught innocuous agreements while failing to apply to seriously anti-competitive ones."

428 J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 423 and see also 122 for his view that adherence to "legal, rather than economic, forms is a feature of the United Kingdom law... a feature which.. has caused ...unnecessary complication."

429 See further M. Coleman and M. Grenfell, *The Competition Act 1998: Law and Practice* (Oxford University Press 1999) 4 for discussion on the need for reform.

the enforcement dimension was undoubtedly ineffective.<sup>430</sup> The investigation model, too, had its shortcomings as an effective tool to deal with market strategies. The operational short-comings of these models included their complexity, uncertain scope, undue formalism, poor remedies and their general ineffectiveness.<sup>431</sup>

It is interesting to ask why Parliament chose to enact an EU inspired model. It seems that some academics, legal practitioners, civil servants, bureaucrats, administrators of the old models and business favoured the enactment of EU style legislation. It is clear that the pre-1998 models had a very poor fit with EU competition law and this imposed an additional compliance burden on business.<sup>432</sup> Eyre and Lodge suggest that the driving forces for reform in the UK were national business associations and the DTI<sup>433</sup> and that alignment was facilitated by factors such as close relationships evolving between UK, EU and other Member States' officials.<sup>434</sup> This opinion sits well with the political science based explanation offered by Van Waarden and Drahos for the convergence of domestic competition

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430 For example, there was no penalty if particulars were not furnished to the Registrar. See R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 122 for the view that the only risk, in reality, was the possible punishment of disobedience of a court order as contempt. See M. Coleman and M. Grenfell, *The Competition Act 1998: Law and Practice* (Oxford University Press 1999) 5 where the authors state "[I]t was only if the RPC then struck down a restriction (or if the parties failed to notify the agreement in the first place) that the restrictions were rendered void and unenforceable. Moreover although voidness exposed the parties to civil liability, no fines could be imposed on the parties, unless and until they committed a 'second offence' of purporting to enforce a registrable agreement in breach of an order already made against that agreement by the Restrictive Practices Court; in those cases there could be contempt of court proceedings resulting in fines on the company concerned and on its directors, as well as possible imprisonment of directors."

431 J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 423.

432 See R. Eccles, "Transposing EEC Competition Law into UK Restrictive Trading Agreements Legislation; the Governments Green Paper" (1988) ECLR 277. For views expressed in House of Lords see comments of Lord Haskel, Hansard (November 17th 1997 col 417) and of Lord Simon of Highbury Hansard (HL), (October 30th 1997 Col 1145) and (November 25th 1997 col. 960).

433 See S. Eyre and M. Lodge, "National Tunes and a European Melody? Competition Law Reform in the UK and Germany" (2000) 7(1) Journal European Public Policy, 63, 76 where the authors state "it was the case of an old DTI agenda, often using the CBI to test its proposals, which met the neo-liberal economic policy agenda of the Conservatives and Labour's desire not only to fulfill demands expressed by business associations but also to make "New Labour" more credible by reducing ministerial discretion in competition issues."

434 See S. Eyre and M. Lodge "National Tunes and a European Melody? Competition Law Reform in the UK and Germany" (2000) 7(1) Journal European Public Policy, 63, where they state that contacts occurred through the secondment of UK officials to the Commission, UK membership of the advisory committee and increasing communication among competition authorities.

policies in the Netherlands, Germany and Austria with the EU model.<sup>435</sup> They conclude that convergence resulted from the combined effect of institutionalism and the epistemic community.<sup>436</sup> They point to the gradual and largely implicit pressure and the possibilities for mutual modelling arising from the development of a multi-level split legal system, mostly in the form of *case law*, which, however, was channelled between the levels through the lines of communication and exchange created by the development of a multi-level epistemic community of legally trained officials.<sup>437</sup> This community, they argue, allows for “European ideas to infiltrate the national level, but it also facilitates actors at the EU level to draw lessons from application by national actors. As contacts increased, it became natural to look for solutions to problems in EU law or borrow solutions from EU case law or other Member States.”<sup>438</sup> The Competition Act 1998 enacted a close copy of the EU prohibitions. From the point of view of this research, the key point is that the Act was intended to solve domestic problems (of ineffective restrictive practices/registration models and poor fit with EU competition law) that were wholly unconnected to the operation of the ROTD.

### **4.3 COMPETITION ACT 1998**

This section, first, sketches the key provisions introduced by the 1998 Act and, then, identifies the new interfaces created with the ROTD. Then, it argues that these interfaces are not satisfactorily resolved by the general rules on the relationship between legislation and common law. To this end, it takes the perspective of a restrained person who wishes to call on the ROTD in a situation where an unreasonable “restraint of trade” also comes within the reach of the competition legislation.

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435 F. Van Waarden and M. Drahos, “Courts and (Epistemic) Communities in the Convergence of Competition Policies” (2002) *Journal of European Public Policy* 913.

436 See Haas “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46/1 *International Organization* 1, 3 where the author defines the epistemic community as “a network of professionals with recognized expertise and competence in a particular policy domain and the authoritative claim to policy relevant knowledge within that domain.”

437 F. Van Waarden and M. Drahos, “Courts and (Epistemic) Communities in the Convergence of Competition Policies” (2002) *Journal of European Public Policy* 913, 928.

438 F. Van Waarden and M. Drahos, “Courts and (Epistemic) Communities in the Convergence of Competition Policies” (2002) *Journal of European Public Policy* 913, 931.

#### 4.3.1 Overview of the 1998 Act

The Competition Act 1998 marked a sharp discontinuity with the approaches taken by preceding legislation to restrictions.<sup>439</sup> This is due, largely, to its innovative substantive prohibitions.

It introduced a prohibition and exemption model (like Art 101) to apply generally apart from some specific instances. Chapter I, s.2, prohibits agreements and decisions and concerted practices between or by undertakings or associations of undertakings which are implemented in the UK and the object or effect of which is the prevention, restriction or distortion of competition in the UK. The DGFT got competence to require conduct to be modified or terminated and to impose administrative fines on undertakings. Exemptions could be granted (either individually by the DGFT or on a category basis by the Secretary of State). Later, the individual notification system was abolished.<sup>440</sup> Notwithstanding the similarities to the EU model, the 1998 Act (initially) contained two provisions curbing the applicability of s.2 to some provisions that are relevant to this research because they affect the overlap between the ROTD and the legislation. The first situation concerns professional associations and the second situation involves vertical agreements.

The Act provided that s.2 did not apply to the extent to which an agreement constituted a designated professional rule, imposed obligations arising from such designated professional rules, or constituted an agreement to act in accordance with such rules.<sup>441</sup> This exclusion from the prohibition was intentional and appears to be based on the view that “.. it would be unwarranted to apply prohibitions designed primarily for the private sector business to quasi-public law processes of drawing up and enforcing professional rules.”<sup>442</sup> This attitude may be due to lobbying by

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439 The fact that the old rules had been cleared by the Director General of Fair Trading was held to be “no assistance” as to whether the new rules of the Association infringed the 1998 Act in *Hendry v. WPBSA* [2002] UKCLR 5 para 107.

440 *The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004* (SI 2004 No 1261).

441 Schedule 4 paragraph 1(1) Professional rules are those which regulate a professional service or the persons providing or wishing to provide that service.

442 See debates in House of Lords Cttee (13 Nov 1997 cols 285-94) and HL Report Stage (9 Feb 1998, cols 896-898).

professions<sup>443</sup> and, also perhaps, to some institutional continuity with the preceding legislation. The 1998 Act excluded professional services listed in Schedule 4 part II of which were notified to and designated by the Secretary of State for Trade and Industry<sup>444</sup> and this list closely matched the professional services that had been exempted from the registration model.<sup>445</sup> The view that professional services should be outside the legislative prohibition did not prevail for long. The 1989 White Paper stated that they should come within the reach of the prohibition and, on an individual basis, be considered and assessed.<sup>446</sup> In March 2001, the OFT Report “*Competition in the Professions*” expressed the view of the Director General (John Vickers) that there was a “strong case for removing Schedule 4.”<sup>447</sup> This view accorded with the one expressed by the Law and Economics Consulting Group (LECG) Report of December 2000. In November 2002, the OFT reiterated its view that professionals should be “fully subject to competition law.”<sup>448</sup> S.207 of the Enterprise Act 2002 repealed Schedule 4 with effect from April 1 2003.

The second relevant exclusion in the 1998 Act was for vertical agreements following “special treatment” which allowed the Secretary of State to make an Order to exclude them.<sup>449</sup> It is true that vertical agreements were also excluded

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443 See speech to 2006 Annual Fall Conference on Competition Law “*Promoting Competition in Professions- Developments in the UK*”, at 8.2 for comments of OFT Chairman (Phillip Collins) that the professional associations “have traditionally been eloquent, powerful and well connected lobbyists who have traditionally sought protection from competition and exemption from competition laws through reliance on restrictive regulation by their professional bodies on the basis that, as professionals, they are in the best position to ensure that standards are maintained and consumers’ interests are protected.” It is available at <http://oft.gov.uk/news-and-updates/speeches/2006/0906>

444 The list included legal services, medical, dental, ophthalmic, veterinary, nursing, midwifery, physiotherapy, chiropody, architectural, accounting and auditing, insolvency, patent agency, Parliamentary agency, surveying, engineering, educational and religious professional services.

445 The scope of the exclusion under the 1998 Act was narrower than the RPTA because it covered only the designated rules and not any and every restrictive agreement concerning the supply of the professional service. See OFT *Guidelines The Competition Act 1998: Trade Associations, Professions and Self-Regulating Bodies* (OFT 408) March, para 6.8 for the suggestion that “an agreement of fees made between a local group of practitioners” is one which may be caught by the Chapter 1 prohibition .

446 *Opening Markets: New Policy on Restrictive Trade Practices*, Cm 727, July 1989, Annex E.

447 OFT Report 328 *Competition in Professions* March 2001 para 44. The OFT Report and the LECG Report are available at [http://www.oft.gov.uk/OFTwork/publications/publication-categories/reports/professional\\_bodies/oft328](http://www.oft.gov.uk/OFTwork/publications/publication-categories/reports/professional_bodies/oft328). For a discussion of the OFT Report and the longer LECG Report see G. Murphy “Level Playing Field in Britain’s Professions High on OFT and Government Agenda” (2002) ECLR 7.

448 November 2002 *Response to Lord Chancellor Department “In the Public Interest”* of July 2002 available at <http://www.oft.gov.uk/news-and-updates/press/2002/lord-chancellors-paper>

449 *Vertical Exclusion Order* SI 2000 No 310 made pursuant to s.50.

from the registration model but this may not be the reason for their exclusion from the 1998 Act. It seems that the Order was made because of technical difficulties in drafting a legislative exclusion.<sup>450</sup> At that time, the applicability of EU competition law to vertical agreements was being revised to address criticism of overbroad interpretations of Art 101(1) unwarrantedly prohibiting vertical agreements.<sup>451</sup> The *Vertical Exclusion Order* was repealed with effect from May 1st 2005 by the *Competition Act 1998 (Land Agreements Exclusion and Revocation) Order*.<sup>452</sup> This repeal meant that competition legislation became applicable to vertical agreements for the first time. *How* the reversal to 1998 Act's initial attitude to vertical agreements was executed is interesting. The legal position was changed, not in an Act, but by Statutory Instrument. This may be noteworthy because a statutory instrument does not attract full blown debate in Parliament, thus, possibly explaining the scant attention paid to the implications of these changes for the legislation's interface with the ROTD.

The overlap between the ROTD and the competition legislation increased sizeably with the repeal of two exclusionary measures. For example, rules of professional associations and vertical agreements (including franchises) came within the overlap area. The staggered timeline according to which the Competition Act 1998 became applicable to more restrictions on professionals means that new interfaces with the ROTD only emerged on an incremental basis. This pattern may explain why little comment was made regarding the possibility of negative implications for the continued and full application of the ROTD. The interfaces with the ROTD increased in their *number and complexity* as an incidental consequence of closely reproducing the EU model of competition law in domestic legislation.

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450 See further HL Consideration of Commons' Amendments 20 October 1998 col 1397.

451 Especially following T-374, 375, 384 & 388, *European Night Services v. Commission* [1988] 5 CMLR 718. See P. Freeman & R. Whish, *A Guide to the Competition Act 1998* (London: Butterworth, 1999) 28 where the authors argue that Parliament could have duplicated the EU position (including the reforms proposed in the 1996 European Commission Green Paper).

452 SI 2004 No. 1260.

#### 4.3.2 Problematic Interfaces Created by the 1998 Act

The Competition Act 1998 applies to a far greater number of “restraints of trade” than the preceding legislation. Its more extensive coverage and, more importantly, its greater range of possible determinations increase and complicate its interfaces with the ROTD. This section explores these interfaces from the perspective of a restrained person who would prefer to rely on the ROTD when faced with an unreasonable “restraint of trade” that also comes within the reach of the competition legislation. From this perspective, the key question is whether the competition legislation legitimately prevents a court from applying the ROTD and deciding that a “restraint of trade” is unreasonable and, thus, unenforceable?

The Competition Act 1998 does not contain any express provisions *vis-a-vis* the ROTD. Unlike competition legislation in some other jurisdictions, the Act does not contain any provision that expressly either abolishes or curtails the applicability of the ROTD.<sup>453</sup> As the competition legislation makes no specific provision to organise its interface with the ROTD, the general rules on the relationship between legislation and common law apply. The interface between legislation and the common law is governed by doctrines, assumptions and canons of statutory interpretation. Some of these approaches are next outlined before considering how they may delineate the interface between competition legislation and the ROTD.

According to the doctrine of parliamentary sovereignty, an Act can lay down any proposition of law.<sup>454</sup> The doctrine of the overriding effect of an Act provides that a statute, as the expression of the legislature, overrides inconsistent provisions of pre-existing law (be it statutory or otherwise) and is overridden by any later inconsistent statute.<sup>455</sup> It is assumed that the courts will give effect to any law passed by Parliament so long as it is expressed clearly.<sup>456</sup> Even if an Act does not spell out its specific effect on existing law, it will, as the expression of Parliament,

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453 Legislation in Australia expressly delineates its relationship with the ROTD, see s. 4M Trade Practices Act 1974.

454 F.A.R Bennion, *Statutory Interpretation* (London: Butterworths 1992) 111.

455 F.A.R Bennion, *Statutory Interpretation* (London: Butterworths 1992) 112.

456 R. Cross, *Statutory Interpretation* (London: Butterworths 1976) 142.

become part of the *corpus juris*.<sup>457</sup> A statute may abolish the common law, amend it or take it over by enacting it, either with or without modification. Bennion depicts this relationship with the image of a floor (representing the common law or *lex non scripta*) concealed, to some degree, by rugs (representing Acts) which may be removed or overlain.<sup>458</sup>

Under the “rug” metaphor, competition legislation is viewed as the rug that conceals the floor as constituted by the ROTD. The applicability of the ROTD is, thus, relegated to those areas that are left uncovered by competition law. This means that ROTD occupies only a limited and residual position.<sup>459</sup> This view of the interface seems to be accepted by Kamerling and Osman who state: “[O]nly if competition law does not apply will the restraint of trade doctrine apply....”<sup>460</sup> A similar view has been expressed by Furse when he described the common law as occupying only “a residual role in relation to competition law generally.”<sup>461</sup> It is next argued that this residual applicability approach, when viewed from the perspective of the restrained person, produces problematic interfaces between ROTD and competition legislation

There are four interesting interfaces between the ROTD and the competition legislation in cases of an unreasonable “restraint of trade” (*i.e.* unenforceable under the ROTD). The first interface is where the “restraint of trade” is prohibited by the legislation. The second interface arises where the “restraint of trade” comes within an exempting statutory instrument. The third interface is where the “restraint of trade” is found to satisfy individually the exception criteria. The fourth interface is where there is a determination that there is no infringement of the legislation on the grounds that neither its object nor effect is anti-competitive. How the residual applicability approach to statutory interpretation could determine the applicability of the ROTD in each of these four scenarios is next explored.

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457 F.A.R Bennion, *Statutory Interpretation* (London: Butterworths 1992) 112.

458 *ibid*

459 I. Maher, *Competition Law: Alignment and Reform* (Dublin: RoundHall Press, 1999) 464 and V. Power, *Competition Law and Practice in Ireland and the EU* (Dublin: Butterworths, 2001) 90 and 189.

460 A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) preface xvi.

461 M. Furse, *Competition Law of the UK and EC* (Oxford: Oxford University Press, 4th ed. 2003) 361.



The first scenario is where a “restraint of trade” infringes the prohibition in the competition legislation and is rendered void. In such a case, under the rug metaphor, the restriction is covered clearly and completely by the legislation and, apparently, leaves no space for any residual application of the ROTD. This view seems to be supported by dicta in *Hendry*, when the High Court, having found the restraint was void under competition law, stated it was unnecessary to consider whether the restraint was void under ROTD.<sup>462</sup> In the second scenario, the “restraint of trade” comes within an express exempting measure (for example a SI) and is thereby permitted by competition law. Under the rug metaphor, this application of the legislation apparently leaves no residual space for the ROTD to apply. The third scenario is where there is an individual decision that the “restraint of trade” comes within the exception specified by competition legislation. This positive act of permission occurs following an individual assessment and could amount to rug coverage and eliminate any residual space for applications of the ROTD. Finally, the fourth scenario entails a determination that the “restraint of trade” does not have an anti-competitive object or effect as proscribed by the legislation. This determination is made following an individual analysis and, in that way, entails an application of the legislation which consequently eliminates any residual space for the application of the ROTD.

The residual applicability (or rug) approach is an exclusionary one that may preclude the ROTD from applying in any situation where the legislation is applicable. This approach disadvantages persons who would prefer to rely on the ROTD. The starkest disadvantage arises where the competition legislation *applies* but *does not prohibit* the unreasonable “restraint of trade” clause. In such cases, a restrained person can no longer resist an unreasonable “restraint of trade” by calling on the ROTD but gets no protection under the competition law. Even in cases where competition legislation prohibits a particular “restraint of trade” there may be some inconvenience or disadvantage in a procedural sense to the restrained person if the ROTD is not available. It is clear that the interface between the ROTD

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<sup>462</sup> *Hendry v. WPBSA* [2002] UKCLR 5 para 119 and para 144 and similarly in *Jones v. Ricoh UK Ltd* [2010] EWHC 1743 (Ch).

and competition law may be delineated in ways that serve to displace the ROTD and this creates a serious problem for some restrained persons.

#### 4.6 CONCLUSION

This chapter examined the evolution of the interfaces between the ROTD and competition legislation. It traced the changing scope and determinations reached under, firstly, pre-1998 legislation and, then, under the EU style Competition Act 1998. The historical perspective threw light on the motivations for legislative amendments. It also explained how the changes created, in *an incidental fashion*,<sup>463</sup> different and complex interfaces between the ROTD and competition legislation.

This chapter argued that the traditional approach to statutory interpretation as represented by the rug metaphor does not satisfactorily resolve the interface between the ROTD and competition legislation from the perspective of a restrained person. It argued that the rug metaphor risks *overexcluding* the ROTD, especially in relation to “restraints of trade” that come within the reach of but are not prohibited by competition legislation.

EU competition law may also contribute to domestic interface problems. This is because the ROTD’s interface with domestic competition law may be affected by EU rules on the relationship between EU competition law and domestic law because it makes sense (in practice and as a matter of logic) that the ROTD’s interface does not differ depending on whether *EU* competition law or *UK* competition law is applied.<sup>464</sup> It is clear that EU competition law must be applied where there is a sufficient potential impact on the pattern of interstate trade and, in practice, this jurisdictional threshold is quite easily reached.<sup>465</sup> The next chapter examines the interfaces between the ROTD and EU competition law.

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463 This point is an important one which will be discussed in Chapter Seven.

464 A. Scott, “The Evolution of Competition Law and Policy in the United Kingdom” LSE Working Papers 9/2009, 5. Available at SSRN: <http://ssrn.com/abstract=1344807>

465 The obligation to apply EU competition law where there is a sufficient potential effect on interstate trade is contained in Art. 3 of EU Reg. 1/2003 and is discussed in detail in Chapter Five.

## CHAPTER FIVE

# INTERFACE BETWEEN EU COMPETITION LAW AND ROTD

### 5.1 INTRODUCTION

This chapter examines the interfaces between EU competition law and the ROTD. These interfaces are obviously important in cases where both EU competition law and the ROTD apply to a measure. Moreover, the interfaces between the ROTD and EU competition law may also be relevant to the delineation of the interfaces between *national* competition law in the UK and the ROTD. As Scott argues it makes good sense for the ROTD to have the same interface with UK competition law as it does with EU competition law because otherwise the ROTD's applicability to a particular measure could differ according to whether *EU* or *UK* competition law is being applied.<sup>466</sup>

Since May 01<sup>st</sup> 2004, the interface between EU competition law and national law (comprising competition law and other law) is delineated by Art 3 of Regulation 1/2003. It is important to ascertain precisely the scope of Art 3. Art 3 is best understood after examining both *why* and *how* it evolved.

In order to explain *why* Art 3 came into existence, section 5.2 first details the uncertainties that surrounded the interface between EU competition law and national law in the period before May 2004. Then it examines *how* the interface between Art 101 and the ROTD was articulated by the High Court in *Days Medical Aids* in January 2004.<sup>467</sup> Section 5.3 examines Art 3 and its implications for the interface between Art 101 and the ROTD. It starts by considering the European

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466 A. Scott, "The Evolution of Competition Law and Policy in the United Kingdom" LSE Working Papers 9/2009 p5. Available at SSRN: <http://ssrn.com/abstract=1344807>

467 *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm), [2004] UKCLR 384.

Commission's initial proposal for Art 3 and traces the changes it underwent before the final version of Art 3 was eventually agreed by the Member States. Next it examines how Art 3 has been interpreted by the High Court when determining the interface between EU competition law and the ROTD. The High Court (in *Days Medical Aids*<sup>468</sup> and in *Jones v Ricoh*<sup>469</sup>) interpreted Art 3 and declined to strike a restriction down under the ROTD because:

“once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade.”<sup>470</sup>

Thus, an unreasonable “restraint of trade” to which Art 101 has been applied but does not prohibit cannot be resisted under the ROTD. That this interpretation of Art 3 ousts the protection otherwise available under the ROTD creates a serious problem for those persons who wish to rely on the ROTD. It will be argued in this chapter that the High Court failed properly to understand and apply Art 3.

## 5.2 INTERFACES BEFORE MAY 2004

To understand fully *why* Art 3 was drafted, it is necessary to understand the uncertainty that surrounded the delineation of the interface between EU competition law and national competition law at that time. The then prevailing situation is examined from two angles: firstly, through the judgments of the EU Courts and Opinions of Advocates General (section 5.2.1) and, secondly, through a judgment of the High Court (section 5.2.2). The examination will reveal the uncertainties and difficulties surrounding attempts to articulate, definitively and comprehensively, the interface between EU competition law and national law (including but not limited to national *competition* law).

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468 *ibid.*

469 [2010] EWHC 1743 (Ch) Roth J.

470 Para 49.

### 5.2.1 EU view of Interface with National Law

The EEC Treaty 1957 did not determine the relationship between national law and EU competition law but, rather, provided for the Council to determine it in a directive or regulation.<sup>471</sup> Art 3 of Reg. 1/2003 is the first such measure which means that, for decades, the interface was addressed in an *ad hoc* fashion by case law.<sup>472</sup> Case law did not clearly and completely determine the interface between EU competition law and national law (including national competition law and other types of national law).<sup>473</sup>

*Walt Wilhelm* is the first judgment that addressed the interface between EU competition law and national competition law.<sup>474</sup> The Court of Justice stated that:

“*parallel application* of the national system can only be allowed in so far as it does *not prejudice the uniform application* throughout the Common Market of Community rules on cartels and of the full effect of the measures adopted in implementation of those rules.”<sup>475</sup>

Walz described this judgment as offering a “procedural” rather than a “normative” rule.<sup>476</sup> His view, according to Wesseling, suggests that there is no “principle of pre-eminence” of EU competition law as long as the application of national competition law does not prejudice the uniform application of EU competition law.<sup>477</sup> Wesseling further notes that the procedural supremacy perspective is narrowly focussed because EU competition law takes precedence only after a

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471 Art 103 (ex Art 83(2)(e)).

472 As a practical solution, the Commission issued *Notice on Cooperation between National Competition Authorities and Commission* [1997] OJ C313/3 and *Notices on Cooperation between National Courts and the Commission in applying Arts [101] and [102]*, [1993] OJ C 39/05.

473 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426, 427 where the author states that “[T]he question on the interrelationship between EC and Member State antitrust laws has never been answered in full. The Court has provided important guidelines but these guidelines did not settle the matter.”

474 Case 14/64 *Walt Wilhelm v. Bundeskartellamt* [1969] CMLR 100. See also R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426; C.S. Kerse, *Antitrust Procedure* (Sweet & Maxwell, 4th ed.1998) para 10.33 and A. Jones and B. Sufrin, *EC Competition Law, Text Cases and Materials* (Oxford: Oxford University Press, 1st ed. 2001) 1013.

475 Case 14/64 *Walt Wilhelm v. Bundeskartellamt* [1969] CMLR 100, para 4.

476 R. Walz, “Rethinking *Walt Wilhelm*, or the Supremacy of Community Competition Law over National Law [1996] 21(6) ELR 449, 451 argues in favour of a normative rule to replace it.

477 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426.

*formal* decision and, thus, did not eliminate what he describes as “frictions between concurrently applicable” rules.<sup>478</sup> The *Walt Wilhelm* judgment can be seen as a narrow one which only resolved the interface where there was a decision that EU competition law *prohibited* a particular clause. This research takes the view that the judgment does not provide a universally comprehensive solution for all cases involving stricter national law (whether it is competition law or other law). In order to show how uncertain the interface was left by the *Walt Wilhelm* judgment, the next paragraphs discuss three situations involving stricter national law.

The first uncertain interface arose where a restriction *satisfied the exemption* terms set out in Art 101(3). In such a case, there was divided opinion among scholars as to whether any stricter national law could be applied. The *Walt Wilhelm* judgment (para 5) stated that national law must not thwart EU authorities carrying out certain “*positive though indirect, action* with a view to promoting a harmonious development of activities within the whole Community.”<sup>479</sup> Although the Court of Justice did not stipulate that “positive though indirect action” included exemptions under Art 101(3), it is, as Wesseling observes, difficult to find an alternative reasonable interpretation.<sup>480</sup> The phrase, according to Kerse, referred to measures addressed to Member States to harmonise national laws and he suggested that “a national prohibition could not override the effect of a Community exemption because the application of national laws must not interfere with the uniform application throughout the Community of the competition rules.”<sup>481</sup>

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478 *ibid.*

479 Para 5 (emphasis added).

480 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426, 428.

481 C.S. Kerse, *EU Antitrust Procedure* (Sweet and Maxwell 1998 4th ed.) para 10.33.

Other commentators argued that the permissive nature of Art 101(3) should not preclude a national authority from applying more stringent national rules.<sup>482</sup> For example, in *Walt Wilhelm*, Advocate General Roemer opined that where national authorities:

“thwart the Community exemption through the application of a national rule of prohibition, they no more threaten the objectives of the Treaty than do the parties to an agreement when they refrain from applying it, which can occur at anytime. ....Indeed, in the absence of a Community provision which requires performance of an exempted agreement, it may, at least, at first sight, *be surprising that a Member State could be considered to be under an obligation to relax its national law to permit such performance.*”<sup>483</sup>

Exemptions, as pointed out by Jones and Sufrin, formed part of the European Commission’s “coherent competition policy and were designed to encourage certain types of agreements.”<sup>484</sup> Whish argued that exemptions are not “just a grudging concession” by the Commission but “rather have a positive role” in the Community’s economic policy.<sup>485</sup> The absence of any individual assessment by the European Commission where block exemption regulations arose strengthened the argument that exemptions were “merely permissive.”<sup>486</sup> However, Advocate General Tesauo, in *Bundeskartellamt v. Volkswagen and VAG Leasing* (and similarly in *BMW*<sup>487</sup>) opined that the primacy of Community law required that an agreement protected by an *exempting regulation* not be prohibited by national authorities using stricter national law because the Commission moulded competition policy with block exemptions.<sup>488</sup> Maher argues that, because some block exemption regulations expressly permitted Member States to apply stricter national laws, Member States could not *ordinarily* apply stricter law.<sup>489</sup> From this brief survey of views, it is clear that there was no certainty as to whether national

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482 A. Jones and B. Sufrin, *EC Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 1st ed. 2001) 1008-15 and the authors referred to UK MMC Report *The Supply in the UK for Retail Sale of Fine Fragrances* (1993) HMSO Cm 2380.

483 Cited in C.S. Kerse, *EU Antitrust Procedure* (Sweet & Maxwell, 4th ed.) 1998 at para 10.33 (emphasis added).

484 A. Jones and B. Sufrin, *EC Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 1st ed, 2001) 1013.

485 R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993), 41.

486 A. Jones and B. Sufrin, *EC Competition Law: Text Cases and Materials* (Oxford: Oxford University Press, 1st ed, 2001) 1013.

487 Case C- 70/93 *BMW v ALD* [1995] ECR I 3439.

488 Case C- 266/93 [1995] ECR I-3477, [1996] 4 CMLR 505.

489 I. Maher, *Competition Law: Alignment and Reform* (Dublin:RoundHall Sweet & Maxwell 1999),99.

law (competition law or other law) could strike down a restriction that satisfied the exempting criteria of Art 101(3).

The second difficult interface arose where national competition law sought to prohibit a measure whose *object or effect was not proscribed* by Art 101(1).<sup>490</sup> Wesseling expressed the view that, in general, stricter national competition law could be applied to measures which did not restrict competition in the sense covered by Art 101(1).<sup>491</sup> In support, he drew on the statement in *Walt Wilhelm* (para 3) that EU and national competition laws consider cartels from different vantage points and that this formed the basis for the continued concurrent application of national and EU competition laws.<sup>492</sup> Nonetheless, Wesseling acknowledged the opposing argument that stricter national law would create divergent market conditions and thereby undermine the Common Market.<sup>493</sup> The Court of Justice in *Walt Wilhelm* stated that:

“ ... national competition authorities may take action against an agreement in accordance with their national law, even when an examination from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to supplement it.”<sup>494</sup>

Under the procedural supremacy rubric (advanced by Walz), a formal decision that Art 101(1) was not infringed (for example, a “negative clearance”) could amount to the stipulated “positive though indirect, action with a view to promoting a harmonious development of activities within the whole Community.”<sup>495</sup> In *Guerlain* the question was whether a “comfort letter” (stating that there was “no

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490 This is distinct from cases where the agreement fell outside Art 101(1) due to the inadequate effect on interstate trade.

491 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426, 427. 492 *ibid* and also noted Case C-67/91 *Direccion General de Defensa de las Competencia v. Asociacion Espana de Banca Privada* [1992] ECR. I-4785.

493 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426, 427 and referred to the Advocate General Opinion in Case C- 266/93 *Bundeskartellamt v. Volkswagen and VAG Leasing* [1995] ECR I-3477, [1996] 4 CMLR 505.

494 Case 14/64 *Walt Wilhelm v. Bundeskartellamt* [1969] CMLR 100 para 9.

495 Para 5.



longer any need” for the Commission to take action and the file would be closed) prevented prosecution under national law?<sup>496</sup> Here, the Court of Justice stated that:

“the fact that a practice has been held by the European Commission not to fall within the ambit of the prohibition contained in Articles [101](1) and (2), *the scope of which is limited to agreements capable of affecting trade between Member States*, in no way affects that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.”<sup>497</sup>

Walz points out that, while *Guerlain* is often cited as authority for the rule that comfort letters giving negative clearance may not prevent the application of national law, this conclusion is not entirely clear from the judgment.<sup>498</sup> He notes that, according to the Commission, the comfort letters were issued because there was no interstate trade effect but he remarks that it is “not absolutely clear” whether this interpretation was also adopted by the Court of Justice.<sup>499</sup>

The third uncertain interface involved the implications of *Art 101(3)* for the applicability of stricter national law other than national *competition* law. This type of interface may be described as a “diagonal” one.<sup>500</sup> It is hard to see how *Art 101(3)* can immunise a clause from being prohibited by such national law. *Art 101(3)*, on a literal interpretation, offers exemptions only from the prohibition in *Art 101(1)*. It does not offer any protection from the prohibition in *Art 102*. Whether *Gesetz Gegen den Unlauteren Wettbewerb (UWG)*<sup>501</sup> which is domestic unfair practices legislation (and not the national competition law) in Germany could be applied to a clause that came within a Block Exemption Regulation arose for consideration.<sup>502</sup> The answer according to the Court of Justice, in a preliminary reference proceeding, was that the national law could be applied to the clause because the block exemption regulation did not lay down mandatory conditions for

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496 Case 253/78 and 1-3, 37 & 99/79 *Procureur de la Republique v Giry and Guerlain* [1980] ECR 2327, [1981] 2 CMLR 99.

497 Para 18 (emphasis added).

498 R. Walz, “Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law [1996] 21(6) ELR 449, 451.

499 *ibid.*

500 See G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) 408 where the author defines a “diagonal” conflict as a conflict between EU competition law and a “national rule of law that is not based on national competition law.”

501 The first *Gesetz Gegen den Unlauteren Wettbewerb (UWG)* was adopted in 1896 and replaced in 1909 and in 2004.

502 Case C- 41/96 *VAG Haendlerbeirate v. SYD Consult* [1997] ECR I- 3123.

contracts.<sup>503</sup> Wesseling interprets this judgment to mean that the Court of Justice did not regard the *UWG* as national competition law on the grounds that stricter national *competition* law cannot prohibit what is exempted by EU competition law.<sup>504</sup>

The foregoing shows that the interface between EU competition law and stricter national law (including but not limited to national competition law) was not clearly and unequivocally delineated. This led to uncertainty in, at least, the three situations discussed above.

The most interesting interface for this research is the interface between the ROTD and Art 101. How the High Court interpreted EU law on this interface is next analysed and criticised.

### *5.2.2 High Court's View of Interface Between Art 101 and ROTD*

In *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing and Ors*, Langley J. considered the interface between ROTD and Art 101.<sup>505</sup> Specifically, he had to decide whether an unreasonable “restraint of trade” could be found void under the ROTD if it did not infringe Art 101(1) on the grounds that neither its object nor effect is anti-competitive? DMA, the plaintiff, argued that this type of agreement falls within Art 101 and that only EU law could provide for its validity or invalidity.<sup>506</sup> Pihsiang, the defendant, submitted that the “mere non-application” of Art 101(1) would not oust the common law.<sup>507</sup> Langley J. decided that applying EU competition law precludes the court reaching a different finding under the ROTD. In his view, once Art 101 is applied the ROTD cannot be relied on to produce a different finding. This means that an unreasonable “restraint of trade” may not be resisted under the ROTD if Art 101 is applied even if Art 101 does not prohibit the

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503 Case C- 41/96 *VAG Haendlerbeirate v. SYD Consult* [1997] ECR I- 3123 para 16.

504 R. Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options” (1999) ECLR 426, 430.

505 [2004] EWHC 44 (Comm).

506 [2004] EWHC 44 (Comm) para 256.

507 See [2004] EWHC 44 (Comm) para 257 where the defendant also argued that if the agreement was entitled to an exemption, the common law would only be incompatible with European Community law to the extent that it prevented the exemption from having full force and effect.

restriction on the grounds that the restriction either does not have the requisite anti-competitive object or effect to infringe Art 101(1) or, alternatively, because it satisfies the terms of Art 101(3).

This author suggests that this High Court judgment gives EU competition law unduly wide scope and, thereby, causes unwarranted detriment to restrained persons seeking to rely on the ROTD. The main criticism is that Langley J. failed to take proper account of important factual differences between *Days Medical Aids* and the situations that occurred in the EU cases. It will be argued that Langley J. relied too heavily on judgments and Opinions without identifying and fully considering the significance of key differences as between the situations and circumstances. Moreover, it will be suggested that Langley J.'s treatment of the EU materials was truncated and that this obscured significant differences which should diminish their cogency *vis-a-vis* the UK case. Criticism is next directed at how Langley J. approached, firstly, Court of Justice judgments (in *Walt Wilhelm*<sup>508</sup> and in *Giry and Guerlain*<sup>509</sup>) and, secondly, Opinions of Advocate General Tesauro (in *BMW*<sup>510</sup> and in *Bundeskartellamt v. Volkswagen and VAG Leasing*).<sup>511</sup> Later, this chapter criticises Langley J.'s interpretation of Art 3 of Reg. 1/2003.

The first criticism is that Langley J. quoted a few paragraphs from *Walt Wilhelm* without any accompanying explanation of their factual context or background.<sup>512</sup> Langley J.'s brief treatment of *Walt Wilhelm* failed to highlight the parameters that limited the general relevance of the specific issues decided in the EU judgment. Langley J. did not tease out important differences between the factual situations in *Walt Wilhelm* and in *Days Medical Aids*.

The dispute in *Walt Wilhelm* arose from contemporaneous separate investigations by the European Commission and the German cartel authority (Bundeskartellamt) into collusion in the aniline dyestuffs market. The Bundeskartellamt's decision to fine the undertaking for price-fixing in breach of German competition law was

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508 Case 14/64 *Walt Wilhelm v. Bundeskartellamt* [1969] CMLR 100.

509 Case 253/78 and 1-3, 37 & 99/79 *Procureur de la Republique v Giry and Guerlain* [1980] ECR 2327, [1981] 2 CMLR 99.

510 Case C-70/93 *BMW v ALD* [1995] ECR I 3439.

511 Case C-266/93 [1995] ECR I-3477, [1996] 4 CMLR 505.

512 Case 14/64 *Walt Wilhelm v. Bundeskartellamt* [1969] CMLR 100.

challenged by one undertaking in the national court on the grounds, *inter alia*, that the investigation by the national authority should cease because of the Commission's investigation. The national court made a preliminary reference to the Court of Justice. It is important to highlight the narrow question it asked of the Court of Justice which was whether the Treaty allowed *national authorities* to apply national *competition* law to the same facts? The specificity of this question sets fundamental parameters that limit the Court of Justice's reply and, consequently, limit the universality of the Court of Justice's reply. Langley J.'s cryptic treatment of *Walt Wilhelm* risks giving the Court of Justice judgment unwarrantedly extended applicability.

Langley J. quoted paragraphs 4-7 from the Court of Justice judgment. Paragraph 4 states, *inter alia* that "parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and the full effect of the measures adopted in implementation of those rules." Paragraph 6 states, *inter alia*:

"[T]he binding force of the Treaty and of measures taken in application of it must not differ from one State to another as a result of internal measures, lest the functioning of the community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence."

In paragraph 7, the Court of Justice stated that "... should it prove that a decision from a national authority regarding an agreement would be incompatible with a decision adopted by the Commission ...the national authority is required to take proper account of the effects of the latter decision." Langley J. did not cite paragraph 9, which states that national competition law could be applied where there is a Commission investigation provided that application of national law does "not prejudice the full and uniform application of Community law."<sup>513</sup> Paragraph 9 is too important to be omitted as it sets out the particular factual matrix which was at play in *Walt Wilhelm*.

The omission in the High Court's judgment of the national tribunal's referring question, and, of the Court of Justice's reply in paragraph 9 combines to mask an

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513 Para 9.

important institutional difference between the two cases. In *Walt Wilhelm*, EU institutions were seeking to apply EU competition law in opposition to the preferred action of national competition authorities. In *Days Medical Aids* there was no action by any competition enforcement agency (national or EU) and so, the prospect of any clash between EU institutions and national institutions was remote or nonexistent. In *Days Medical Aids*, the question of priority as between national and supranational norms was decided within a national court in an *inter partes* dispute. This is an important contextual difference that makes the Court of Justice's judgment less pertinent.

The next criticism is that Langley J. failed to recognise properly that the conflict in *Days Medical Aids*, unlike that in *Walt Wilhelm*, is "diagonal" because the relevant national law is not *competition* law. Langley J. apparently equated the ROTD with competition law when he remarked that the ROTD is "no more than earlier language for the restraint on competition at which Article [101] is aimed."<sup>514</sup> Chapters One, Two and Three of this research argued that the ROTD is not the same as EU competition law and that they are different legal regimes in terms of their substantive provisions, their concerns and some processes.<sup>515</sup> Another and related criticism is the High Court's failure to explain how an application of national law (which is not competition law) creates the requisite *conflict* with EU competition law in the sense of upsetting the full and uniform application of EU competition law.

Langley J.'s treatment of the judgments in *Giry Guerlain* appears to be incomplete.<sup>516</sup> He briefly noted that the European Commission's administrative letter closing a file did not prevent the application of national law which might be more rigorous than Community law. Langley J. did not point out that, in *Guerlain*, the agreement fell below the requisite interstate trade effect which means that it could not be subject to Art 101. This is a key difference with the case at hand which needed to be, at least, noted.

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514 Para 254.

515 In particular, the ROTD is never enforced by a public authority and no sanction (such as a fine or order) can be levied on the parties.

516 Case 253/78 and 1-3, 37 & 99/79 *Procureur de la Republique v Giry and Guerlain* [1980] ECR 2327, [1981] 2 CMLR 99.

The judgments in *Walt Wilhelm* and *Giry Guerlain* do not deal with the situation that arose in *Days Medical Aids*. Therefore, these EU judgments cannot be *uncritically* and *automatically* extended to the situation in *Days Medical Aids*. Unlike the EU cases, *Days Medical Aids* was an *inter partes* private dispute before a national court over a contractual provision that i) was not anti-competitive in the sense proscribed by Art 101(1), ii) was not investigated by a Community institution and iii) was unreasonable under the ROTD which is distinct from the domestic competition legislation.

Secondly, Langley J.'s treatment of the Opinions of Advocate General Tesouro in *BMW*<sup>517</sup> and in *Bundeskartellamt v. Volkswagen and VAG Leasing*<sup>518</sup> is open to criticism. Langley J. quoted from the Opinion in *BMW* that "a national court is bound not to take decisions that are incompatible with a block exemption."<sup>519</sup> The relevance of this statement to the situation in *Days Medical Aids* is not clear because Langley J. had decided that the particular clause did not satisfy any block exemption regulation. From the Opinion in *Bundeskartellamt v. Volkswagen and VAG Leasing*,<sup>520</sup> Langley J. cited that "... a binding finding of the Commission, or *a fortiori*, a judgment of the court, to the effect that the agreement does not adversely affect competition, precludes it being penalised at national level."<sup>521</sup> Langley J. stated that this Opinion addresses the issue with which he was "confronted."<sup>522</sup>

This research takes a different view because, in *Days Medical Aids*, there was no decision of any EU institution that Art 101(1) did not proscribe the measure. Nonetheless, Langley J. found there was an "inescapable logic" in "applying the same principles in a case to which an exemption applies to a case in which Article [101](1) is held not to apply at all because the relevant agreement is found not to

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517 Case C- 70/93 [1995] ECR I 3439.

518 Case C- 266/93 [1995] ECR I-3477, [1996] 4 CMLR 505.

519 [2004] EWHC 44, para 261 where he cited para 38-39 of Advocate General Opinion in Case C- 70/93 *BMW* [1995] ECR I 3439.

520 Ibid.

521 See [2004] EWHC 44, para 262 where Langley J. cited para 59 of Advocate General Opinion in Case C- 70/93 *BMW* [1995] ECR I 3439.

522 *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing and Ors* [2004] EWHC 44 (Comm) para 263.

have an anti-competitive effect and so not to ‘need’ exemption.”<sup>523</sup> This author suggests that Langley J’s remark obscures differences between an exemption under Art 101(3) and negative clearance type decision under Art 101(1) that there is no anti-competitive object or effect. Decisions under paragraphs (1) and (3) of Art 101 are reached by applying different criteria and evidential onus is borne by different parties.

There are significant differences between the *Days Medical Aids* situation and the situations addressed by the cited Court of Justice judgments and Opinions of Advocates General which Langley J. did not tease out fully. The institutional distinction is that in *Days Medical Aids* there was no prospect of disobedience by a national body to any (formal or informal) determination in related proceedings under Art 101(1) or (3) by any EU organisation. The other key difference is the diagonal nature of the interface that arose in the context of private litigation in a national court. The High Court is open to criticism for giving undue force to inexact EU *dicta* that the Court of Justice and Advocate General had directed towards ensuring the priority of EU competition law decisions over conflicting ones by national authorities under national competition law. Arguably, the EU materials cited by Langley J. do not necessarily preclude the application of the ROTD to allow the restraint to be resisted.

While the foregoing elements of Langley J.’s judgment have been superseded, in substantive terms, by Art. 3, their analysis is still useful for the light it shines on the High Court’s view of EU sources and of the ROTD. The judgment appears to be unduly deferential to EU materials when delineating the interface between EU competition law and the ROTD. It seems that the High Court regarded the ROTD as a national competition law rather than as a unique national doctrine capable of protecting different interests other than those protected by competition law. This chapter argues that such a view of the ROTD is misconceived. The High Court’s apparent equation of the ROTD with national competition law, in effect, resulted in the common law doctrine being overwhelmed by EU competition law. The High Court failed to defend the potency of the ROTD as a valued and distinct legal

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<sup>523</sup> *Ibid.*

instrument available to restrained persons to resist unreasonable restrictions that happen to come within the reach of but do not infringe competition law.

### 5. 3 INTERFACE SINCE MAY 2004: ART 3 of REGULATION 1/2003

Since May 2004, Art 3 of Reg. 1/2003 provides the rule of jurisdictional delimitation between EU competition law and national competition law.<sup>524</sup> Art 3's convoluted provisions and their impact on the ROTD can be appreciated fully only with some knowledge of its contentious evolution which is sketched next (and detailed more fully later in this chapter). Art. 3, when initially proposed by the European Commission, was a succinct one paragraph provision. It evolved into a three paragraph provision following amendments advanced by Member States during a process that lasted from September 2000 until December 2002.<sup>525</sup>

#### 5.3.1 European Commission's Proposal of September 2000

The European Commission's proposed text provided:

“[W]here an agreement... within the meaning of Article [101] of the Treaty, or the abuse of a dominant position within the meaning of Article [102] may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.”<sup>526</sup>

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524 See *Communication from the Commission to the European Parliament on the Functioning of Regulation 1/2003* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0206:EN:NOT>. Also see

Commission Staff Working paper Accompanying *Communication from the Commission to the European Parliament on the Functioning of Regulation 1/2003* COM (2009) 206 final para 139-181 which is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT>

525 See, in particular, the following European Council documents in Interinstitutional File 2000/0243(CNS) 5158/01 p10 (January 11th 2001) at <http://register.consilium.europa.eu/pdf/en/01/st05/st05158.en01.pdf> ;

9999/01 p11 (27th June 2001) at <http://register.consilium.europa.eu/pdf/en/01/st09/st09999.en01.pdf>;

13563/01 p 20 (November 20th 2001) at <http://register.consilium.europa.eu/pdf/en/01/st13/st13563.en01.pdf>;

8383/02 pp21-22 (May 21st, 2002)at <http://register.consilium.europa.eu/pdf/en/02/st08/st08383.en02.pdf>; and 13451/02 p18 (October 28th 2002) <http://register.consilium.europa.eu/pdf/en/02/st13/st13451.en02.pdf>.

526 *Proposal for Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87*.COM (2000) 582 final. OJ C 365 19.12.2000



The Explanatory Memorandum for the proposed Regulation advanced various theoretical and practical arguments from the Commission in support of the proposed article.<sup>527</sup> It accepted that the judgment in *Walt Wilhelm* provided a rule of conflict resolution but did not provide a rule of jurisdictional delimitation. It noted that some undertakings felt forced to argue that their agreement breached Art 101(1) and satisfied Art 101(3) in order to “substantiate a *conflict* between outcome under EU and national competition law” in order to bring the case within the *Walt Wilhelm* solution.<sup>528</sup> It argued that the proposed article would ensure coherence between Arts 101(1) and 101(3). Also, the Commission expressed its worry about increases in instances of stricter national competition law seeking to prohibit agreements which would not have the anti-competitive object or effect proscribed by Art 101(1).<sup>529</sup> It further stated that the new article would ensure a “level playing field” throughout the Union so that agreements capable of affecting interstate trade are subject to a common standard.<sup>530</sup> Additionally, it pointed up the inconsistency with a single market if “an agreement which would be considered innocuous or beneficial under Community law can be prohibited under national competition law.”<sup>531</sup> It asserted that the new article would remove the costs caused by the parallel application of national competition law and EU competition law.<sup>532</sup> It also asserted that the proposed article would assist the efficient allocation of cases to the best placed national competition authority and avoid problems where national competition law obliged a national competition authority to deal with a case, for example, to adopt a formal decision on receipt of a complaint.<sup>533</sup> The breadth and scope of the above reasons reveal the shortcomings of the *Walt Wilhelm* judgment as a solution.

However, these arguments did not persuade all Member States to support the proposed article. This is unsurprising as the proposed text would have completely

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527 *Proposal for Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82*. COM (2000) 582 final, 14.

528 One example of where a firm sought exemption instead of negative clearance is provided by *Phillips Osram and KSB/Goulds/Iowara/Itt* [1990] OJ L 19 p 25.

529 Para 17.

530 *ibid.*

531 *ibid.*

532 *ibid.*

533 *ibid.*

ousted the applicability of national competition laws to arrangements and conduct falling within the reach of EU competition law. The proposal was amended at various intervals which are next sketched and examined later in detail.

### *5.3.2 Overview of Art 3*

The European Commission's proposed text had to evolve into a complicated three paragraph article before it was finally accepted by Member States. Art 3(1) provides:

“[W]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions of associations of undertakings or concerted practices within the meaning of Article [101](1) which may affect trade between the Member States within the meaning of that provision, they shall also apply Article [101] to such agreements, decisions or concerted practices.”

This paragraph ensures that a national court or competition authority cannot ignore Art 101 by applying only national competition law to provisions falling within the reach of EU competition law.

Art 3(2) provides:

“[T]he application of national competition law may not lead to the prohibition of agreements, decisions of associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101](1) of the Treaty, or which fulfil the conditions of Article [101](3) of the Treaty or which are covered by a Regulation for the application of Article [101](3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.”

Essentially, the first sentence of Art 3(2) means that that “national competition law” cannot prohibit an arrangement which is not prohibited by Art 101 on the grounds that it either does not have anti-competitive object or effect, or else, comes within the exceptions specified in Art 101(3). This has been described as the

“convergence rule.”<sup>534</sup> The second sentence contains an exception that allows the application of stricter national law to prohibit unilateral conduct.<sup>535</sup>

Art 3(3) provides:

“Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Article [101] and [102] of the Treaty.”

This final paragraph of Art.3 contains a saver that dis-applies Art 3(1) and 3(2) *vis-à-vis* certain national laws. For this research, the relevant part of Art 3(3) is the part that covers national laws which “*predominantly pursue an objective different from that pursued by Article [101] and [102].*” Art 3(3) allows national institutions to apply some national laws without activating either Art 3(1) or (2). Thus, the national law may be applied solely (*i.e.* not also applying EU competition law) and the national law may prohibit measures that are not proscribed by Art 101, on the grounds that either their object/effect is not proscribed by Art 101(1) or because they satisfy the exception of Art 101(3).

For this research, the kernel of the problem is that if the ROTD comes within the “convergence rule” of Art 3(2) (first sentence), it cannot void what Art 101 does not prohibit unless the ROTD comes either within the second sentence of paragraph 2 (unilateral conduct exception) or within paragraph 3 (as law that predominantly pursue other objectives). It is clear that the interpretation of Art 3 is of crucial importance to the capacity of the ROTD to challenge restrictions within the overlap area that are not prohibited by EU competition law.

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534 The *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council- Report on the functioning of Regulation 1/2003* {COM(2009) 206 final} para 158. The Paper is available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT)

535 *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council- Report on the functioning of Regulation 1/2003* {COM(2009) 206 final} para 141 states: “[I]n its current wording, the obligation of convergence covers only the application of national competition law to agreements, concerted practices and decisions of associations of undertakings. Member States remain free to enact and maintain stricter national competition laws than Art [102] to prohibit or sanction unilateral conduct.” The Paper is available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT)

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT

The next section examines how Art 3 has been interpreted by the High Court in the context of the interface between Art 101 and the ROTD.

### 5.3.3 High Court Interpretation of Art 3

The High Court's interpretation of Art 3 and its implications for the interface between Art 101 and ROTD is next examined. The High Court first expressed its view on Art 3 in *Days Medical Aids*<sup>536</sup> and this view was repeated in *Jones v Ricoh UK Ltd.*<sup>537</sup> According to the High Court, Art 3 prevents the application of ROTD to resist a measure to which Art 101 is applied but does not prohibit where the restriction either i) does not have an anti-competitive object/effect or ii) comes within the criteria of Art 101(3).

The High Court judgment in *Days Medical Aids* addressed Art 3 which had been adopted but had yet to come into effect.<sup>538</sup> For this reason, the Court's view of Art. 3 might be relegated as being merely *obiter*. In 2004, Furse remarked that it was by "no means certain" that this judgment will be followed.<sup>539</sup> However, in 2010, in *Jones v Ricoh UK Ltd*, Roth J., having decided that Art 101(1) prohibited a particular clause in a Confidentiality agreement, stated:

".... it is not necessary to consider separately the domestic law of restraint of trade. In any event, once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade: Article 3(2) of Regulation 1/2003, and see *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm), [2004] UKCLR 384 , at [265]-[266]."<sup>540</sup>

This conclusion has the effect of ousting or muzzling the ROTD once Art 101 is applied. It means the ROTD is not available to persons to resist the enforcement of

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536 [2004] EWHC 44 (Comm) Langley J. For analysis of this lengthy judgment and its interpretation of Art 3 see Lucey, M.C., "EC Competition Policy: Emasculating the Common Law Doctrine of Restraint of Trade?" (2007) ERPL 419.

537 [2010] EWHC 1743 (Ch) Roth J.

538 The judgment was delivered in January 2004 and predated the coming into effect of Art 3 on May 01st, 2004.

539 M. Furse, *Competition Law of the EC and UK* (Oxford: Oxford University Press, 2004 4th ed) 369.

540 [2010] EWHC 1743, para 49. Roth J. found that the clause was prohibited by Art 101(1) and did not come within Block Exemption Regulation 2790/99.

an unreasonable “restraint of trade” that comes within the jurisdiction of but is not prohibited by Art 101. This creates a serious problem for some restrained professionals.

The approach of the High Court to Art 3 is next criticised on three grounds. These are, firstly, its ready acceptance that Art 3 is activated, secondly, its treatment of High Court judgments on trade mark delimitation disputes and, thirdly, the inadequacy of its attempts to ascertain the intended scope of Art 3(3).

#### 5.3.3.1 Why is Art 3 Activated?

The first criticism is that the High Court too readily accepted that Art 3 was relevant. Art 3(1) and Art 3(2) are activated only in a case where national *competition* law is applied.<sup>541</sup> The trigger is expressly stipulated as “national competition law” and this phrase is narrower than the broader concept of “national law.” Thus literally interpreted, Art 3 is not activated in cases where national courts apply only national law that is not “national competition law.”

The High Court did not explain why it regarded the ROTD as “national competition law” for the purposes of Art. 3, in these cases, where the Competition Act 1998 was expressly excluded from applying.<sup>542</sup> It would have been more convincing if the Court had explained why the ROTD may be seen as “national competition law.” In this regard, the Court could have pointed out that Art 3 does not limit the term “national competition law” to only national legislative versions of EU competition law. Moreover, it could have drawn on a teleological approach to interpret “national competition law” to capture any stricter national laws that may undermine the uniform EU wide standards set by Art 101. It could have highlighted how the Commission’s “*Staff Working Paper on Article 3*” asserts that the concept of “national competition law” must be interpreted in light of Art 3’s objective which is to avoid parallel application of EU competition law and national competition law and what “matters is the substantive content of the national rule

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<sup>541</sup> See further M.C. Lucey “Unforeseen Consequences of Article 3 of EU Regulation 1/2003” (2006) 27 ECLR 557.

<sup>542</sup> *Vertical Exclusion Order* SI 2000 No 310.

rather than the legal instrument of which it forms part.”<sup>543</sup> Furthermore, the High Court could have stated that an “effects” rather than “form” based approach would capture the ROTD because it may void certain consensual restrictions agreed by economic operators. However, that none of these arguments were debated shows how readily the High Court equated the ROTD with “national competition law.”

### 5.3.3.2 Reliance on *Apple* and *WWF* to Interpret Art 3

The second criticism concerns the High Court’s undue reliance on two judgments on trade mark delimitation agreements to support its conclusion that the ROTD does not come within the saving provision of Art 3(3). The High Court in the 2010 judgment of *Jones v. Ricoh UK Ltd* and the 2004 judgment in *Days Medical Aids* placed considerable reliance on a few paragraphs from judgments in *WWF* and *Apple*.

Roth J. in *Jones v. Ricoh UK Ltd* refers to paragraphs 264 and 265 of the judgment in *Days Medical Aids*. Paragraph 264 merely recites the text of Art 3. Paragraph 265 from *Days Medical Aids*, *inter alia*, states:

“[W]hatever characterisation may be given to the common law restraint of trade doctrine ... I do not think it can be said predominantly to pursue an objective different from Articles [101] and [102]. A reflection of the close relationship can be found in *WWF v World Wrestling Foundation* [2002] EWCA CIU 196 in the judgment of Carnwarth LJ at paragraphs 64 and 66, and in *Apple Corps Limited v Apple Computer Inc* in the judgment of Nicholls LJ at paragraphs 109-113.”<sup>544</sup>

It is an obvious but appropriate criticism to point out that the *WWF* and *Apple* judgments considerably predate Art 3 and, as such, cannot intend to determine whether the ROTD predominantly pursues the same objective as EU competition law for the purposes of Art 3. It is argued next that the *WWF* and *Apple* judgments contain merely incidental observations on the ROTD and competition law which were made within their own particular factual contexts and that they have been given undue weight and currency by Langley J.

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<sup>543</sup> SEC (2001) 871, para 62. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT>  
<sup>544</sup> Para 265.

The next paragraphs critically examine the paragraphs cited from *WWF* and *Apple* in order to argue that they offer insufficient support for the High Court's (Langley J.) later conclusion in *Days Medical Aids* that the ROTD is not saved by Art 3(3). The cited judgment in *Apple* arose following a dispute between a music company and a computer company over the use of an apple trade mark. In 1981, the companies reached a settlement in the form of a trademark delimitation agreement. Later, one company alleged breaches of the agreement's "no challenge" clause. At the trial, the defence wanted to argue that the trade marks registration was invalid. On November 15 1990, Ferris J. ruled that the invalidity point could not be argued on the pleadings. On December 21<sup>st</sup>, Ferris J. refused leave to the defendant to serve a "late Rejoinder" which the defendant had drafted on the registration invalidity point. These November and December rulings were appealed to the Court of Appeal which issued the judgment that contains the cited paragraphs 109-113. This context must be borne in mind when appraising the paragraphs of Nicholls L.J. that were cited and relied on by the High Court in *Days Medical Aids*.

In *Apple*, Nicholls L.J., in para 109, stated: "[F]or present purposes" the "essence" of Art 101 is "not substantially different" from principles of the ROTD.<sup>545</sup> These opening words of the quotation ("[F]or present purposes") are crucial because the purposes and context of this dispute in *Apple* were highly particular. In his judgment Nicholls L.J. had to decide whether one party was allowed to serve a "late Rejoinder" to a registration invalidity point made by the other side. He decided that the validity or invalidity of the trade mark registration was an irrelevant issue to the case under Art 101 and under ROTD.<sup>546</sup> It is important to appreciate that Nicholls L.J. was not deciding whether a clause infringed either the ROTD and/or Art 101. In this light, it is unsafe to take his remarks as being a widely applicable declaration that the ROTD and competition law are always the same.

Nicholls L.J. commented that the Court of Justice in *Remia* "adopted an approach which is not so different from that of the common law."<sup>547</sup> However, the analysis

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545 Para 109.

546 Para 112.

547 Para 110.

of *Remia*, in Chapter Two, shows how the Court of Justice decided that a restriction in a transfer of business agreement is not prohibited by Art 101(1) if it is necessary to ensure that the transaction has the effect intended and would have a beneficial effect on competition.<sup>548</sup> The *Remia* test is not the same as the ROTD's approach which is to refuse to enforce a restriction unless it has been justified as reasonable both *inter partes* and in the "public interest." Furthermore, even if the ROTD and EU competition law take a somewhat similar approach to *agreements for the sale of businesses*, this coincidence cannot support the far more general conclusion that the ROTD and EU competition law are essentially the same and pursue the same objective in the sense intended by Art 3. Suffice it to recall here that Chapter One showed the ROTD intentionally adopts a more robust scrutiny of restrictions in employment (and analogous personal contracts) than it does when assessing restrictions in sale of business agreements. In paragraph 113 of *Apple*, Nicholls L.J. noted one difference between EU competition law and the ROTD and this concerned the time at which an assessment is made. The pertinent point of time under the ROTD is when the agreement is made (in this case 1981) but under EU competition law matters can be considered "not only at the outset of the agreement but also from time to time during the life of the agreement."<sup>549</sup> This is a difference but it is not the only difference between the ROTD and EU competition law. The paragraphs from Nicholls L.J. that were cited by Langley J. provide too slim a basis for any conclusion that the objectives of the ROTD are the same as those of EU competition law. This research suggests that the remarks made in *Apple* were delivered in a particular and limited context and were never intended to be a reliable comparison of the objectives of the ROTD and EU competition law.

Also, Langley J. cited two paragraphs 64 and 65 from a judgment in *WWF* in a dispute over the alleged breach of a trademark delimitation settlement agreement between the World Wildlife Fund ("Fund") and the World Wrestling Federation ("Federation") on the use of the initials "WWF."<sup>550</sup> Carnwarth L.J.'s judgment is

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548 See Case 42/84 *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission* [1985] ECR 2545, para 20 where the Court of Justice stated that non-competition clauses in an agreement for the transfer of material assets and goodwill of two subsidiaries may not be prohibited by Art [101](1) if they have a "beneficial effect on competition" and they are "necessary to the transfer concerned and their duration and scope must be strictly limited to that purpose."

549 Para 113.

550 *WWF v World Wrestling Foundation* [2002] EWCA Civ 196, para 66.



an appeal against the Order of Jacob J. made in favour of “Fund” for an injunction and damages to enforce a settlement agreement of 1994. The Court of Appeal considered the appeal under 6 headings.<sup>551</sup> Langley J. cited paragraphs 64 and 66 from Carnwarth L.J. judgment which are found under headings 5 and 6 which are titled “Other Issues” and “Conclusions and Remedy.” The location of these two paragraphs suggests that they do not form a core element of the judgment. Each of these paragraphs is next examined in turn.

In paragraph 64, Carnwarth L.J. notes that the Court of Appeal (like Jacob J. earlier) had difficulty in seeing the basis of the Art 101 case. Paragraph 65 deals with an argument based on ECHR and is irrelevant to this chapter. Paragraph 66 states the Court of Appeal’s conclusion that “the Federation gains no assistance in this case from the doctrine of restraint of trade, whether in its common law *or European form.*” These few italicised words cannot seriously be taken as a considered adjudication that EU competition law is a European version of ROTD.<sup>552</sup> It is important to note that the case under Art 101 had not been made clearly. Jacobs J. had described the case made under Art 101 as “muddled and confused” and concluded that there was nothing in the Art 101 point. In particular, Jacobs J. criticised the lack of evidence on market definition and lack of explanation as to why interstate trade was affected. That the case under Art 101 was poorly made may well explain why Carnwarth L.J. apparently did not draw distinctions between EU competition law and the ROTD.

For these reasons, the cited paragraphs in *WWF* and *Apple* provide far too slight a basis to support a conclusion that ROTD pursues the same objective predominantly as EU competition law. They cannot fairly be treated as conclusive comparisons of the objectives of the ROTD and Art 101 for the purposes of Art 3.

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551 These are a) Principles for Summary Judgment, b) Breach of Contract, c) Public Policy, d) Injurious Association, e) Other Issues f) Conclusion.

552 On the origins of EU competition law D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998).

### 5.3.3.3 Inadequate Attempts to Understand Art 3(3)

The third criticism of the High Court is directed at its poor efforts to tease out whether Art 3(3) could save the ROTD from the “convergence rule” of Art 3(2). In *Days Medical Aids*, Langley J. was not persuaded by submissions that the ROTD has, even in part, different objectives to Arts 101 and 102. The defence had sought to contrast the ROTD’s concern with the “perceived public policy in ensuring personal freedom to trade and thence its distaste for long term agreements” with competition law’s recognition that agreements “while restrictive on personal freedoms may nonetheless promote competition and so benefit consumers.”<sup>553</sup> However, Langley J. took the view that Art 3(3) is aimed at “consumer protection laws...”<sup>554</sup> In Langley J.’s view, the ROTD does not “predominantly pursue an objective different from that pursued” by EU competition law and, consequently, does not come within the saving provision of Art 3(3).<sup>555</sup> This conclusion on the interface between the ROTD and EU competition law is not only flawed (for the reasons stated above) but, it is next argued, creates a serious problem.

### *5.3.4 Interface Problem*

According to the High Court’s interpretation of Art 3, when a court has applied EU competition law to a particular measure it cannot reach a different conclusion by applying the ROTD. This conclusion causes an acute problem for persons who would want to rely on the ROTD in a case where the ROTD would produce a more favourable outcome. The best such example is where an unreasonable “restraint of trade” that would be void under the ROTD is not prohibited by Art 101 on the grounds that its object/effect is not anti-competitive.

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<sup>553</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 para 255.

<sup>554</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 para 266.

<sup>555</sup> *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 para 265.

It is notable that, in 2010, Roth J. in *Jones v. Ricoh* repeated the conclusion from *Days Medical Aids* when he stated that:

“once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade.”<sup>556</sup>

In *Jones v. Ricoh*, the particular clause was prohibited by both Art 101 and the ROTD which is unlike the situation in *Days Medical Aids* where the unreasonable “restraint of trade” was not prohibited by Art 101(1). Thus, it may be argued that Roth J.’s comments could be limited to cases where the EU competition law prohibits the clause. However, that is not a safe view for two reasons. Firstly, the broader interpretation is possible under a literal approach and, secondly, because the conclusion originated in *Days Medical Aids* where the particular clause was not prohibited by Art 101.

The scale of this problem is potentially wide. Art 101 is applicable to measures which may affect, even indirectly, the pattern of trade between Member States.<sup>557</sup> Thus, it is likely that a profession-wide restrictive rule of a national professional association would satisfy the interstate trade effect test.<sup>558</sup> Also, a restriction contained in a bilateral contract might have sufficient potential effect on the pattern of trade. For example, a network of post-termination non-competition clauses in professional partnerships (such as dentistry or veterinary) in geographical areas in Northern Ireland located near the border with Ireland may affect the pattern of trade in those professional services.

Moreover, the delineation of the interface between EU competition law and the ROTD may even be relevant in cases where EU competition law is not applicable due to inadequate effect on trade. It may affect cases where UK competition law and the ROTD are applicable on the grounds that it is logical for the ROTD to have a consistent interface with both UK and EU competition law.<sup>559</sup> Otherwise, a serious inconsistency may be created. Consider, for example, the situation of a

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556 [2010] EWHC 1743 (Ch) Roth J. para. 49.

557 Case 56/65 *Société La Technique Minière v. Maschinenbau Ulm GbH* [1966] ECR 234.

558 *Belgian Architects* OJ [2005] L 0004/10 and Case C-309/99 *Wouters v. NOVA* [2002] ECR-I 1577.

559 See A. Scott, “The Evolution of Competition law and Policy in the United Kingdom” LSE Working Papers 9/2009 p5. Available at SSRN: <http://ssrn.com/abstract=1344807>

dentist in Northern Ireland who seeks to resist the enforcement of an unreasonable post-termination non-competition clause in a large partnership or franchise located close to the border with Ireland. If the contractual restriction falls within the jurisdiction of Art 101 due to its potential to affect cross border trade, then, following the *Days Medical Aids* judgment, he cannot rely on the ROTD if Art 101(1) is applied and does not prohibit the clause. It would be highly inconsistent if the same restriction on a different dentist who was physically located remotely from cross border trade could call on the ROTD because his restriction does not attract EU competition law. Thus, although, Art 3 speaks only to the relationship between EU competition law and some national law, in practice, Art 3 may have negative repercussions for the interface between UK competition law and the ROTD.

#### 5.4 CONCLUSION

This chapter detailed the background context that prompted the European Commission to propose a provision, in Art 3, to delineate the interface between EU competition law and national law. It intended to remedy the shortcomings of the *Walt Wilhelm* approach which only provided certainty where there was a *conflict* between national and EU competition law. The *Walt Wilhelm* judgment did not provide comprehensive and certain rules on delineating the interface between EU competition law and national law (comprising competition and other national law).

Art 3 seeks to eliminate uncertainty. In Art 3(1) it insists that EU competition law be applied where there is adequate effect on interstate trade. It clearly ensures the priority of Art 101 over stricter national *competition* law. The “convergence rule” in Art 3(2) confers a priority on Art 101 that goes further than the previous *conflict resolution* rule because it prevails even if Art 101(1) does not prohibit the clause. The new uncertainty, created by Art 3, concerns the type of national laws that are saved by Art 3(3). Art 3(3) allows stricter national law that “predominantly pursues an objective different from that pursued” by EU competition law. The High Court apparently takes the view that the ROTD is not saved by Art 3(3). It has asserted that a contrary conclusion cannot be reached under the ROTD once EU

competition law has been applied to a particular restriction. This approach creates a most significant problem for persons wishing to call on the ROTD to void a restriction that is not prohibited by Art 101. The keenest problem is that it ousts protection that has otherwise long been available to persons under the ROTD.

The range of professionals in the UK injured by this conclusion is even greater if (for reasons of consistency) the interface between the ROTD and *national* competition law is delineated in the same way. It is possible that the range of persons affected by this conclusion may be more extensive, in the future, if the jurisdictional scope of competition law increases by interpreting “undertaking” to include some professionals in employment. The next chapter suggests that the overlap between the ROTD and competition law would be significantly extended if competition law becomes applicable to some employment contracts. An increase in overlap would extend the interface between the ROTD and competition law. It would correspondingly increase the number of persons who may lose the traditional protection available under the ROTD on the grounds that competition law also applies.

## OVERLAP BETWEEN ROTD AND COMPETITION LAW: CURRENT AND POTENTIAL “UNDERTAKINGS”

### 6.1. INTRODUCTION

The concept of “undertaking” is a key jurisdictional term for competition law in England and Wales. Competition law applies only to arrangements agreed between “*undertakings*”, decisions of “associations of *undertakings*” and abuses of a dominant position by “*undertakings*.” The scope of “undertaking” is important for this research because it determines the extent to which competition law overlaps with the space traditionally occupied by the ROTD. This chapter explores the range of professionals who may be regarded as “undertakings” for the purposes of competition law in England and Wales. It assesses the current situation and predicts how it may increase in the future.

Section 6.2 examines the provenance of the concept of “undertaking” in the Competition Act 1998. Section 6.3 considers the range of persons that have been regarded as “undertakings” under EU competition law. Section 6.4 pays attention to the margins of the concept of “undertaking” by exploring whether some employees may be “undertakings.” It challenges the view that employees cannot be “undertakings” by advancing legal and economic arguments and, also, by drawing on Opinions of two Advocates General. It concludes that it is not safe to assume that no professional in employment could ever be classified as an “undertaking” for the purposes of UK competition law.

The possibility of any employee being classified as an “undertaking” is significant because it raises the possibility of UK competition law applying more widely than initially envisaged by Parliament. This development could cause UK competition law to become applicable to some contracts of employment and to measures of

associations whose members are all or mostly employees. In such an eventuality, the interface problem regarding the concurrent applicability of ROTD and competition law becomes acute. For employees and ex-employees accustomed to relying on the ROTD's traditional protection (detailed in Chapter One) the worry is that the ROTD's capacity to void unreasonable "restraints of trade" would be quenched on the grounds that courts cannot reach a different outcome under the ROTD once they have applied competition law.

## 6.2 "UNDERTAKING" in COMPETITION ACT 1998

It is important to explore the actual and potential scope of "undertaking" in UK competition law. The concept of "undertaking" is not a traditional one in UK law or in the competition legislation of other common law jurisdictions such as, for example, Australia. When enacting the Competition Act 1998, Parliament (unlike legislatures in some other Member States) chose not to include a statutory definition of "undertaking."<sup>560</sup> Parliament decided against accepting the following definition that was proposed:

"[U]ndertaking includes a person who, or body which, requires, causes or connives in an infringement of the Chapter I prohibition or Chapter II prohibition. Except where the context otherwise requires words and expressions in this Act shall have the same meaning as in the Treaty."<sup>561</sup>

"Undertaking" is not a commonplace phrase in general English legal terminology, unlike the terms used in the original EU languages, which have been described as "ordinary, everyday words for "firm or business," namely: 'Unternehmen' (German), 'enterprise' (French), 'onderneming' (Dutch) and 'impresa' (Italian)."<sup>562</sup> That Parliament preferred to use the concept of "undertaking" over the more

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560 For example, Article 1(f) of the *Mededingingswet* 1998 (Dutch Competition Act) defines an undertaking as follows: "an undertaking within the meaning of Article [101]1, first paragraph of the EC Treaty." In Ireland the Competition Act 1991 defined an "undertaking" to include persons "engaged for gain." The definition was repeated in the current competition legislation.

561 Amendment No. 187B, see Feb 23 1998 Lord Fraser of Carmyllie col 512.

562 L. Ritter, F. Rawlinson and D.W. Braun, *EEC Competition Law- A Practitioner's Guide* (The Netherlands: Kluwer Law, 2001) 31 in fn 158. In Irish the term is "gnóthas" which means a business

business centred term of “enterprise”<sup>563</sup> shows, in this author’s view, an unequivocal desire to align the national provisions with EU law. The government’s view was that “...the prohibitions are modeled on Articles [101] and [102] which apply to undertakings and, as a result of clause 58, (later s.60) words in the Bill such as “*undertaking*” are to be interpreted by reference to [EU] law.”<sup>564</sup> It is clear that the provenance of the concept is EU competition law and that the concept of “undertaking” must be construed in that light, especially, in light of the consistency obligations of s.60 of the Competition Act 1998.

In order to gain a fuller appreciation of the range of persons who may possibly be classified as “undertakings” under UK competition law, it is necessary to consider the approach adopted under EU competition law. The concept of “undertaking” in the Act is particularly susceptible to EU developments because of its peculiar EU provenance and, additionally, the receptive attitude of courts under s.60 of the Competition Act 1998 to various EU competition law sources. Thus, in order to gain the fullest picture of the range of persons who may be “undertakings” under UK competition law, the next section ascertains the types of persons who are “undertakings” under EU competition law.

### **6.3 PERSONS WHO ARE “UNDERTAKINGS” IN EU COMPETITION LAW**

Although “undertaking” is an important jurisdictional concept,<sup>565</sup> no definition of “undertaking” was provided in the Treaty of Rome or its successors. This position contrasts with the approach taken in other Treaties such as the ECSC<sup>566</sup> and

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563 See A. Campbell, *Restrictive Trading Agreements in the Common Market* (London: Stevens and Sons 1964) 7 and 14 where “enterprise” is the term used in some English language European Community law books published before the accession of the UK to the EEC in 1972.

564 Lord Simon of Highbury Feb 23 1998 col 511 (emphasis added).

565 A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) 283. See also L. Louri, “Undertaking as a Jurisdictional Element in EC Competition Rules” (2002) 29 LIEI 143, 149.

566 Article 80 of the now expired ECSC Treaty provided “ ... ‘undertaking’ means any undertaking engaged in production in the coal or the steel industry.....and....., any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.”



Euratom<sup>567</sup> and with the Merger Regulation.<sup>568</sup> A definition is contained in a Protocol attached to the Agreement on the European Economic Area which provides that “...an ‘undertaking’ shall be any entity carrying out activities of a commercial or economic nature.”<sup>569</sup> This definition echoes the EU Courts’ approach which examines the nature of the activities carried on by the entity and is a function based test. Under this “functional” view, an “undertaking” comprises any entity engaged in economic activity, regardless of its legal status,<sup>570</sup> the way in which it is financed,<sup>571</sup> and that any activity consisting in offering goods and/or services on a given market is economic activity.<sup>572</sup> The concept of “undertaking” is construed broadly and inclusively.<sup>573</sup> It is not limited to corporate entities and includes persons engaged in undoubtedly economic or commercial activity, for example those in *de facto* control of a business,<sup>574</sup> self-employed persons, sole traders,<sup>575</sup> future proprietors of businesses,<sup>576</sup> distributors, suppliers,<sup>577</sup> franchisees<sup>578</sup> and licensors of patent rights.<sup>579</sup>

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567 Article 196 of Euratom Treaty provides “(a) ‘person’ means any natural person who pursues all or any of his activities in the territories of Member States within the field specified in the relevant chapter of this Treaty; (b) ‘undertaking’ means any undertaking or institution which pursues all or any of its activities in the territories of Member States within the field specified in the relevant Chapter of this Treaty, whatever its public or private legal status.”

568 Regulation 139/2004, [2004] OJ C24/1. See W. Wils, “The Undertaking as a Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons”(2000) 25 ELRev 99, 106 where the author argues that consistency between the Treaty and ECMR provisions “requires a common notion of undertaking.”

569 Art 1 of Protocol 22.

570 *P&I Club* [1985] OJ C 376/2, [1989] 4 CMLR 178.

571 Case C-55/96 *Job Centre* [1997] ECRI-7119 para 21.

572 Case C-118/85 *Commission v. Italy* [1987] ECR 2599 para 7; *Polypropylene* [1986] OJ L 230/1, [1988] 4 CMLR 347 para 99; Case C-41/90 *Hofner and Elser v. Macroton* [1991] ECR I-1979

573 Advocate General Cosmas in Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 49.

574 Dec76/743 *Reuter/ BASF* [1976] OJ I254/40 [1976] 2 CMLR D44. a research chemist with a controlling shareholding in a company challenged a non-competition clause in an agreement for the company’s transfer.

575 For example a shopkeeper in Case C- 210/81 *Demo-Studio Schmidt v. Commission* [1983] ECR 3045, [1984] 1 CMLR 6 and a plant breeder in Case 258/78 *Nungesser v. Commission* [1982] ECR 2015.

576 Advocate General Lenz in Case 42/84 *Remia BV and NV Verenigde Bedrijven Nutricia v. Commission* [1985] ECR 2545, para 50 noted that Mr de Rooij’s role was not confined to merely being the future proprietor of the business but that he received additionally certain powers and dispositive rights which justified regarding him as an independent commercial entity. The Court of Justice noted that he was both a contracting party and recipient of rights peculiar to himself.

577 Case 35/83 *BAT v. Commission* [1985] ECR 365, [1985] 2 CMLR 470.

578 For example Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] E.C.R. 353

579 *AOIP v. Beyrard* [1976]OJ L6/8, [1976] 1 CMLR D14; *Vaessen/ Morris* [1979] OJ L19/32, [1979] 1 CMLR 511; *Theal/Watts* [1977] 1 CMLR D44 , on appeal, Case 28/77 *Tepea v. Commission* [1978] ECR 139.

Some *professionals* have been regarded as “undertakings” for the purposes of EU competition law. Italian customs agents or officials were classified as “undertakings” in two sets of legal proceedings. One case involved infringement proceedings by the European Commission against the professional association (CNSD) under Art 101.<sup>580</sup> The Commission decided that the customs agents were “undertakings” as they are engaged in economic activity and that classification of an occupation in domestic law as a liberal profession is “not inconsistent with the fact” that they are engaged in economic activity.<sup>581</sup>

The other legal action concerning customs agents was *Commission v. Italy (CNSD)* which was an action against Italy for failure to fulfil an obligation.<sup>582</sup> The Italian government unsuccessfully argued, *inter alia*, that customs agents, like lawyers, surveyors or interpreters could not be “undertakings” because their services are intellectual and cannot be offered unless relevant permission is granted and particular conditions satisfied. It specifically argued there was “no unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis” and that all self-employed persons could not be treated as “undertakings.”<sup>583</sup> Advocate General Cosmas emphasised that the key issue is not the status of the entity but whether the activity is “economic” in the broad sense. In his view, there was no doubt that the activity of customs agents was economic because they offered “ ... in return for payment, services concerning the completion of customs formalities...”<sup>584</sup> Additionally, he observed that their activities “clearly require a minimum organisational framework of personal, tangible and intangible elements (for example the existence of a fully equipped office, communications and so forth) which have been set up for a certain purpose, which is the offer of services to the operators concerned with a view to profit.”<sup>585</sup>

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580 Commission Decision 93/438 CNSD [1993] OJ L 203/27; [1995] 5 CMLR 495, upheld by T-513 *CNSD v. Commission* [2000] ECR II- 1807.

581 Commission Decision 93/438 CNSD [1993] OJ L 203/27, Recital 40.

582 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851

583 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 46

584 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 53.

585 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 54.

Advocate General Cosmas concluded by noting how customs agents:

“fully assume all the economic risks involved therein, risks inherent, moreover, in the exercise of any economic activity which seeks to make a profit. That is the risk that the costs of the various factors intervening in the process of supplying the services will not be covered by payment for the services supplied to carry out the customs operations....if there is an imbalance between expenses and receipts, it is the customs agent himself who is required to make up the administrative deficit and run the risk of insolvency.”<sup>586</sup>

The Court of Justice decided that the customs agents’ activities were “economic” in character because they offer services for payment, assume the financial risks and must bear any deficit.<sup>587</sup> In its view, in such circumstances, the intellectual nature of the work, the requirement for authorisation and the fact that the work “can be pursued in the absence of a combination of material, non-material and human resources, is not such as to exclude it from the scope” of competition law.<sup>588</sup> In *Pavlov*, the Court of Justice readily classified as “undertakings” self-employed medical specialists because they provided economic services on a market and were “paid by their patients and assume the financial risks attached to the pursuit of their activity.”<sup>589</sup> Similarly, in *Wouters*, the Court of Justice remarked on how members of the Bar offered legal services for a fee and bore the risk of any deficit between expenditure and receipts and were, thus, “undertakings.”<sup>590</sup> Echoing earlier judgments, the Court averred that this conclusion could not be altered by the “complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated.”<sup>591</sup>

It is clear that persons, including professionals, who are self-employed, and/or in control of a business, engage in “economic activity” and, therefore, are “undertakings.” Thus, EU competition law may apply (if there is sufficient effect on interstate trade) where professionals act, for example, as independent contractors, specialists, consultants or independent providers of exclusive services

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586 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 55.

587 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 37.

588 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 38.

589 Joined Cases C-180- 84/98 *Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2001] 4 CMLR 1, [2000] ECR I-6451, para 76.

590 Case C-30/99 *Wouters v Algemene Raad Van De Nederlandse Orde van Advocaten* [2002] 4 CMIR 27 [2002] All ER (EC) 193, para 48.

591 Para 49. This echoes Joined Cases C-180-184/98 *Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2001] 4 CMLR 1, [2000] ECR I-6451, para 77.

and either i) enter into anti-competitive arrangements or ii) are subject to anti-competitive decisions of their professional associations. A similar range of persons could be “undertakings” under the Competition Act 1998. Consequently, many professionals if classified as “undertakings” could face a problem, if, for the reasons detailed in Chapters Four and Five, the application of competition law to a restriction prevents a different result being produced by the application of the ROTD.

#### **6.4 EMPLOYEES AS “UNDERTAKINGS” in EU COMPETITION LAW?**

Whether any professional *in employment* can be classified as an “undertakings” is the key question for this chapter. This question is crucial because classifying an employee as an “undertaking” has potentially very serious implications for the degree of overlap and interface between the ROTD and competition law in England and Wales.

The orthodox position is that employees are not “undertakings” for the purpose of competition law. For example, Bellamy and Child state that “[A]n employee is not an undertaking.”<sup>592</sup> Jones and Sufrin state that “it seems that employees acting as employees are not undertakings.”<sup>593</sup> This chapter suggests that the orthodox view is not so solidly founded that it will persist if seriously challenged. Three arguments are next offered to challenge the view that employees cannot be classified as “undertakings.” These are that the orthodox view, firstly, lacks solid support in judgments, secondly, leads to uncertainty and, thirdly, produces economically inconsistent outcomes.

##### *6.4.1 Orthodox View is not Solidly Supported by Case Law*

The first argument is that there is no EU Court judgment or European Commission Decision holding that employees cannot be regarded as “undertakings” for the

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592 D. Bellamy & Child (Ed. P Roth and V Rose) *European Community Law of Competition* (Oxford University Press 6th ed. 2008) para 2.021.

593 A. Jones & B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press 4th ed. 2011) 134

purposes of competition law. The EU Courts have not ruled conclusively that no employee can ever be an “undertaking” even where it was faced with cases involving employees.

Regrettably, the Court of Justice in *Wouters* did not express its view as to whether employed lawyers could be “undertakings.” This is perhaps because the referring national tribunal expressly stated that lawyers registered in the Netherlands were “undertakings” and the interveners did not challenge this point. The Commission’s Decision in *CNSD* specifically records that customs agents may be either employees or independent agents.<sup>594</sup> Although the Court of Justice judgment in *Commission v. Italy (CNSD)* mentioned the possibility of customs agents being employees, its analysis focused on the arguments of the Italian government that not all self-employed persons are “undertakings.”<sup>595</sup> *Suiker Unie* is sometimes cited as the authority for the view that employees are not “undertakings.”<sup>596</sup> However, the facts in *Suiker Unie* did not involve employees and the particular issue at stake was whether an *agent* was an “undertaking?” When answering this question the Court of Justice stated:

“...if such an agent works for the benefit of his principal he may, in principle, be treated as an auxiliary organ forming an integral part of the latter’s undertaking, who must carry out his principal’s instructions and thus, *like a commercial employee*, forms an economic unity with this undertaking.”<sup>597</sup>

On a close reading of this quotation, it may be argued that the Court of Justice was not making a determination that an employee is never an “undertaking” but, instead, simply drew an analogy between some agents and some employees. The italicised *dicta* from the judgment do not support the conclusion that no employee, in any circumstance, can ever be classified as an “undertaking.”

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594 Commission Decision 93/438 *CNSD* OJ [1993] L 203/27; [1995] 5 CMLR 889.

595 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851, para 37.

596 See for example, D. Bellamy & Child (Ed. P. Roth and V. Rose) *European Community Law of Competition* (Oxford University Press 6th ed. 2008) para 2.021 where the authors cite Cases 40-48 /73 *Suiker Unie v. Commission* [1975] ECR 1663.

597 In Joined Cases C-40—48/73 *Suiker Unie v. Commission* [1975] ECR 1663, para 539(emphasis added).

Advocate General Jacobs expressed a compelling view when he observed that that the Court of Justice in *Suiker Unie*:

“merely had to draw the line between employees and independent commercial agents in their respective relations to third parties. Thus, it could base its reasoning mainly on the attributability of employee’s activities to their employer.”<sup>598</sup>

Advocate General Jacobs rightly highlighted that the attribution of illegality as between principal and agent is only one of the tasks performed by the concept of “undertaking” and the other function is the more obvious one of determining “the categories of actors to which the competition rules apply.”<sup>599</sup> Recently, Jones pointed out how the concept of “undertaking” has been developed incrementally in two streams of jurisprudence (one stream dealing with the substantive reach of Art 101 and the other with the attribution of liability as between entities) and that each stream is, arguably, underpinned by different policy objectives and that, interpretations of “undertaking” in one line of cases may occur without full regard for the consequences for the other line of cases.<sup>600</sup>

#### 6.4.2 *Orthodox View Creates Uncertainty and Some Forced Reasoning*

The second criticism of the view that an employee cannot be an “undertaking” is that it creates uncertainty about the applicability of Art 101 to measures of associations of professionals. Under the orthodox position, an association whose members are all self-employed is an “association of undertakings” but an association of employees is not.<sup>601</sup> The orthodox view is uncertain as to whether an association comprising both employees and self-employed persons (for example accountants or architects) is an “association of undertakings.”<sup>602</sup> In practice, where

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598 C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie* [1999] ECR I-5751 [2000] 4 CMLR 446, para 209.

599 C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie* [1999] ECR I-5751 [2000] 4 CMLR 446, para 206.

600 A. Jones, “The Boundaries of Undertaking in EU Competition Law” (2012) 8(2) *European Competition Journal* 301, 304.

601 See Case C-30/99 *Wouters v Algemene Raad Van De Nederlandse Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 27,138 where Advocate General Léger stated “... it is not necessary for a body to carry out any economic activity in order to be classified as an association of undertakings (*van Landewyck* 87-88 and *IAZ* 19-20).

602 See Case C-30/99 *Wouters v Algemene Raad Van De Nederlandse Orde van Advocates* [2002] ECR I-1577,[2002] 4CMLR 27, para 53 where Advocate General Léger conceded it is “in reality, trickier to ascertain” whether or not it is an association of undertakings.

the percentage ratio of employed to self employed persons is low, the European Commission has, in effect, ignored the existence of employees.<sup>603</sup> An approach to classification that is based on percentage ratio is undesirable. Its shortcomings are well demonstrated by situations where the data on the employment status of individual members are not available. For example, the founding legal instrument of the European Patent Institute (EPI) did not distinguish between self-employed and employed patent representatives. Thus, when deciding that the EPI was an “association of undertakings” the Commission inelegantly (and perhaps unconvincingly) commented that the:

“fact that salaried professional representatives are also members of the EPI and have a say in determining the provisions of the code, which might not even concern them, does not prevent it from being considered that these provisions are the expression of the collective will of the EPI members who carry on the profession on a self employed basis.”<sup>604</sup>

Here, the Commission denied the admitted influence of the salaried employees on the substantive content of the Code to deflect its classification of the association’s members as “undertakings.” Similarly, in *COAPI*, no attention was paid as to whether the industrial property agents were self-employed or employed. The judgments on the customs agents association (CNSD) failed to tease out the significance of some customs agents being in employment.<sup>605</sup> In its *Report on Competition in Professional Services*, the Commission expressed the view that a:

“professional body acts as an association of undertakings for the purposes of Article [101] when it is regulating the economic behaviour of the members of the profession. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the professions.”<sup>606</sup>

This reasoning appears to be strained. Turning a blind eye to the existence of some employees not only makes the applicability of Art 101 to decisions of “associations of undertakings” uncertain but also leads to some forced reasoning where Art 101 is applied to professional associations whose members comprise both employees and self-employed persons.

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603 See for example, *Belgian Architects* [2005] OJ L 4/10 where the Commission noted that 91.5% of the members of the Belgian Architects’ Association’s were in independent practice, 5.9% were civil servants and the remainder were salaried.

604 Para 24.

605 Case C- 35/96 *Commission v. Italy (CNSD)* [1998] ECR I- 3851

606 *Commission Report on Competition in Professional Services*, COM (2004) 83 final, para 69.

### 6.4.3 Orthodox View Creates Economically Inconsistent Immunities

The third criticism of the orthodox view is that it creates economically inconsistent immunities from the prohibition in Art 101. Some of these inconsistencies may be illustrated with the following three examples.

Firstly, post-termination restrictions in a contract for the sale of a partnership (*e.g.* veterinarians) fall outside the reach of competition law if both partners are salaried employees. However, if the partners have enough equity shareholding they might be “undertakings” and competition law could be applicable. The second example is that Art 101 will not apply to any measure of an association of professionals if all its members are employees irrespective of the distortive market effects of the measure but Art 101 applies if the members are self-employed. From an economic perspective, the measures of both associations could be equally anti-competitive (*e.g.* a boycott) but Art 101 will not apply to an association if it is wholly composed of employees (*e.g.* stockbrokers/radiographers). The third example concerns post-termination restrictions in an employment contract. Competition law will not apply if the ex-employee takes up a new employment but will be applicable if the ex-employee starts a new business.<sup>607</sup> This is because the ex-employee becomes an “undertaking” when he pursues his own economic interests on cessation of employment. However, from an ex-employer’s perspective, there may be no meaningful distinction between an ex-employee competing against him as part of a small-scale new employment or in self-employment. Moreover, as Townley points out, distinctions based on whether a person works with or against the employer’s interests engender distortions that may undermine efficiency by, for example, encouraging firms to “bring functions in-house in order to avoid” competition law.<sup>608</sup>

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607 See I. Van Bael and F. Bellis, *Competition Law of the European Community* (The Netherlands; Kluwer Law International, 4th ed. 2005) 35 where the authors state “from the moment an employee pursues his own economic interests different from his employers’ interests he might well become an independent undertaking.”

608 C. Townley, “The Concept of an ‘Undertaking’: The Boundaries of the Corporation - A Discussion of Agency, Employees and Subsidiaries” in G. Amato and C-D Ehlermann (eds) *EC Competition Law: A Critical Assessment* (Oxford: Hart Publishing 2007) 15.



These examples show that immunity from the applicability of Art 101 is created on the basis of an employment relationship with another party and that this leads to outcomes that do not make economic sense. It is inconsistent to put some anti-competitive restrictions in personal contracts outside the reach of competition law on the purely formal grounds that the professional has an employer.

#### 6.4.4 Advocates General Recognise “atypical” Employees

There are Opinions from two Advocates General that articulate the possibility of some professionals in employment being regarded as “undertakings.”

In *Albany*, Advocate General Jacobs noted the basic principle that employees are not “undertakings” before he went on to predict that this principle would be tested in “borderline” areas, such as, perhaps, professional sport.<sup>609</sup> In *Pavlov*, Advocate General Jacobs discussed whether medical specialists could be “undertakings”.<sup>610</sup> As all the medical specialists were self-employed they were readily classified as “undertakings.” Interestingly, Advocate General Jacobs specifically comments how it is more difficult to classify employed than self-employed medical specialists. He elaborates as follows:

“[I]n principle, employees who offer labour against remuneration fall outside the scope of Art [101] (1). *Employed professionals are, however, not typical workers.* Sometimes their pay is directly linked to the profits and losses of their employer and they do not really work under the direction of that employer. They, therefore, constitute one of the borderline categories envisaged in my Opinion in *Albany*.”<sup>611</sup>

In *Wouters*, Advocate General Léger noted that, in the Netherlands, lawyers can act either as independent agents or as employees.<sup>612</sup> He subdivided the employed lawyers into two categories. His first group comprised employed lawyers who

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609 Case C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie* [1999] ECRI-5751 [2000] 4 CMLR 446, 459.

610 Case C 180-184/98 *Pavlov v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451, [2001] 4 CMLR 1.

611 Case C 180-184/98 *Pavlov v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451, [2001] 4 CMLR 1, para 112 (emphasis added).

612 Case C-30/99 *Wouters v Algemene Raad Van De Nederlandse Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 27, para 48.

“perform their services for, and under the direction of, another person who pays them remuneration...in that case [they] are workers and as such do not fall within the scope of Community competition law.”<sup>613</sup> This categorisation accords with the traditional conception of a person who is employed on the basis of receiving direction and remuneration from the “boss.” More interestingly, Advocate General Léger’s second group comprises *employed* lawyers who “do not really work under their employer’s direction and that their remuneration is directly linked to the latter’s profits and losses.” Advocate General Léger stated that such persons came within the borderline categories first articulated by Advocate General Jacobs. It seems that Advocate General Léger is making a finer subdivision than Advocate General Jacobs because he draws a distinction *within* a group of lawyers in employment based on their *de facto* circumstances.

The Opinions in *Albany* and *Pavlov* highlight two aspects that make the employment relationship “atypical”. Firstly, the employee does not really work “*under their employers’ direction*” and, secondly, *remuneration is linked to employers’ profits/losses*. The basis and potential scope of these two criteria are next explored in order to tease out the contours of this so-called “borderline” category so as to understand its potential scope.

The first criterion of “not working under the direction of the employer” connotes independence in the employee’s performance of the services. As such, it deviates from the conventional view of employment in the classic terms of a master and servant.<sup>614</sup> It seems clear that medical and legal professionals come within this category. The interesting question is whether the requisite level of independence from employer is found outside the traditionally defined liberal professions such as “occupations requiring special training in the liberal arts or sciences.”<sup>615</sup>

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613 Para 52.

614 See *C-22/98 Criminal Proceedings against Becu* [1999] ECR I-5665, [2001] 4 CMLR 26, para 26. Where the Court of Justice states “[t]he employment relationship ... is characterised by the fact that they perform the work ... for and under the direction of each of those undertakings...”

615 See *European Commission Report on Competition in Professions*, COM (2004) 83 final, para 1 which studies lawyers, accountants, architects, engineers and pharmacists and referred to tax advisers and estate agents as “neighbouring professions.”

There is research in the area of employment relations<sup>616</sup> that challenges the depiction of employees as dependent labour whose employers act as caretakers providing long term job security.<sup>617</sup> That research draws on theories of organizational behaviour and the sociology of work which examine the psychological<sup>618</sup> employment contract and ownership of human capital.<sup>619</sup> For example, Stone argues that certain employment relationships are no longer based on a psychological contract whereby the employer is the caretaker of the employee.<sup>620</sup> She highlights the creation by employers of new types of employment relationships which are *contingent* in two aspects: firstly the work is formally defined as short-term or episodic and, secondly, “the attachment” between the employer and employee “has been weakened.”<sup>621</sup> She records that the “recasualization of work” is not limited to “blue collar workers” but extends all along the employment spectrum to include “high end professionals and managers.”<sup>622</sup> She gives the example of Silicone Valley technicians who “are expected to chart their own path, face their own fortunes and manages their own careers in a “boundaryless”<sup>623</sup> workplace.”<sup>624</sup> These independent employees assume that they own their newly acquired knowledge based skills. Stone’s research is interesting for this chapter because it shows that various types of

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616 K. Stone, “The new Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law (2001) 48 UCLA L. Rev 519; K. Stone, “Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace” (2002) 34 Conn L. Rev 721.

617 See M. Roehling, “The Nature of the New Employment Relationship(s): A Content Analysis of the Practitioner and Academic Literatures” (1998) 39(4) Hum. Resource Mgmt, 305.

618 Organizational theorists coined this term to describe the employee’s beliefs about the terms of the employment contract. See further S.L. Robinson and D. Rousseau “Violating the Psychological Contract; Not the Exception but the Norm” (1994) 15 J. Org. Behav 245 and also, M. Cavanaugh and R. Noe “Antecedents and Consequences of Relational Components of the New Psychological Contract” (1999) 20 J. Org. Behav 323.

619 D. Neef, “Rethinking Economics in the Knowledge Based Economy” in D. Neef, G. Siesfeld and J Cafola (eds) *The Economic Impact of Knowledge* (Butterworth Heinemann 1998) .

620 K. Stone, “Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace” (2002) 34 Conn L. Rev 721,731 quotes from M. Cavanaugh and R. Noe, “Antecedents and Consequences of Relational Components of the New Psychological Contract” (1999) 20 J. Org. Behav 323, 327.

621 K. Stone, “Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace” (2002) 34 Conn L. Rev 721, 725.

622 K. Stone, “Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace” (2002) 34 Conn L. Rev 721,726.

623 See A. Miner and D. Robinson, “Organizational and Population Level Learning as Engines for Career Transitions” (1994) 15 J. Org Behav 345, 347 where the authors define a “boundaryless” career as a “career which unfolds unconstrained by clear boundaries around job activities, by fixed sequences of such activities, or by attachment to one organization.”

624 K. Stone, “Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace” (2002) 34 Conn L. Rev 721,732.

employees (including ones who are not liberal professionals) do not work under the direction of their employer and operate in an unattached manner. Arguably, such professionals in employment, on account of their functional independence, may well come within the “atypical” category and be liable to be classified as “undertakings.”

The second indicator of borderline employment cited by the Advocates General is that the employee’s “remuneration is directly linked to the [employer’s] profits and losses.” The level of exposure to financial volatility is set at a low level. It appears to be lower than the standard accepted by the Court of Justice in *CNSD* and *Wouters* which noted the individual’s obligation to *make good* any imbalance between expenditure and receipts which is quite close to the responsibilities of the self-employed. Moreover, the threshold in the Opinions of the Advocates General is also lower than the level of financial *risk* that would be required in order to render an agent independent from his principal.<sup>625</sup> The threshold stated in the Opinions potentially includes many situations where the employee has an opportunity or incentive to make money for his employer and, consequently, for himself. Examples could include situations where the employee is well remunerated by means of profit-share schemes and performance bonus arrangements.

On this basis, it would be a mistake to infer from the label “atypical” or “borderline” that only a small set of employees could potentially be classified as “undertakings.” It is possible for the approach of the Advocates General to “undertaking” to capture not only some traditional professionals but also some newer types of professionals in employment who perform independently of their employers’ directions and whose remuneration is linked somehow to employers’ profits. The “atypical” professionals in employment may not be limited to the liberal professions but could include estate agents, stockbrokers and sellers of other financial products, writers, artistic performers and IT specialists who enjoy autonomy in the execution of their daily work and are remunerated with a

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<sup>625</sup> See T- 325/01 *Daimler Chrysler AG v. Commission* [2005] ECR II-3319 on the level of risk borne by agents.

percentage share of the sale or “purse,” performance bonuses or commissions calculated as percentage of profits.

The cited Opinions of the Advocates General, the flexible approach of the EU Courts and the European Commission allied to this chapter’s criticisms of the orthodox approach means it is unsafe to assume that professionals in employment can never be “undertakings” in EU competition law. One author sees some merit in the possibility of considering “all employees whether they act for or against their employer, as “undertakings” in their own right.”<sup>626</sup>

The next question is whether a similar expansive interpretation of “undertaking” could be reached under the UK competition legislation. As detailed earlier in Chapter Three, EU competition law exerts considerable influence on the interpretation of UK competition legislation. S.60 of the Competition Act 1998 imposes particular duties of consistent interpretation.

## **6.5 EMPLOYEES AS “UNDERTAKINGS” in UK COMPETITION LAW?**

Whether employees may be “undertakings” under UK competition law is a crucial question when identifying the potential overlap and interface between national competition law and the ROTD. This section explores this question by examining some formal determinations on “undertakings” issued by courts and other organisations before considering other sources such as OFT Guidelines.

### *6.5.1 Formal Decisions.*

There have been few judgments discussing whether individuals are “undertakings.” In *Hendry*, it was common ground between the parties that self-employed professional snooker players were “undertakings” and that the WPBSA was an

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<sup>626</sup> See C. Townley, “The Concept of an ‘Undertaking’: The Boundaries of the Corporation- A Discussion of Agency, Employees and Subsidiaries” in G. Amato and C-D Ehlermann (eds) *EC Competition Law: A Critical Assessment* (Oxford: Hart Publishing 2007) 15

“association of undertakings.”<sup>627</sup> In *Qualifying Insurers Subscribing to the ARP and Capita London Market Services Limited v. Ross & Co and the Law Society*, the High Court did not have to decide whether Law Society members and the Society itself constituted “undertakings.”<sup>628</sup> This is because the Vice Chancellor, firstly, concluded that the professional indemnity insurance scheme was not anti-competitive and, in effect, this disposed of the case without having to consider the “undertaking” issue. More recently, in *ET Plus S.A.*, Gross J. made some interesting remarks in an application for a stay for arbitration.<sup>629</sup> The claimants disputed the jurisdiction of the arbitration by submitting various grounds including an argument based on Art 101. The essential element of this claim is that particular employees constituted “undertakings independent of their employers” (the Claimants) who engaged in unauthorised conduct with the individual defendants. While the judge readily accepted that some individuals may be “undertakings” he decided it was “fanciful” to regard these particular employees as “undertakings.”<sup>630</sup> In reaching this conclusion, he found it “instructive that the examples given in *Bellamy & Child, European Community Law of Competition* (5<sup>th</sup> ed.) are far removed from the facts” of this case.<sup>631</sup> However, it could be argued that the type of judgment (application to stay) and the nature of the dispute (alleged post-termination disclosure of confidential information by individuals employed by claimants) mean that the *ET Plus S.A.* judgment cannot be treated as an authoritative conclusion that no employee may be an “undertaking.”

*Safeway Stores Ltd. V. Twigger & Ors* considered the issue of liability as between a business (which was clearly an “undertaking”) and its employees.<sup>632</sup> The particular issue was whether the “undertaking” [employer] may recover damages from its ex-employees who were responsible for an infringement of s.2(1) of the Competition Act 1998. The Court of Appeal decided that the liability was personal to the “undertaking” and that the employer “undertaking” could not pass on the liability to its employees. Specifically, it noted that the Act (s.36) provides that an “undertaking” is liable to a penalty from the OFT and the “undertaking” can appeal

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627 *Hendry v. WPBSA* [2002] UKCLR 5.

628 [2004] EWHC 118 (Ch), para 45.

629 *ET Plus SA v. Welter* [2005] EWHC 2115, [2006] 1 Lloyds Rep 251.

630 Para 84.

631 *ibid.*

632 2010 EWCA Civ 1472

the penalty (s.46).<sup>633</sup> In reaching his decision, Pill LJ averted to the Act's policy which is to protect the public by imposing obligations specifically on the "undertaking." In his view:

" the policy of the statute would be undermined if undertakings were able to pass on the liability to their employees or ... their employees' insurers. Only if the undertaking itself bears the responsibilities and meets the consequences of their non-observance are the public protected. A deterrent effect is contemplated..."<sup>634</sup>

It is important to appreciate that the judgment did not generally discuss the concept of "undertaking" but, instead, examined the *basis of the liability of an undertaking.*"

The OFT in *Anaesthetists*, decided that a group of anaesthetists constituted one "undertaking" and that the constituent individual members were not "undertakings."<sup>635</sup> It based its conclusion on the fact that the group presented itself on the market as a single entity and the members "generate profits for the common benefit of the group, operate under a common name, share administrative functions such as joint billing, have a bank account (or accounts) in the name of the group and/or a single set of accounts is produced in respect of the group's commercial activities." It decided that the individual professional members of one group (GAS) conducted themselves as individual "undertakings" on the market. Later, the OFT investigated the admission rules of Glasgow Solicitors Property Centre which comprised solicitor estate agents on the basis that they were measures of an "association of undertakings". Regrettably, the decisions do not deal discretely with the question as to whether employed solicitors are "undertakings." In *Northern Ireland Livestock and Auctioneers Association* the members of the association operated marts and, as such, were clearly "undertakings" in the view of the DGFT.<sup>636</sup> The CAT ruled in *Institute of Independent Insurance Brokers v. DG of Fair Trade* that the General Insurance Standards Council (GISC), an industry

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633 Pill LJ contrasted the 1998 provisions with those in Part 6 of the Enterprise Act 2002 which created a criminal offence of dishonesty which may be committed only by individuals. Para 41  
634 Para 44.

635 "Where the general business practices of a group of individuals are such that the group engages in commercial or economic activity on a market and its individual members do not engage in that same commercial or economic activity on a market other than through the group for as long as they continue to be members of the group, then the group will be treated as a single undertaking rather than as an association of several undertakings for the purposes of the Competition Act 1998."

636 OFT 03/02/2003 [2003] UKCLR 433 para 24.

self regulator, was an “undertaking” but did not decide whether or not its individual members were “undertakings.”<sup>637</sup>

### 6.5.2 Guidelines and Opinions

When dealing with the question of whether a particular body or person is an “undertaking”, the OFT Guidelines may be relevant. S. 60 of the 1998 Act provides not only a link to EU competition law but, also, explains the structure of the Act in terms of providing general provisions requiring elaboration, which is not in the Act but in OFT Guidelines.<sup>638</sup> While the legislation does not accord legal effect to OFT Guidelines, they have, at least, “some persuasive authority.”<sup>639</sup> It is clear that Court of Justice case law on “undertaking” undoubtedly influenced the content of the OFT Guidelines 400 (on the “Major Provisions”) and Guidelines 401 (on the Chapter One Prohibition). Each of these Guidelines states, in identical terms, that an “undertaking”:

“*includes* any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status. It *includes* companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit making organisations.”<sup>640</sup>

The OFT Guidelines provide a non-exhaustive illustrative list of inclusions and do not contain any exclusions. The UK Guidelines include putative economic activity by virtue of the phrase “*capable*.”<sup>641</sup> Arguably, this phrase could include an employee who is not actually engaged in commercial activity but has the necessary *capability*. OFT Guidelines 408 on *Trade Associations, Professions and Self Regulating Bodies* note there is no statutory definition of trade associations, professions or other self regulating bodies and that the boundaries among the three

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637 Case Nos 1002/2/1/01, 1003/2/1/01, 1004/2/1/01) [2002 Comp AR 62. See B. Rodger, “Early Steps to a Mature Competition Law System” [2002] ECLR 61 where the author notes that the “robust” judgment will have implications for many areas of self regulation.

638 I. Maher, “Juridification, Codification and Sanction in UK Competition Law” (2000) 63 MLR 544, 550.

639 K. Middleton, B. Rodger et al, *Cases and Materials on UK and EC Competition Law* (Oxford: Oxford University Press, 2003), 122. See further. I. Maher, “Juridification, Codification and Sanction in UK Competition Law” (2000) 63 MLR 544, 551. For a discussion of “soft law” and its contribution to the evolution of competition law see H. Cosma and R. Whish, “Soft Law in the Field of EU Competition Policy” (2003) 14(1) European Business Law Journal 25.

640 OFT *Guidelines 400* para 1.9 and *OFT Guidelines 401* para 2.5 (emphasis added).

641 Guideline 400, para 2.5 (emphasis added).



terms may be “imprecise.”<sup>642</sup> They state that any body formed to represent its members in commercial matters may be an “association of undertakings” and that self regulating bodies are “associations of undertakings.”<sup>643</sup> The Guidelines are potentially more expansive than EU sources on “associations of undertakings” as they do not limit “associations of undertakings” to associations comprising only or mostly self-employed.

An interesting question is how, in the absence of a statutory definition of “undertaking”, UK courts may deal with the Opinions of Advocates General that some professionals in employment may be classified as “undertakings.” In general, as noted in Chapter Three, UK institutions have exhibited a generally receptive attitude to various EU materials in excess of the obligations imposed by s.60 of the Act. Considerable deference has been shown by some UK organisations to Opinions of Advocate General even though they are not expressly mentioned by s.60 when setting out the obligations of consistency with EU law. The Court of Appeal expressly reserved the issue as to whether Opinions come within the obligations of s.60 but noted they are “important and authoritative” and are “respectfully viewed by this court.”<sup>644</sup> This attitude suggests that the courts may be receptive to the views of Advocate General Jacobs and Advocate General Léger on the possible classification of employees as “undertakings.”

The CCAT judgment in *Bettercare Group Ltd* took an interesting approach to deciding whether a particular body was an “undertaking.”<sup>645</sup> It stated that “...we conceive it our duty under s.60(1) to approach the “undertaking” issue in the manner in which we think the European Court would approach it, as regards the principles and reasoning likely to be followed.”<sup>646</sup> It not only echoed<sup>647</sup> the Court

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642 Para 1.2.

643 Para 7.2.

644 Buxton LJ in *Napp Pharmaceuticals Holdings Limited v Director General of Fair Trading* [[2002] EWCA Civ 796; [2002] 4All E.R. 376, para.37. In *Intel Corporation v. VIA Technologies Inc* [2003] ECC 16, [2002] EWCA Civ 1905 para 43 the Court of Appeal had regard to an Opinion of an Advocate General which described the similarities between the European Commission practice and a US antitrust doctrine.

645 *Bettercare Group Limited v. Director General of Fair Trading* [2003] ECC 40

646 The CCAT readily brought its task within the remit of s.60 by deciding that the “question whether a particular body is or is not an “undertaking” for the purpose of the Chapter II prohibition ( or indeed the Chapter I prohibition) of the Act is a question which, in a broad sense,

of Appeal's view that Opinions are "important and authoritative"<sup>648</sup> but specifically considered the Opinions of Advocate General Jacobs on "undertakings."<sup>649</sup> While the particular issue at stake in *Bettercare* was the classification of *public bodies* (not employees) the CCAT noted as "a key consideration" Advocate General Jacob's remark that "the underlying question is whether the entity is in a position to generate the effects which the competition rules seek to prevent."<sup>650</sup> It is here suggested that this functional or teleological interpretative technique would admit some employees to be treated as "undertakings."

UK courts, if minded, do not face any serious domestic obstacles to interpreting the concept of "undertaking" to include employees. The prompt or catalyst may come from an EU judgment that a professional in employment is an "undertaking." Then, national courts could follow the EU approach given the express provisions in the Act (EU derived concept of "undertaking" and s.60). Even if there is no judgment, a UK court faced with the question may be guided by Opinions envisaging that "atypical" employees may be "undertakings."

The question of whether an employee may be an "undertaking" could arise where it is sought to apply UK competition law to a measure of an association whose members include mostly employees, for example, if an individual professional is unhappy about an industry wide restriction contained in rules of his professional association. If an association of employees is treated as an "association of undertakings" then the extension of national competition law to contracts with employees may be hard to resist.

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"corresponds" to the question of whether a particular body is or is not an "undertaking" for the purposes of Arts 101 and 102 of the Treaty, para 31

647 [2003] ECC 40 para 37

648 Buxton LJ in *Napp Pharmaceuticals Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796; [2002] 4All E.R. 376, para.37

649 C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie* [1999] ECRI-5751 [2000] 4 CMLR 446, para 91

650 *Bettercare Group Limited v. Director General of Fair Trading* [2003] ECC 40 citing C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie* [1999] ECRI-5751 [2000] 4 CMLR 446, paras 102 and 190

In practice, the overlap between ROTD and UK competition law is greater than the overlap between ROTD and EU competition law. This is because bilateral contracts attract the application of national competition law more readily than EU competition law due to the absence of jurisdictional criteria requiring an “appreciable” effect on inter-state trade.<sup>651</sup> Additionally, the cumulative effect within the national context could be relatively great.<sup>652</sup> The *de facto* filters in EU competition law (appreciable effect on interstate trade) that render employment agreements below the EU law radar cannot be relied on to keep employment agreements below the range of domestic competition law. Thus, a more extensive overlap between ROTD and UK competition law is likely and a more extensive overlap based on broadly interpreting “undertaking” increases and widens the scale of the interface problem.

## 6.6 CONCLUSION

This chapter explored the scope of the concept of “undertaking.” It identified the possibility of some employees being classified as “undertakings” under EU competition law and under UK competition law. Any expansion in the interpretation of “undertakings” accords with the understandable inclination of the EU organisations to extend rather than to confine the reach of EU competition law.<sup>653</sup>

This chapter cast doubt on the sustainability of the orthodox view that employees cannot be “undertakings.” It highlighted the view of some Advocates General that “borderline” employees may be “undertakings.” It argued that this category could include more than members of the liberal professionals. Moreover, it suggested that

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651 EU competition law applies only if there is an adequate effect on interstate trade, see Case 56/65 *Societe La Technique Miniere v. Maschinenbau Ulm GbH* [1966] ECR 234.

652 As the Irish Competition Authority opined “ While such an agreement between one individual and an employer may not have a substantial impact on competition, the existence of such agreements in many sectors of the economy mean that their combined effect would be to greatly restrict competition.” *Notice on Employee Agreements and the Competition Act*, Iris Oifigiuil No 75, 18 September 1992.

653 J. Mashaw, “Agency Statutory Interpretation” in *Dynamic Statutory Interpretation*” Issues in Legal Scholarship Article 9 (2002) (bepress). Also see P. Strauss “When the judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History” (1990) 66 *Chi-Kent L. Rev* 321.

even if the Court of Justice itself does not issue a judgment deciding that an employee is an “undertaking” there is a possibility that the UK institutions may come to that conclusion on the basis of the Opinions of Advocates General.

If employees are regarded as “undertakings” under national competition law then the scale of the overlap with the ROTD becomes more extensive than initially envisaged. This extension of overlap also increases the scale of the interface between ROTD and competition law. It is important to recall (from the discussion in Chapter One) that the ROTD offers a very high level of protection to employees and quasi-employees who are subject to “restraints of trade” and that this is valued protection which is not inevitably provided by competition law. This is especially the case where an unreasonable restraint on a professional is within the reach of competition law but is not prohibited by competition law.

***PART III***

***SOLUTIONS***

**CHAPTER SEVEN**

## *CHAPTER SEVEN*

# **SOLUTIONS**

### **7.1 INTRODUCTION**

Part II (Chapters Four to Six) of this research examined the interfaces between the ROTD and competition law in England and Wales. It identified acute problems where a professional is not allowed to rely on the ROTD to resist an unreasonable restriction in situations where the restriction comes within the reach of but does not infringe competition law.

Part III (Chapter Seven) searches for and offers viable proposals for judge to resolve the most acute problems for professionals who are subject to restrictions that come within the overlap areas created by the intersections of the ROTD with competition law in England and Wales. Section 7.2 considers the ROTD's interfaces with UK competition law. Section 7.3 discusses the ROTD's interfaces with EU competition law. Section 7.4 offers two general and seven specific proposals that aim to resolve interface problems for professionals who wish to rely on the ROTD to resist restrictions that do not infringe competition law in England and Wales.

In its search to resolve the ROTD's problematic interface with UK competition law, Section 7.2, firstly, considers the possibility of UK competition law not following EU competition case law. Secondly, it explores whether some canons of statutory interpretation offer mechanisms to delineate the ROTD's interface with UK competition law in a more satisfactory manner for restrained professionals. It discusses, firstly, the "presumption against casual change" and, secondly, the "mischief rule."

Section 7.3 identifies Art 3 of EU Reg. 1/2003 as the mechanism that offers the most satisfactory delineation of the ROTD's interface with EU competition law. In

particular, it suggests that Art 3(3) offers a viable route to a solution because it allows national courts to apply stricter national law that “predominantly pursues” a different objective to the one pursued by EU competition law.

Section 7.4 presents proposals for judges in England and Wales which will allow the ROTD to benefit from the mechanisms identified in Sections 7.2 and 7.3. The proposals intend to ensure that judgments under the ROTD will clearly convey significant differences between the ROTD and competition law. The proposals articulate the ROTD’s essential differences in terms of its concern for the protection of restrained *persons* rather than for *market* competition. Studies of key judgments delivered under the ROTD are threaded throughout the presentation of the proposals in order to show that the proposals are realisable. Articulating the ROTD’s distinctiveness is the key to securing its legitimate application to restrictions within the overlap areas that are not proscribed by competition law in the UK.

The proposals (presented in Section 7.4) aim to ensure that the ROTD will benefit from, as appropriate, either the canons of construction (detailed in Section 7.2) and/or the saving provision made in Art 3(3) of EU Reg. 1/2003 (detailed in Section 7.3).

## **7.2 INTERFACE WITH UK COMPETITION LAW**

Section 7.2 explores two separate routes to solve the ROTD’s interface problems with UK competition law. The first route (Section 7.2.1) explores the possible deviation by UK competition law from EU competition law. The second route (Section 7.2.2) considers interpreting UK competition law according to particular canons of statutory interpretation in order to curtail the legislation’s negative impact on the availability of the ROTD.

### *7.2.1 UK Competition Law not copy EU Competition Law*

The extent to which UK competition law must closely copy EU competition law is an important issue. Undoubtedly, s.60 of the Competition Act 1998 impedes

courts' freedom to interpret UK competition law. Nonetheless, it might not present an insuperable obstacle to interpretations under UK competition law that do not exactly mirror EU competition law. It is notable that the s.60(2) obligation is only to "secure that there is no inconsistency" with the EU judgments.<sup>654</sup> Moreover, Parliament intentionally chose this phrase and rejected a specific proposal providing that the application of domestic competition law "*must conform with*" EU competition law.<sup>655</sup> During debates Lord Kingsland enquired why the proposed legislation did not provide that it must conform to EU competition law jurisprudence.<sup>656</sup> In reply, Lord Simon declined to make the proposed duty "yet tighter" because of the impossibility of creating an exact copy of the EU system which has "elements which cannot simply be transposed into the domestic system."<sup>657</sup> Parliament accepted that those applying domestic competition legislation must "be able to produce a *sensible translation*" of the EU case law into the domestic system.<sup>658</sup>

Different interpretations of UK competition law are permitted by s.60 where "relevant differences" exist. Literally interpreted, "relevant differences" are ones existing "between the provisions concerned" which means the Treaty Articles and the Act. Nonetheless, "relevant differences" have been identified between other texts, for example, between Director's Guidance and the Commission Guidelines.<sup>659</sup> Given that a wide attitude has already been taken to identifying "relevant differences," courts might accept differences in context and purpose as between the EU rules and the national rules as amounting to "relevant differences."

Arguably the EU threshold rule, based on the potential effect on inter-state trade, creates a peculiar context within which EU competition law developed. In particular, the threshold test means that many personal contracts do not routinely come within the remit of Art 101 and, consequently, that there is not a thoughtful EU jurisprudence on the application of Art 101 to restraints on *persons*. This

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654 Opinions of Advocates General are not mentioned in s.60.

655 25 Nov 1997, Col. 960.

656 25 Nov 1997, Col. 960.

657 25 Nov 1997, Col. 961.

658 25 Nov 1997, Col 961 (emphasis added).

659 *Napp Pharmaceutical Holdings Limited v. The Director General of Fair Trading (No 4)* [2002] ECC 13 CCAT at para 503.



lacuna did not emerge following any policy to exclude them but, rather, as an incidental consequence of a threshold test that, in practice, excludes many personal contracts that are not part of a network of similar agreements. Arguably, this creates a contextual “relevant difference” with the national legal environment where national competition legislation is applicable to many more personal contracts. It could be argued that because EU competition law develops in a different context (one that did not greatly involve restrictions on individuals) it cannot be thoughtlessly copied when national competition law is applied to restrictions on professionals, *a fortiori* when contained in personal contracts. This is especially the case if the UK competition legislation does not prohibit a restriction but prevents it from being challenged under a different national law.

Thus, s.60, if interpreted literally and according to Parliamentary intention, allows domestic competition legislation to be construed in ways that do not exactly copy EU competition law.<sup>660</sup> The possibility of UK competition law taking a different approach than Art 101(1) to certain restrictions on persons is next explored.

One possibility is for courts to apply any “necessity” approach under s.2 of the Competition Act 1998 in a stricter manner than occurs under Art 101(1). Two such options are next explored. These are for s.2, firstly, to apply a more stringent test of “necessity” and, secondly, to take a sterner attitude to justifications.

The first option is for UK competition law to interpret the standard of “necessary” in a way that is closer to “essential.” It may be recalled from Chapter Three that Morgan J. in *Bookmakers’ Afternoon Greyhound Services* quoted Commission Guidelines stating that the concept of “necessity” could be satisfied “by something which is not strictly essential” but is difficult to implement.<sup>661</sup> However, under s.

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660 See *The Institute of Independent Insurance Brokers v. The Director General of Fair Trade* [2001] CAT 4, para 215 where the Tribunal states “.. although s.60 of the Act enjoins us to construe s.2 consistently with Community law, our primary task, as a United Kingdom tribunal, is to construe the statute with which we are concerned.”

661 *Bookmakers’ Afternoon Greyhound Services v. Amalgamated Racing* [2008] EWHC 1978, para 452 which states “[T]he concept of necessity has some flexibility and in an appropriate case can be satisfied by facts which show that it would be difficult to achieve the commercial objective without the presence of the restriction.” See further para 336 which states “[I]f on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction

60(3), courts are obliged only to “have regard” to guidelines from the European Commission. A greater obstacle is that the Court of Justice in *Pronuptia* accepted that a restriction on franchisees could be *necessary* where the restriction avoids inconvenience for the franchisor.<sup>662</sup>

Another option (involving a divergence from EU competition law) might be for courts to scrutinise justifications submitted under s.2 that are based on “public interest” criteria. Following *Wouters*, it is unlikely that the national court can refuse outright to consider any justifications based on “public interest” criteria. As discussed in Chapter Three, the High Court in *Bookmakers’ Afternoon Greyhound Services*, citing *Wouters*, appeared prepared to accept an ancillary restraint may be “justified on *public interest* grounds, notwithstanding its anti-competitive effect.”<sup>663</sup> However, it may be possible to argue that “public interest” for the purposes of national competition law ought to be interpreted in its *own context*.

It could be argued that the interpretation of “public interest” needs to be grounded in the national legal tapestry and, thereby, take account of values such as individuals’ freedoms. The freedom of restrained market actors to choose was recognised under domestic competition law by the Competition Appeal Tribunal (CAT) in *GISC*.<sup>664</sup> Here, the Tribunal accepted that the contested scheme limited “the freedom of the insurer members of GISC to deal with whom they please. Freedom to compete implies the freedom to choose how, where, on what terms and with whom to do business.”<sup>665</sup> This quotation not only links freedom to compete directly with the freedom to choose but, additionally, emphasises the importance of freedom of choice for individuals in the conduct of their business. The Tribunal took great account of the negative reality of the restrictive effects on the members’

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would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it.”

662 Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] E.C.R. 353.

663 *Bookmakers’ Afternoon Greyhound Services v. Amalgamated Racing* [2008] EWHC 1978, para 332 The dispute in this case did not involve restrictions on persons but involved a commercial venture among businesses for the exclusive and collective sale of media rights which was challenged by a third party.

664 *Institute of Independent Insurance Brokers v. The Director General of Fair Trade* [2001] CAT 4

665 *Institute of Independent Insurance Brokers v. The Director General of Fair Trade* [2001] CAT 4, para 183.

freedom to do business in their chosen manner.<sup>666</sup> Thus, the argument could be made that any justification based on “public interest” cannot be accepted under s. 2 unless it takes account not only of the interests of the general public but, additionally, of the restrained person’s interests (including his freedom to choose how he conducts his business). In this way, the “public interest” type justification is subjected to stricter testing which may result in it being rejected.

However, it must be acknowledged that UK competition law taking a different attitude than EU competition law offers, at best, a partial solution as only some professionals would benefit. Moreover, UK competition law diverging from EU competition law is not a smooth solution. For example, it may be difficult to overcome the consistency requirement in s.60. In particular, convincing a court of the existence of “relevant differences” may be difficult. Debates in the House of Lords predicted this qualification would cause litigants to debate what amounts to “relevant differences.”<sup>667</sup> Moreover, it may be difficult to persuade the court that the divergence is an acceptable “sensible translation.”<sup>668</sup> Finally and most importantly, producing different outcomes under domestic and EU competition law creates fresh and fundamental difficulties such as uncertainty and inconsistency. Such solution places a great strain on drawing the jurisdictional line (based on effect on trade between Member States) between national and EU competition law. It is not desirable that outcomes for persons under competition law vary according to different geographical locations in the UK so that some professionals will be subject to EU competition law (in which case the Art 101 outcome will prevail). With these shortcomings in mind, the search for solutions to the domestic interface next takes a different tack.

### *7.2.2 Canons of Statutory Interpretation*

This research next argues that the ROTD’s applicability to restrictions on professionals need not be automatically quenched by the concurrent applicability of competition legislation. UK competition legislation, unlike, for example, Trades

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<sup>666</sup> *Institute of Independent Insurance Brokers v. The Director General of Fair Trade* [2001] CAT 4, para 189

<sup>667</sup> February 23, 1998 col. 514.

<sup>668</sup> See House of Lords 25 Nov 1997, Col. 961.

Union legislation, does not expressly dis-apply or curtail the applicability of the ROTD.<sup>669</sup> In the 1960s, Wilberforce observed, extra-curially, that the effect of the Restrictive Trade Practices Act 1956 was to render “invalid a wide class of agreements which would never have been upset at common law and not to make any declaration as to the exclusion of the common law as such.”<sup>670</sup> It is next suggested that a similar view could be taken of current competition legislation and its interface with the ROTD.

This chapter suggests that the relationship between the ROTD and current competition legislation is more nuanced than is portrayed by the residual applicability approach or “rug” metaphor (described in Chapter Four) which over-excludes the ROTD as it prevents the ROTD’s application to restrictions where competition legislation also applies. Some traditional canons of statutory interpretation are next considered as mechanisms that might prevent the ROTD from being ousted or unduly muzzled by UK competition legislation.

#### 7.2.2.1 “Presumption Against Casual Change”

The first canon of construction that may protect the ROTD’s sphere of operation is the “presumption against casual change.” This is a “well established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.”<sup>671</sup> To quote Bennion: “[I]t is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute by a side wind, but only by measured and considered provisions.”<sup>672</sup>

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669 S. 11 Trade Union and Labour Relations (Consolidation) Act 1991. See further *Goring v. British Actors Equity Association* (1987) IRLR 122 and *Boddington v. Lawton* [1994] ICR 478. 670 R. O Wilberforce, A. Campbell, *The Law of Restrictive Trade Practices and Monopolies* (London: Sweet and Maxwell 1966) 14.

671 *National Assistance Board v. Wilkinson* [1952] QB 648, 661.

672 See F.A.R Bennion, *Statutory Interpretation* (London: Butterworths 1992) 561 where the author states that the court, when considering “which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened this principle.”

The “presumption against casual change” may reinforce the concept of “undertaking” in UK competition law acting as a firewall to protect the ROTD against the encroachment by UK competition law following expansive interpretations in EU competition law to include employees. “Undertaking” is not defined in the Competition Act 1998. Parliament specifically declined to insert a definition into the legislation based on the EU case law.<sup>673</sup> It may be argued that “undertaking” does not capture employees if the legislation is interpreted according to the “presumption against casual change.” To characterise employees as “undertakings” could, against all expectations, bring employment contracts within the reach of competition law and, consequently, upset the longstanding exclusive applicability of the ROTD which offers unique protection to employees. However, this route offers only a partial solution to interface problems. A wider based argument is next explored.

The “presumption against casual change” supports the argument that competition legislation should be interpreted so that it does not oust the ROTD’s applicability because this is too radical an outcome to be effected in an incidental or casual fashion. If competition law determinations negatively affect actions conducted under a different legal instrument, this would radically change the legal landscape by means of a “side wind” as Bennion termed it.<sup>674</sup> In particular, any determination that an unreasonable “restraint of trade” does not infringe s.2 or s.18 of Competition Act 1998 should not affect the force of the ROTD. Similarly, the ROTD should not be affected by any determination that a particular “restraint of trade” is permitted by s. 9 of Competition Act 1998 or by a block exemption. This approach also accords with the literal rule of statutory interpretation under which exemptions/exceptions should not produce an effect that is wider than their express terms which are expressly limited to the prohibition in s.2 of the Competition Act 1998. It is accepted that an exemption from s.2 cannot protect against the reach of the prohibition of an abuse of a dominant position contained in s.18 of the 1998 Act. Under the “presumption against casual change” it could be argued that no determination under the competition legislation should provide a general protection

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673 Feb 23 1998 Lord Fraser of Carmyllie col 510 withdrew amendments in the face of certain defeat.

674 F.A.R Bennion, *Statutory Interpretation* (London: Butterworths 1992) 561.

against the applicability of a stricter and longstanding common law doctrine such as the ROTD. The “presumption against casual change” is a canon of interpretation which refuses to interpret legislation in ways that produce, in a casual fashion, fundamental changes to the legal landscape.

For the ROTD to benefit from this canon of interpretation, it is essential that the ROTD and competition legislation are clearly understood to be different. It must be clear that any displacement of the ROTD by competition law would amount to significant *change*. To this end, the proposals contained in this chapter (in Section 7.4) intend to ensure that the ROTD is not seen as being equivalent to competition law.

#### 7.2.2.2 “Mischief Rule”

The “mischief rule” offers an additional canon of statutory interpretation for delineating the ROTD’s interface with competition legislation in a more satisfactory mode for restrained professionals. This, the oldest rule of statutory interpretation, interprets legislation on the basis that it provides a cure to a “mischief” or problem.<sup>675</sup> As such, it curtails the effect of legislation to remedying only the recognised “mischief.” Recently, this approach to statutory interpretation was expressly used by the Court of Appeal in relation to s.188 of the Enterprise Act 2002 which creates the “cartel offence.” In *R. v. B (I)*, Hughes L.J. stated that preparatory documents are “of course admissible to demonstrate the *mischief* in contemplation.”<sup>676</sup> To this end, he took account of “numerous statements made before and at the time of its creation” including a White Paper<sup>677</sup> and an OFT commissioned Report<sup>678</sup> which was, he noted, “substantially accepted by the government.”<sup>679</sup> This judgment, it is suggested, shows that a broad range of materials may be consulted when ascertaining the “mischief” sought to be cured by competition legislation.

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675 See further R. Cross, *Statutory Interpretation* (Butterworths, 3rd ed.1995).

676 *R. v. B (I)* [2009] EWCA Crim 2575, para 21(emphasis added).

677 *Productivity and Enterprise: A World Class Competition Regime* (July 2011).

678 *Proposed Criminalisation of Cartels in the UK* (Hammond and Penrose, November 2001)

679 Para 22

The “mischief rule” supports interpreting the concept of “undertaking” so that it does not include employees. Under the “mischief rule”, it could be argued that employment contracts were never a problem that was intended to be cured with the competition legislation. There was no intention of Parliament to bring employment relationships within the reach of competition legislation. The 1989 White Paper stated that employment relations would be excluded.<sup>680</sup> It is suggested that courts in England and Wales could interpret “undertaking” to include only an entity or person engaged in economic activity *for himself*. Implying the two words “for himself” is a purposive interpretation which would reflect the legislature’s intention. However, a solution based on defining “undertaking” offers only a partial solution because it only assists employees. Thus, a broader solution is next canvassed.

It is essential to identify the “*mischief*” that the competition legislation intended to rectify. There are many official statements that throw light on the ambition of the 1998 Act. Some statements refer to the shortcomings of the pre-1998 legislative models (discussed in Chapter Four). For example, the Green Paper *Review of Restrictive Trade Practices Policy* stated that the “system is inflexible and slow, too often concerned with cases which are obviously harmless and not directed sufficiently at anti-competitive agreements. The scope for avoidance and evasion considerably weakens any deterrent effect the system has and enforcement powers are inadequate.”<sup>681</sup> Other statements evidence Parliament’s desire to align domestic competition law with the EU model for the benefit of businesses. For example, in Parliament, Lord Simon of Highbury emphasised “the critical importance in minimising burdens on business. The problems for business in having two similar but, in their detail, different prohibitions interpreted according to two different bodies of case law could be very burdensome.”<sup>682</sup>

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680 *Opening Markets: New Policy on Restrictive Trade Practices Policy* Cm 727 1989

681 Department of Trade and Industry Cm 331, Mar 1988, para 3.8

682 Lord Simon of Highbury. Hansard (HL), October 30th 1997, Col. 1145 and also see November 25th 1997 col. 960 where he noted that the purpose of s. 60 was “to ensure that as far as possible the UK prohibitions are interpreted and develop consistently with EC prohibitions. That is of crucial importance in minimising burdens on business.”

Political scientists have offered some explanations for the protracted delay in reforming UK competition law.<sup>683</sup> As early as 1962, the Board of Trade had reported that in the long term it would be “desirable ... on the grounds of policy, as well as legal convenience, for the member states to harmonise their domestic legislation with that of the Community legislation.”<sup>684</sup> Official documents dating from the 1970s set out a number of proposals for reform.<sup>685</sup> In the Green Paper (“*Review of Restrictive Trade Practices: A Consultative Document*”) the DTI proposed repealing the registration model and enacting EU style provisions.<sup>686</sup> The 1989 White Paper<sup>687</sup> confirmed this intention and a Green Paper in November 1992<sup>688</sup> set out some options.

It seems clear that the 1998 competition legislation was intended to create a more effective and efficient system to tackle anti-competitive market practices<sup>689</sup> which would reduce compliance costs for businesses by reducing the differences between the national models and EU competition law.<sup>690</sup> Thus, the “mischief” related to the operational shortcomings of the investigation and registration models which included their poor fit with EU competition law.<sup>691</sup> It must be emphasised that the “mischief” was not any interface problem with the ROTD. There does not appear to be any Parliamentary intention to enact competition law as a licencing solution to a perceived problem of too strict determinations under the ROTD. During the protracted period for reform there seems to have been no discussion of any

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683 See K. Suzuki, “Reform of British Competition Policy: Is European Integration the Only Major Factor” European Institute of Japanese Studies (EJIS) (2002) Working Paper No. 94 Stockholm School of Economics for a study of interest configurations pertaining to UK competition policy.

684 PRO EW 27/5 Board of Trade Report 1962 p 26 cited in S. Eyre and M. Lodge “National Tunes and a European Melody ? Competition Law Reform in the UK and Germany” (2000) 7(1) *Journal European Public Policy* 63, 68.

685 *Green Paper A Review of Monopolies and Mergers* Policy Cmnd 7198 ( May 1978); *A Review of Restrictive Trade Practices* Policy Cmnd 7512 (March 1979) which resulted in some changes in the Competition Act 1980.

686 *A Consultative Document* Cm 331 (London HMSO March 1988).

687 *Opening Markets: New Policy on Restrictive Trade Practices*.

688 *Abuse of Market Power* DTI Review of Restrictive Trade Practices Cm 2100.

689 See J.P. Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Law* (London: Sweet and Maxwell, 1974) 427 for criticism of the Fair Trading Act 1973 and a call to repeal the 1956 system and to put in its place an integrated comprehensive administrative organisational approach to cartels, monopolies and mergers. Also see R. Whish, *Competition Law* (Lexis Nexis Butterworths, 5th ed. 2003.) 306 where the author noted the legislation’s ineffectiveness in punishing cartels, the weak powers of DGFT to obtain information and the little control over unilateral conduct of firms possessing market power.

690 Lord Haskel, Hansard November 17th 1997, col. 417.

691 Following *Pepper v. Hart* [1993] AC 593, 634 Courts may refer to Ministerial statements made in parliamentary debates if the legislation is ambiguous, obscure or would result in absurdity.



problems with the ROTD. The implications for the ROTD of enacting EU model were not greatly debated in Papers and Reports.<sup>692</sup> The Green Paper of March 1988 did not consider the interface between the common law and the proposed legislation.<sup>693</sup> The absence of a considered debate in the literature suggests that there was no sense of a problematic interface with the ROTD that needed to be remedied with competition law.

Chapter Four traced the development of the ROTD's current problematic interfaces and suggested they evolved as an *incidental* consequence of the enactment of the EU style competition law model. This chapter proposes that, under the "mischief" rule, competition legislation need not be interpreted in ways that curb the ROTD's application to unreasonable "restraints of trade." It could be argued that competition legislation was enacted to do a particular task (to tackle anti-competitive practices effectively and to fit with EU competition law model) and is not intended to cure any "mischief" such as a too strict attitude taken by the ROTD to unreasonable restrictions on persons. This argument will only succeed if the ROTD and competition law are not seen as equivalent legal measures.

Either or both of the two canons of interpretation (discussed above) might create, from the perspective of restrained professionals, a better interface for the ROTD with competition legislation. In cases where competition legislation prohibits a restriction that falls foul of the ROTD, both laws could remain applicable. Where an unreasonable "restraint of trade" is not prohibited either by s 2. or s.18 of the Competition Act 1998, the ROTD could retain its cogency to determine that the restriction is unenforceable. The "presumption against casual change" and the "mischief rule" depend on the differences between the ROTD and competition legislation being articulated clearly.

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692 R.J. Taylor, "UK Competition Law and Procedures - An Overview" [1988] 9(4) ECLR 446, 457.

693 See R.J. Taylor, "UK Competition Law and Procedures - An Overview" [1988] 9(4) ECLR 446. 457 where the author argued the need for "some dovetailing" between the ROTD and the 1998 Act.

The proposals, detailed in Section 7.4, intend to ensure that the ROTD is seen as different to competition law and, thus, not incidentally ousted by the concurrent applicability of UK competition legislation. However, as indicated in Chapter Four, the ROTD's interfaces with UK competition law may be affected by EU competition law. This is due to logical and practical arguments in favour of the ROTD having the same interface with EU competition law and with national competition law.<sup>694</sup> For this reason, the search for solutions to the ROTD's interface with EU competition law is next pursued.

### 7.3 INTERFACES WITH EU COMPETITION LAW

Chapter Five pinpointed two sources which, in combination, create problematic interfaces between the ROTD and EU competition law. These sources are, on the one hand, Art 3 of EU Reg. 1/2003 and, on the other hand, High Court judgments including *Days Medical Aids Ltd*.<sup>695</sup> In particular, the “convergence rule” in Art 3(2) stipulates that restrictions which do not infringe Art 101 may not be prohibited by “national competition law.” The High Court expressed the view that Art 3(2) may operate *vis-a-vis* the ROTD.<sup>696</sup> The most problematic EU law interface with the ROTD is with Art 101.

This section looks to Art 3 of EU Reg. 1/2003 as a mechanism that would allow the ROTD to prohibit restrictions that come within the reach of but are not prohibited by Art 101. It starts by examining how the term “national competition law” was recently approached by a Court of Appeal (Criminal Division) judgment on Art 3. Next, it explores whether Art 3(2) offers a solution for the ROTD. Finally, it examines Art 3(3) which allows the application of stricter national law which predominantly pursues a different objective to EU competition law. It argues in favour of interpreting Art 3(3) with the assistance of Recital 9 of Reg. 1/2003. It emphasises the relevance of Recital 9's statements on the scope of Art 3(3) in

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694 A. Scott, “The Evolution of Competition Law and Policy in the United Kingdom”, LSE Working Papers 9/2009 p 5. Available at SSRN: <http://ssrn.com/abstract=1344807>

695 *Days Medical Aids Ltd v. Pihsiang* [2004] EWHC 44 (Comm) Langley J and also *Jones v. Ricoh (UK) Ltd* [2010] EWHC 1743 (Ch) Roth J.

696 *Days Medical Aids Ltd v. Pihsiang* [2004] EWHC 44 (Comm) Langley J. and also *Jones v. Ricoh (UK) Ltd* [2010] EWHC 1743 (Ch) Roth J.

relation to, firstly, the objective of EU competition law and, secondly, the type of national law that does not predominantly pursue a competition law objective.

### *7.3.1 Court of Appeal's View of "National Competition Law"*

In 2009, the Court of Appeal (Criminal Division) in *R. v. B(I)* discussed the meaning of "national competition law" for the purposes of Art 3(3).<sup>697</sup> The judgment involved an appeal from the Crown Court's decision that it enjoyed jurisdiction to try the "cartel offence" created by s.188 Enterprise Act 2002. The appellant argued that s.188 was "national competition law" for the purposes of Art 3 of Reg. 1/2003 and, therefore, only "national competition authorities" designated in accordance with Reg. 1/2003 could enforce it. S.188 creates a criminal offence that involves an element of dishonesty. Hughes L.J. noted that the arrangements caught by s. 188(2) and (3) are "within but narrower in scope than those caught by" Art 101.<sup>698</sup> The decision of the Court of Appeal (Criminal Division) that s.188 (a law it described as "one arrow in the UK legislative quiver designed to prevent anti-competitive practices") is not "national competition law" may appear, at first sight, to be good news for those arguing that the ROTD is not "national competition law."<sup>699</sup>

However, in order to see whether this judgment could save the ROTD from being classified as "national competition law," it is important to examine the *basis* upon which the Court of Appeal reached its conclusion. While Hughes L.J. states that there was "no doubt whatever" that s.188 was enacted in order "to provide a stronger deterrent to such practices to threaten executives with imprisonment than was achieved by threatening undertakings with civil financial penalties..." he also finds that this fact did not conclude the question whether s.188 is "national competition law" in the sense intended by Reg. 1/2003.<sup>700</sup>

Hughes L.J. noted that the Court had earlier decided (in *R. v. Goldshield Group plc*) that "Art 3 had no impact on a prosecution for an established criminal

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697 [2009] EWCA Crim 2575, [2010] Bus L.R. 748, Hughes L.J., David Clark J., Judge Morris QC.

698 [2009] EWCA Crim 2575, para 15.

699 [2009] EWCA Crim 2575, para 23.

700 [2009] EWCA Crim 2575, para 24.

offence... and the fact that the offence was alleged to have taken place in the course of a price-fixing did not mean otherwise” in relation to the common law offence of conspiracy to defraud.<sup>701</sup> Hughes L.J. quoted as follows from the judgment of Moses L.J. in *Goldshield* who had stated that:

“...the Serious Fraud Office and the Crown Court are not seeking to apply competition rules at all... Both the eighth recital and article 3(3) merely reaffirm that which is plain from the whole of Regulation 1, namely that it has no application to laws other than those which constitute the rules on competition within the Community.”<sup>702</sup>

Although Hughes L.J. agreed with the Moses L.J., he clearly asserted that this quotation from *Goldshield* did not determine whether s. 188 is “national competition law” because the s. 188 cartel offence, unlike conspiracy to defraud, “is plainly targeted at anti-competitive behaviour.”<sup>703</sup>

Hughes L.J. noted that the concept of “national competition law” found in Art 3 appears rarely in the Regulation (only in Art 12 (2) and Recitals 8 and 16).<sup>704</sup>

Recital 8 provides that Reg. 1/2003:

“does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.”

Hughes L.J. noted that the final sentence of Recital 8 is not “directly repeated” in Art 3.<sup>705</sup> He then expressed the view that it:

“may or may not have been thought in some circles that this sentence [in Recital 8] demonstrates that a national law such as section 188 is outside the scope of the Modernisation Regulation. Taken by itself, however, its meaning seems to us to be obscure. It begs the question whether section 188, which is transparently a new law designed to strengthen local prevention of anti-competitive behaviour, is a means of enforcing competition rules applying to undertakings or an ancillary law which bolsters the effectiveness of competition rules but is not concerned with directly enforcing them against undertakings. In order to answer that question it is necessary to read the Modernisation Regulation as a whole.”<sup>706</sup>

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701 [2007] EWCA Crim 2659.

702 [2009] EWCA Crim 2575, para 24.

703 [2009] EWCA Crim 2575, para 24.

704 [2009] EWCA Crim 2575, para 28.

705 [2009] EWCA Crim 2575, para 29.

706 Para 30.

Clearly the Court took a contextual approach to interpreting Art 3 by reading Reg. 1/2003 *as a whole*. On this basis, the Court decided that Reg. 1/2003 “is concerned with the direct enforcement of articles [101] and [102], that is to say with decisions whether agreements (etc) are valid or rendered invalid for infringements of those articles.”<sup>707</sup> The validity of an agreement does not arise in relation to s.188.

However, the question of the validity or invalidity of agreements is at the core of disputes where it is sought to rely on the ROTD. The Court of Appeal’s task was helped by the fact that the “risk of inconsistency arising between a prosecution under section 188 and a decision on the validity of an agreement (etc) under article [101/102] is likely to be small.”<sup>708</sup> However, the same observation cannot be made about situations involving the application of the ROTD. Given this difference between s.188 and the ROTD, this research takes the view that the judgment in *R. v. B(I)* does not provide a solid basis for arguing that the ROTD is not “national competition law.” The Court specifically rejected the argument that the test for what amounts to “national competition law” is:

“as broad as whether the law in question pursues the objective of preventing anti-competitive practices. The relevant objective is applying articles [101] and [102], that is to say deciding whether there has or has not been an infringement of them.”<sup>709</sup>

It is noteworthy that the Court of Appeal is prepared to take account of a sentence that appears in a recital but not in an article in Reg.1/2003. The Court did not demean or disregard the sentence in Recital 8 on the grounds that it is merely part of a non-binding recital. This approach supports this chapter’s argument that the recitals in Reg. 1/2003 may assist the interpretation of Art 3. Attention is next paid to Art 3(2) and Art 3(3) in order to explore if they offer any solution if the ROTD is regarded as “national competition law” and, thus, activates Art 3(2)’s “convergence” rule.

### 7.3.2 Implications of Art 3(2)

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707 Para 34.

708 Para 36.

709 Para 32.

Chapter Five discussed the evolution of problematic interfaces between the ROTD and EU competition law. It detailed the emergence of the most problematic interface between Art 101 and stricter national law. The problem is that the application of Art 101 must prevail over stricter national competition law (which apparently includes the ROTD). The focus of this section is on the *intended scope* of paragraphs (2) and (3) of Art 3 in order to explore possible solutions to the interface problem.

Arts 3(1), (2) and (3) evolved incrementally in opposition to the European Commission's initial proposal. Its text would have been highly exclusionary of national competition law as it proposed:

“[W]here an agreement... within the meaning of Article [101] of the Treaty, or the abuse of a dominant position within the meaning of Article [102] may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.”<sup>710</sup>

Some Member States expressed formal reservations about the negative effect that this proposal would exert on national law.<sup>711</sup> A Working Party on Competition (comprising representatives from the European Commission and Member States) was established to conduct an in-depth review of the proposed Regulation, including Art 3. The Working Party produced several Reports that proposed compromise texts and, also, recorded some discordant views of Member States.<sup>712</sup> Similar views of Member States were also recorded in Reports published by the Presidencies in 2001 and 2002. The November 2001 Report from the Presidency records the view of France that Art 3 must not put into question the application of specific national laws permitting domestic reactions to problems arising in a Member State that EU competition law cannot deal with suitably.<sup>713</sup> The May 2002

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710 *Proposal for Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 and amending Regulations. (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87.COM (2000) 582 final. OJ C 365 19.12.2000.*

711 The most enduring reservation was expressed by Germany. Other Member States that expressed reservation included Austria, France and Finland.

712 The Working Party on Competition had meetings on June 19th, July 1st, July 22-23, September 4th, October 21-22 and November 5th. See Interinstitutional file 2000/0243(CNS) 11791/02, p12. Available at <http://register.consilium.europa.eu/pdf/en/02/st11/st11791.en02.pdf>

713 Interinstitutional file 2000/0243(CNS) 13563/01 p 20 available at <http://register.consilium.europa.eu/pdf/en/01/st13/st13563.en01.pdf>. The Report also noted that Germany and Austria had expressed reservations.

Report from the Presidency notes the support of Finland and Sweden for the view of France.<sup>714</sup>

As adopted, Art 3(2) contains the “convergence” rule in its first sentence and an exception in its second sentence. The latter specifically allows the application of “stricter national laws” to prohibit *unilateral conduct*. It is not clear what national laws come within this exception. Recital 8 of Reg. 1/2003 offers the example of abusive conduct towards economically dependent undertakings.

The Commission has discussed the scope of this exception in terms of national laws that prohibit the exploitation of superior bargaining power in the context of distribution agreements in the retail sector (*e.g.* tie-ing) and resale below cost or at a loss.<sup>715</sup> It gives the example of the French law on the abuse of economic dependence contained in Article L.420-2 of the Code de Commerce which, to quote the Commission, “prohibits, where the functioning or the structure of competition may be affected, the abusive exploitation of the condition of economic dependence in relation to a customer company or a supplier by non-dominant firms that have a powerful position with regard to their commercial partners.”<sup>716</sup>

While it is possible that the exception in Art 3(2) may benefit the ROTD, this is far from certain as many “restraints of trade” are not unilaterally imposed and the ROTD is applicable outwith a relationship of economic dependency. This chapter next suggests that Art 3(3) is a more viable mechanism to rely on in cases where Art 3(2) is activated by the application of ROTD. To this end, it pays close attention to the intended scope of Art 3(3).

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714 Interinstitutional file 2000/0243(CNS) 8383/02 Report from Presidency to Permanent Representatives Committee/Council., available at <http://register.consilium.europa.eu/pdf/en/02/st08/st08383.en02.pdf>.

715 See the *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003* {COM(2009) 206 final} para 162 *et seq.* Para 164 notes that some national laws on the abuse of economic dependence apply to exclusionary conduct and normally require that there is no reasonable alternative source of supply/demand of the product or service. Para 170 discusses laws banning resale at cost or at a loss as an example of unilateral conduct. The Paper is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT>

716 *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council- Report on the functioning of Regulation 1/2003* {COM(2009) 206 final}, para 165. The Paper is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT>

### 7.3.3 Evolution of Art 3(3) and Recital 9

Art 3(3) has the effect of dis-applying the “convergence” rule of Art 3(2). It provides:

“[W]ithout prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Article [101] and [102] of the Treaty.”

Art 3(3) allows the unimpeded application of stricter national law that “predominantly pursues” a different objective to the one pursued by Arts 101 and 102. If the ROTD comes within this saving provision its interface problem with Art 101 is solved. In order to understand the scope of Art 3(3) it is essential to examine why and how paragraph (3) was enacted. The next discussion aims to shine some light on the type of national laws that Member States intended to protect with Art 3(3).<sup>717</sup>

As noted above, the Commission had proposed an exclusionary one paragraph provision in 2000 which was later amended incrementally following contributions from Member States. The May 2002 Report from the Presidency records a specific suggestion from France to add a new paragraph to Art 3 to provide:

“[T]his provision is without prejudice to the implementation ...of national law that mainly pursues a different or complementary objective from that assigned to Articles [101] and [102]....”<sup>718</sup>

It seems that this suggestion from France is the genesis of Art 3(3). France, additionally and contemporaneously, offered a detailed proposal, to amend Recital 8.719 Recital 8, at that time, provided that:

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717 See further M.C. Lucey, “Europeanisation and the Restraint of Trade Doctrine” (2012) 32 No. 4 Legal Studies 632

718 Interinstitutional file 2000/0243(CNS) 8383/02 Report from Presidency to Permanent Representatives Committee/Council. Available at <http://register.consilium.europa.eu/pdf/en/02/st08/st08383.en02.pdf>

719 Interinstitutional file 2000/0243(CNS) 8383/02. Available at <http://register.consilium.europa.eu/pdf/en/02/st08/st08383.en02.pdf>



“.. provision must be made... to regulate the relationship between Articles [101] and [102] and national law by excluding the application of national law to agreements ... within the scope of Articles [101] and [102].”

France proposed to amend the Recital to provide:

“[T]he Treaty assigns to Articles [101] and [102] an objective of protecting competition within the common market. Member States can take appropriate measures to protect other legitimate interests..... To the extent that such a law mainly pursues a different or complementary objective from that assigned to Articles [101] and [102], national competition authorities or national courts can apply it on their territory in parallel with and independently from articles [101] and [102].”<sup>720</sup>

After slight amendment, these two proposals from France became a new paragraph to Art 3 and new Recital [8(a)] in the September 2002 Report.<sup>721</sup> Finally, they appear (with some amendment) in Reg. 1/2003 as Art 3(3) and Recital 9. The shared evolution of Recital 9 and Art 3(3) supports the argument that close regard should be had to Recital 9 when interpreting Art 3(3). It is clear that Art 3(3), at the insistence of some Member States, is intended to allow the application of stricter national law that “predominantly pursues an objective different from that pursued” by EU competition law. As Art 3(3) does not provide specific guidance on the objective pursued by EU competition law, regard should be had to Recital 9 when applying Art 3(3) on the grounds of their intertwined evolution.

#### 7.3.4 Recital 9 on the “Objective” of EU Competition Law

Art 3(3) does not detail what objective is pursued by EU competition law. Recital 9 states that Member States may apply national law that “pursues predominantly *an objective different from that of protecting competition on the market.*” This view of the objective of EU competition law is undoubtedly pithy. It gives no hint of the debates surrounding attempts to define the objectives of EU competition law.<sup>722</sup>

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<sup>720</sup> Interinstitutional file 2000/0243(CNS) 8383/02 p 12. Available at <http://register.consilium.europa.eu/pdf/en/02/st08/st08383.en02.pdf>

<sup>721</sup> Interinstitutional file 2000/0243(CNS) 11791/02 p 6-7 and p12. Available at <http://register.consilium.europa.eu/pdf/en/02/st11/st11791.en02.pdf>

<sup>722</sup> For a discussion of the role played by EU competition law in liberal democracy see G. Amato, *Antitrust and the Bounds of Power* (Hart Publishing 1997). See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press 1998) for an argument that Austrian and German traditions of Ordo-liberalism influenced the drafters of EU competition law. A different view is offered by P. Akman, “Searching for the Long-Lost Soul of Article 82” (2009) OJLS 267. On EU competition law and public policy, see G. Monti, “Art 81 EC

The objective of competition law has been articulated by the European Commission in market terms such as the efficient allocation of resources, “consumer welfare”<sup>723</sup> along with the market integration goal.<sup>724</sup> As recently as October 2012, the Vice President of European Commission responsible for Competition Policy, Joaquin Almunia, stated that “[H]alf a century after its establishment, EU competition policy has not lost its force as a factor of integration.”<sup>725</sup> The aim of competition law to integrate the EU market is also expressed in judgments from the 1960s to the present decade.<sup>726</sup> The range of objectives that may be pursued by EU competition law is neatly conveyed by Odudu’s question which asks “ ... whether Union competition law exists to promote efficiency, to achieve the Union objective of market integration or to promote certain market freedoms desirable in a democracy or to achieve any Union objective?”<sup>727</sup> That quotation lists various goals with economic and political

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and Public Policy 39 (2002) CMLRev 105 and C. Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing 2009).

723 M. Monti “European Competition Policy for 21st Century” in B. Hawk (ed.) [2000] Fordham Corp. L. Institute chapter 15. The meaning of “consumer welfare” has attracted debate, especially as it is not commonly found in Court of Justice judgments as pointed out by P. Akman, “Consumer Welfare and Art 82 EC: Practice and Rhetoric” (2009) 32(1) World Competition 71. In Joined Cases C501/06P, C513/06P, C515/06 P and C 519/06P *GlaxoSmith KlineServices Unlimited formerly GlaxoWellcome plc v. Commission* [2009] ECR I-9291[63] the Court of Justice stated that Art 101 “aims to protect not only the interests of competitors or of consumers but also the structure of the market and, in so doing, competition as such.”

724 A hierarchy of objectives is set out by the *European Commission Annual Report on Competition Policy 2000*. The first objective is the “maintenance of competitive markets” while the second is the “single market objective.” The *2004 Guidelines on the Application of Art 81(3)* in para 13 provide that “[T]he objective of Art [101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.”

725 Speech, *Competition Policy as a Pan European Effort*, delivered on October 2nd in Nicosia, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/672&format=HTML&aged=0&language=EN&guiLanguage=en>

726 Cases 56 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 is an early example of EU competition law’s pursuit of market integration objectives. Also see Case C- 126/97 *Eco Suisse China Time Limited v Benetton International NV* [1999] ECR-I- 3055, [2000] 5 CMLR 816 para 36 where the Court of Justice states that Art [101] “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.” More recent judgments on the single market goal include Cases C- 403/08 and C-429/08 *Football Association Premier League Ltd v. QC Leisure* judgment Feb 03, 2011 (not yet reported).

727 See O. Odudu “The Wider Concerns of Competition Law” (2010) 30 Oxford Journal of Legal Studies no. 3, 599, 600 and at fn 4 for lengthy citation of bibliographical sources on competition valued variously for efficiency, for integration and freedoms. Also see C.-D. Ehlermann and L. Laudati (eds) *Objectives of Competition Policy European Competition Law Annual 1997* (Oxford: Hart Publishing 1998).

resonances. This research does not intend to advance the complex debate on the legitimate objectives of EU competition law. It takes the position that, for the purposes of Art 3(3), Recital 9 (albeit cryptically) articulates the objective of EU competition law as “the protection of competition in the market.” Thus, the distinctive focus of competition law, for the purposes of Art 3(3), is *market competition*.

Furthermore, it is useful, when exploring the particular objective of EU competition law, to reflect on the *categories of persons* that it intends to protect. Part I of this research argued that EU competition law does not pursue, as a priority, the safeguarding of the freedoms of restrained professionals.<sup>728</sup> Chapter Two discussed cases where EU competition law was applied to restrictions on persons in ways that sought to benefit *consumers*.<sup>729</sup> The Commission’s *Report on Competition in Professional Services* of 2004 states that “[M]ore efficient and competitive professional services will benefit *consumers* directly.”<sup>730</sup> It is regrettable that the term “public” is sometime used in competition law cases where the term “consumers” is both more accurate and more appropriate for its connotation of actors in the market.<sup>731</sup> For example, in *Pronuptia*, the Court of Justice expressly noted the benefit that would accrue to the *public* from the exclusive purchasing obligation on franchisees, but, in reality, the only beneficiaries would be consumers.<sup>732</sup> In any event, it seems that the objective pursued by EU competition law is primarily centred not on protecting restrained persons but on protecting market competition with the aim of protecting consumers and the so-called “public.”

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728 T-193/02 *Piau* [2005] ECR II 209, appeal from *PIAU COMP /34 124 15* April 2002 para 29 and para 106 where the General Court specifically rejected the arguments of the players’ agent (*Piau*) that the licencing regulations restricted his “freedom to conduct business.”

729 This research agrees with the view expressed by G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007) 1057 that the notion of consumer protection encompasses more than “mere economic interest, and embraces also health and safety as well as the right to information.”

730 *Report on Competition in Professional Services* COM (2004) 83 final, para 104

731 G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007) 1076 describes as “problematic” decisions (e.g. *Phillips Osram*) in which the Commission “substitutes the consumers’ interest with the interest of the public” on the grounds that Art. 101(3) explicitly mentions the consumer but not the general community or public at large.

732 Case 161/86 *Pronuptia de Paris GmbH v Irmgard Schillgallis* [1986] E.C.R. 353, para 21.

### 7.3.5 Recital 9 on the National Laws Saved by Art 3(3)

Recital 9 offers some illustrations of national law that Member States may apply because they predominantly pursue a different objective to EU competition law. It states, *inter alia*, that:

“[T]his Regulation does not preclude Member States from implementing ... national legislation which *protects other legitimate interests* provided that such legislation is compatible with the general principles and other provisions of Community law....Accordingly, Member States may...implement ...*national law that prohibits ... acts of unfair trading practices*, be they unilateral or contractual. Such legislation pursues a specific objective, *irrespective of the actual or presumed effect of such acts on competition in the market*. This is particularly the case for legislation which *prohibits undertakings from imposing* on their trading partners, obtaining or attempting to obtain from them terms and conditions that are *unjustified, disproportionate or without consideration*.”<sup>733</sup>

The above list of national laws that pursue other (i.e. not competition law) objectives includes laws prohibiting “unfair trading practices.” Such legislation which is distinct from competition legislation is found in some Member States. For example, Germany has a long tradition with its *Gesetz Gegen den Unlauteren Wettbewerb* (UWG).<sup>734</sup> In Germany, revised UWG legislation came into effect in July 2004 and, *inter alia*, replaced the older concept of “gute Sitten” (honest practices) with “Unlauterkeit” (unfairness) but intentionally does not define “unfair.”<sup>735</sup> In France, there are laws which prohibit unfair trading practices (*pratiques commerciales déloyales*). It is important to emphasise that these are distinct from the French laws prohibiting the abuse of economic dependence (which are regarded as anti-competitive practices), that they concern restrictive trade practices in contracts or torts and are enforced by civil courts and not by the competition law institutions.<sup>736</sup> This research does not suggest that every provision

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<sup>733</sup> Emphasis added.

<sup>734</sup> The first *Gesetz Gegen den Unlauteren Wettbewerb* (UWG) was adopted in 1896 and replaced in 1909 and in 2004. The 1909 Act provided a template for countries including Austria, Belgium, Spain and Poland, see further F. Henning-Bodewig, *Unfair Competition Law* (Kluwer 2006).

<sup>735</sup> F. Henning-Bodewig, “A New Act against Unfair Competition in Germany” (2005) *International Review of Intellectual Property and Competition Law* 421, 425.

<sup>736</sup> See the *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council- Report on the functioning of Regulation 1/2003* {COM(2009) 206 final} para 165. The Paper is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT>

of the German or French unfair trading practices law invariably comes within Art 3(3) but, rather, that they give some flavour of the type of national law that the drafters of Art 3(3) and Recital 9 may have had in mind.

Recital 9's phrase "irrespective of the actual or presumed effect of such acts on competition in the market" is a useful yardstick for identifying the national laws saved by Art 3(3). It appears to envisage laws that strike at a measure regardless of the measure's consequence for the market. It has been suggested by de Smijter and Kjoelbye that Art 3(3) covers national laws whose objective "is to regulate contractual relationships between undertakings by stipulating the terms and conditions rather than their competitive behaviour on the market."<sup>737</sup> This formula offers useful support for the argument that Art 3(3) saves the ROTD.

#### 7.3.6 Art 3 and ROTD

It is significant that Art 3 was recast so radically from the European Commission's proposal by means of interventions and reservations of Member States. Its radical revision indicates that the scope intended by Member States for Art 3 differs from the wholly exclusionary version proposed by the Commission. Furthermore, it evidences Member States' intention to preserve the applicability of some stricter national law in cases where EU competition law does not prohibit a particular measure. Reservations of Member States on the draft versions of Art 3 were recorded as late in the process as September 2002.<sup>738</sup> These reservations included the view of Finland that Art 3 must not put into question the application of specific national law dealing with specific national problems and the general reservation of Germany (supported by Spain and Finland ) about EU competition law having absolute priority and insisting that the application of stricter national law should be

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<sup>737</sup> See *Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council- Report on the functioning of Regulation 1/2003* {COM(2009) 206 final} para 181 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT> citing E. de Smijter and L. Kjoelbye, "The Enforcement System under Regulation 1/2003" in J. Faull & A. Nikpay, *The EC law of Competition* (Oxford: Oxford University Press 2007) part 2.59.

<sup>738</sup> Interinstitutional file 2000/0243(CNS) 11791/02 pp 6-7 and p12. Available at <http://register.consilium.europa.eu/pdf/en/02/st11/st11791.en02.pdf>

possible.<sup>739</sup> This chapter takes the view that Art 3(3) offers a route to save the ROTD from the “convergence” obligation of Art 3(2).

This research suggests that Recital 9 provides three touchstones against which the ROTD may be assessed in order to argue that it comes within the saving provision of Art 3(3). The first of these relates to the type of contractual terms that the national law prohibits and it focuses on criteria such as *unfair, unjustified and disproportionate*. The second touchstone shines light on any imbalance of power in the relationship between the restrained and the restraining party/entity which meant that terms were more *imposed* than thoroughly negotiated by equals. The third touchstone is the national law’s *disinterest in the market implications* of the restrictive measure. With these touchstones in mind, the next section offers detailed proposals regarding judgments under the ROTD. If judges keep these proposals in mind, then, the ROTD’s distinctive objectives will be clearly conveyed. The result is that Art 3(3) will allow the ROTD to resist restrictions that are not prohibited by Art 101 and, in this way, the most problematic interface for the ROTD is solved.

## 7.4 PROPOSALS

Sections 7.2 and 7.3 identified distinct mechanisms that would allow the ROTD to resist a restriction which also comes within the reach of but is not prohibited by UK competition law and/or EU competition law. The most viable section 7.2 mechanisms are the traditional canons of statutory interpretation that apply to domestic competition legislation. The preferred mechanism identified in section 7.3 is Art 3(3) which determines the interface with Art 101 and, in practice, may also be relevant to national competition legislation. Section 7.4 offers proposals that seek to ensure the ROTD benefits from either or both sets of mechanisms. It presents general proposals and specific proposals for courts in England and Wales which aim to articulate the ROTD’s concern for the *protection of the interests of restrained persons* rather than for market competition. These proposals assist

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<sup>739</sup> Interinstitutional file 2000/0243(CNS) 11791/02, p12 fn 30. Available at <http://register.consilium.europa.eu/pdf/en/02/st11/st11791.en02.pdf>

judges to convey the ROTD's distinctiveness so that the ROTD may legitimately be applied to a restriction which does not infringe competition law.

In order to demonstrate the viability of the proposals, studies of key judgments delivered under the ROTD are presented along with the proposals. The studied cases are: *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd*;<sup>740</sup> *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd*;<sup>741</sup> *Proactive Sports Management Ltd v. Wayne Rooney, Stoneygate 48 et al*;<sup>742</sup> *Eastham v. Newcastle United Football Club Ltd and Ors*;<sup>743</sup> *Macken v. O' Reilly*<sup>744</sup> and *Adamson v. New South Wales Rugby League*.<sup>745</sup> The selection of cases is a balanced one as the first three cases involve "restraints of trade" in personal contracts and the final three cases deal with "restraints of trade" in rules of an association or other entity.

This section starts by offering two general proposals. The first of these is that courts must advert to the public policy dimensions of the ROTD. The second general proposal is for courts to use the language of fairness and justice and to refer expressly to the personal liberties and rights of the restrained persons. The seven subsequent more specific proposals give particular expression to the general proposals when courts pronounce on the ROTD's i) availability/scope and ii) its test. The specific proposals direct courts towards emphasising that the impact of the restriction *on the restrained person* is a crucial issue when deciding whether the ROTD is available and/or when applying the ROTD's test. The ambition of these general and specific proposals is to ensure that the ROTD is not regarded as *competition law* and, therefore, can be applied to resist restrictions on professionals that do not infringe competition law in England and Wales.

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740 [1968] AC 269.

741 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308; 1315 [1974] 3 All E.R. 616 HL affirming [1974] 1 All ER 171 CA.

742 [2010] EWHC 1807 (QB) Manchester District Registry Mercantile Court, Judge Hegarty QC, on app [2011] EWCA 1444.

743 [1964] Ch 413.

744 [1979] ILRM 79.

745 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242.

### 7.4.1 General Proposals

The general proposals focus on how judgments under the ROTD are drafted because they need to differentiate themselves patently from competition law judgments. To this end it is, firstly, proposed that judgments expressly advert to the unique public policy foundations of the ROTD. Secondly, it is proposed that judgments clearly identify the freedoms and liberties that may be affected by the restrictive measure. That these two proposals can operate in combination is succinctly demonstrated by Lord Reid's observation that:

“...as the whole doctrine ...is based on *public policy*, its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that *freedom* which it is the policy of the law to protect.”<sup>746</sup>

This type of language gives a ROTD judgment a tenor and texture that clearly differentiates it from competition law.

#### 7.4.1.1 General Proposal No. 1: Emphasise Public Policy Foundations

The first general proposal is for judgments to emphasise how the ROTD's public policy foundations shape its attitude towards safeguarding persons against unreasonable restrictions. Lord Pearce expressly identified “public policy [as] the ultimate basis of the courts' reluctance to enforce restraints.”<sup>747</sup> Judgments should clearly show how public policy is the platform that informs decisions as to i) whether the ROTD can be applied to a particular measure and ii) how the reasonableness test is applied. When reaching these decisions courts should expressly draw on the ROTD's public policy roots. This proposal will help courts convey the ROTD's objective of making widely available an effective mechanism to allow persons to resist the enforcement of unreasonable restrictions. Courts

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<sup>746</sup> *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 501 (emphasis added).

<sup>747</sup> *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 324.



could, for example, explain that the intervention of the ROTD to appraise the reasonableness of consensual clauses is founded on public policy considerations.<sup>748</sup>

The ROTD has to calibrate compromises among broad ranging principles of public policy. In *Esso*, Lord Morris of Borth-y-Gest stated that in the tussle between different applicable principles “that which makes certain covenants in restraint of trade unenforceable will, in some circumstances, be strong enough to prevail. Public policy will give it priority.”<sup>749</sup> When deciding whether the ROTD is applicable to a particular measure (which is outside the traditional categories of employment and sale of business agreements) the ROTD has to reconcile public policies such as “... on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that everyone should have unfettered liberty to exercise his powers and capacities for his own and the community’s benefit.”<sup>750</sup> When applying the ROTD’s test courts should expressly call on public policy, for example, by noting that an employee’s skill is in “no sense the employer’s property and it is contrary to public policy to restrain its use in any way.”<sup>751</sup> In cases involving employment and quasi-employment contracts, the ROTD pursues the public policy of allowing employees to leave and to use their acquired skills for other employers.<sup>752</sup> The Court of Appeal has stated that it would be “contrary to public policy” if the solicitor was prevented from acting for his client by a clause insisting on loyalty to a former employer.<sup>753</sup> The Court of Appeal has expressly drawn on public policy in order to end the “vice” of ex-employees being subjected to apparently excessive restraints.<sup>754</sup>

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748 See R.A. Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell, 2nd ed. 2009) 188 where the author argues that a court “is even prepared to embark upon an examination of the ‘reasonableness’ of the contract as between parties to it indicates that an interventionist approach is being adopted which is quite distinct from that which governs the enforceability of contracts generally.”

749 *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 305.

750 *Vancouver Malt & Sake Brewing Co v. Vancouver Breweries* [1934] AC 181, 189 (Lord Macmillan for Judicial Committee) and later cited by High Court of Australia in *Peters (WA) Ltd v. Petersville Ltd* [1999] ATPR 41, para 17.

751 *Strange (SW) Ltd v. Mann* (1965) 1 WLR 629, Stamp J.

752 *Countrywide Assured Financial Services Ltd v. Deanne Smart, Marc Pollard* [2004] EWHC 1214, Laddie J., para 7.

753 *Oswald Hickson Collier v. Carter-Ruck* [1984] 2 All ER 1518.

754 *J.A. Mont (UK) Ltd. v. Mills* [1993] FSR 577, 584 (CA) Simon Brown LJ.

These examples of judicial expressions on public policy portray, in distinctive terms, the ROTD's concern for protecting restrained persons. The Irish High Court neatly articulated the public policy based connection between society and the individual when it described the ROTD's objective as being "from the standpoint of the public good, to protect the right to work of weaker parties from abuse and to gain the economic benefits of preventing such abuses."<sup>755</sup> Even if the ROTD does not confer a positive "right to work," the doctrine vindicates, at least, an individual's liberty to earn income without unreasonable impediment.<sup>756</sup>

As shown in Chapter One, the protection offered by the ROTD is not limited to employees or quasi-employees but extends to other persons in relatively weaker bargaining positions. In *Schroeder*, Lord Diplock stated that when courts refuse to enforce provisions "whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19<sup>th</sup> century economic theory to the general public of freedom of trade, but the protection of those whose bargaining power is weak against those whose bargaining power is stronger..."<sup>757</sup> This quotation makes the important point that the public policy basis of the ROTD is not an obsolete or historical element but is one with a contemporary currency. For this research, the importance of public policy lies in how it can guide the ROTD towards defining and articulating itself in distinctive terms.

#### 7.4.1.2 General Proposal No.2: Use Language of Rights and Fairness

The second general proposal is for ROTD judgments to cite principles such as justice and fairness and, where possible, comment on the *rights* of the restrained person. This proposal should be acted upon when courts i) make initial determinations as to whether the ROTD applies to a particular measure and also ii) decide whether the "restraint of trade" has been justified as being reasonable. For

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<sup>755</sup> *Kerry Cooperative Ltd v. An Bord Bainne* [1991] ILRM 851, 869.

<sup>756</sup> J.D. Heydon, *The Restraint of Trade Doctrine* (Sydney: Butterworths, 2nd ed. 1999) 63. See further B. Hepple, "Right to Work" (1981) 10 ILJ 65.

<sup>757</sup> *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308, 1315.

example, in *Greig v. Insole*, Slade J. remarked it would be a serious and “unjust step” to deprive a professional cricketer of the opportunity to *make his living* in a very important field of his professional life.<sup>758</sup> Another illustration is where Lord Wilberforce identified the “freedom to use to the full a man's improving ability and talents” as lying “at the root of the policy” of the ROTD.<sup>759</sup> This language of personal rights and freedoms distinguishes the objective of the ROTD from the more market focussed ambitions pursued by competition law.

These two general proposals orient the tenor of judgments so that the ROTD is seen as a protector of restrained persons (rather than of markets). Wilberforce J. in *Eastham v. Newcastle United Football Club Ltd and Ors* exhibited remarkable determination, based on public policy, to vindicate the rights and liberties of a restrained professional.<sup>760</sup> In his view, it was unnecessary to cite specific authority to show that it was contrary to public policy for the “retain and transfer system” to restrict the footballers’ liberty without being justified and stated that it would be *unjust* if they could not seek a declaration on the basis that the system threatened their “liberty to seek employment.”<sup>761</sup>

The foregoing two general proposals support the next more specific proposals. Seven specific proposals are next offered to courts to implement when reaching decisions in relation to the ROTD’s availability and its test.

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758 *Greig v. Insole* [1978] 1 WLR 303, 354 (emphasis added).

759 *Stenhouse (Australia) Ltd. v. Phillips* [1974] A.C. 311. Another example is where the High Court in *Hughes v. Architects Registration Council of the United Kingdom* [1957] 2 QB 550, 563 adverted to the “right of every man to earn his living in whatever way he chooses unless by the law or his own voluntary submission his way is taken from him.” This view was cited by Lord Hodson in *Dickson v. Pharmaceutical Society of Great Britain* [1970] AC 403, 430.

760 [1964] Ch 413.

761 [1964] Ch 413, 442.

#### 7.4.2 Specific Proposals

The next proposals are more specific as they direct courts in their approach to, firstly, the ROTD's availability/scope and, secondly, its test. They steer courts to emphasise how the ROTD takes keen account of the impact of a restriction on restrained persons and that this focus distinctively shapes not only the ROTD's reach/scope but also its requirement that "restraints of trade" must be justified as reasonable before they can be enforced. The first of these specific proposals deals with the scope/availability of the ROTD and the remaining six specific proposals pertain to how the test is applied.

##### 7.4.2.1 Specific Proposal No 1: Explain the Basis of the ROTD's Scope

The borders of the ROTD are intentionally flexible because courts have consistently maintained that the classification of a "restraint of trade" must remain "fluid and the categories can never be closed."<sup>762</sup> Consequently, courts often have to decide "where to draw the line?"<sup>763</sup> *How* the answer to this question is approached will convey the heart of the ROTD. The ROTD has been applied not only to express non-competition clauses in employment contracts but, also, to diverse provisions in various contracts and rules on the grounds that they may *negatively impact an individual*.<sup>764</sup> This reason distinguishes the ROTD from competition law and, for this reason, should be expressed clearly in judgments.

The *basis* for the ROTD's applicability to restrictions falling outside the traditional categories (of employment contracts and transfer of business agreements) must be made explicit in judgments by explaining that the ROTD aims to protect persons

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<sup>762</sup> *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 337 Lord Wilberforce.

<sup>763</sup> This is the phrase used by Lord Pearce in *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 325.

<sup>764</sup> Chapter One detailed many instances including clauses making pensions conditional on not competing, clauses clawing back commission or deferring discretionary bonuses and provisions preventing sports professionals playing for their preferred club or tournament.

who are disadvantaged by *de facto* shackles and impediments. It is here proposed that courts must highlight that they take account of the potential impact of a measure on the restricted person by considering the restriction's terms and the circumstances in which it was negotiated or concluded when they decide whether a measure is a "restraint of trade." This specific proposal finds strong support in the four cases that are next analysed.

The first study is of *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd*.<sup>765</sup> The judgments of the House of Lords, in this case, make interesting remarks about the applicability of the ROTD outside the traditional categories of employment and sale of business agreements. Here, the ROTD was raised in defence against an application for injunctions restraining garage operators from sourcing petrol in breach of "solus" (exclusive purchase) obligations contained in two standard motor fuels supply agreements.<sup>766</sup>

In the House of Lords, some judgments took the view that the ROTD may apply in situations where an existing freedom of the restrained person is restricted. Lord Reid stated that the ROTD applies where someone "contracts to give up some freedom which he would otherwise have had" and he pointed to the limitation on the garage owners' freedom to sell petrol purchased from third parties.<sup>767</sup> Lord Reid also commented that restrictions regulating existing trade may be a more severe restraint than those preventing the person undertaking a new trade.<sup>768</sup> Kamerling and Osmann suggest that this means that the ROTD will apply even if the restrained party had not previously enjoyed a particular freedom but is required "under a *positive* duty to do something which restricts his current freedom."<sup>769</sup>

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765 [1968] AC 269.

766 The obligation on one garage was less than five years in duration while the other garage was subject to a "solus" agreement of 21 years and a mortgage.

767 [1968] AC 269, 298. See [1968] AC 269, 309 where Lord Morris of Borth-y-Gest stated that there is "a clear difference between the case where someone fetters his future by parting with a freedom he possesses and the case where someone seeks to claim a freedom other than that which he possesses or arranged to acquire." For Lord Hodson's view see [1968] AC 269, 317.

768 Lord Reid (at p298) drew attention to the additional positive obligation on the garage owner to keep the station open to sell the petrol "at all reasonable hours" in addition to the duty not to sell other suppliers' petrol.

769 A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) 10.

Lord Pearce took a different approach. In his view, the ROTD does not apply to:

“ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work, outside the contract, viewed as a whole, is directed towards the absorption of the parties’ services and not their *sterilisation*.”<sup>770</sup>

Thus, in his view, the ROTD does not apply to restrictions during the contract which are “only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others.”<sup>771</sup> Nonetheless, he stated that the ROTD applies “if during the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade.”<sup>772</sup> Lord Wilberforce took another approach to deciding whether the ROTD applied. After re-iterating that the scope of “restraint of trade” is broad and is public policy based, he articulated the possibility of dispensation for some measures from the justification requirement. He stated that:

“judges have been able to dispense from the necessity of justification under a *public policy* test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the *accepted and normal currency* of commercial or contractual relations. That such contracts have done so may be taken to show with at least strong *prima facie* force that *moulded under the pressures of negotiation*, competition and public opinion, they have assumed a form which satisfies the test of *public policy* as understood by the courts at the time...”<sup>773</sup>

It must be emphasised that when Lord Wilberforce created the dispensation, he made it subject to qualifications and clearly stipulated that there is no absolute exemption.<sup>774</sup> In this case, Lord Wilberforce refused to grant the dispensation. It is important to highlight *why* it was not granted. Obligations similar to those at issue in this case were contained in 35,000 supply contracts with 36,000 stations in the UK and about 6,600-7,000 garages were so tied to Esso. Lord Wilberforce denied

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770 [1968] AC 269, 328 (emphasis added).

771 *ibid*

772 *ibid*

773 *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 332-3 (emphasis added).

774 See *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 332-3 where Lord Wilberforce stated that “[A]bsolute exemption for restriction or regulation is never obtained. Circumstances, social or economic, may have altered since they obtained acceptance in such a way for a fresh examination; there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category; but the court must be persuaded of this before it calls upon the relevant to justify a contract of this kind.”

the dispensation in this case because the agreement was “not of a *character* which, by pressure of *negotiation* and competition has passed into acceptance or a balance of interest between the parties or between the parties and their customers.”<sup>775</sup> This statement is important because it, firstly, shows that dispensations from justification are not available just because the restriction is statistically prevalent and, secondly, shows that how the restriction was *negotiated* is decisive. This attitude indicates that the ROTD’s deep concern, based on public policy, is for the interests of *the less able negotiating party*. This concern is also to the fore in the *Schroeder* judgments that are next examined.

*A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd*<sup>776</sup> involved a standard form exclusive services contract between an unknown songwriter and a music publishing company. The songwriter obtained a declaration that the contract was void under the ROTD. The decision was affirmed by Court of Appeal and unsuccessfully appealed to the House of Lords.

In order to decide whether the ROTD could be applied to this situation, Lord Reid took a two stage approach. Firstly, he asked whether the contractual terms are so restrictive that they cannot be justified at all. His second question was whether the restraining party has proved justification which is normally done by “showing that the restrictions were no more than was reasonably required to protect his legitimate interests”<sup>777</sup> Lord Reid examined each clause of the agreement and considered their cumulative effect on the songwriter. The contractual terms included the full assignment of copyright globally in every musical composition “composed created or conceived” by him for potentially ten years. No payment (apart from an initial small sum) was payable unless his work was published but the publishers were not obliged to publish. The songwriter had no right either to terminate the contract or to get the re-assignment of copyright in the event of non publication. Lord Reid stated the ROTD normally did not apply to a contract of exclusive services but “if the

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<sup>775</sup> *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 337.

<sup>776</sup> *A Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308; 1315 [1974] 3 All E.R. 616 HL affirming [1974] 1 All ER 171 CA.

<sup>777</sup> [1974] 1 W.L.R. 1308, 1310. Viscount Dilhorne agreed with Lord Reid.

contractual restrictions appear to be unnecessary *or to be reasonably capable of enforcement in an oppressive manner* then they must be justified before they can be enforced.”<sup>778</sup> Lord Reid concluded that he did not need to consider “whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient to say that such evidence as there is falls short of justification.”<sup>779</sup> In his view, it was an unreasonable restraint to tie the composer for this period “so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish.”<sup>780</sup>

Lord Reid’s expansive approach to the scope of the ROTD seems to be founded on his concern for the effect of restriction *on the restrained person*. In his view, the ROTD can apply, in circumstances that do not amount to coercion or undue influence, where the terms are “one-sided” and where the contract is capable of being enforced oppressively. This expansive approach to the ROTD’s availability demonstrates that the objective of the ROTD is to safeguard less able parties. Lord Reid’s characterisation of the ROTD as national law that strikes down restrictions that are unnecessary and/or capable of oppressive enforcement aligns with the illustration given in Recital 9 of national law prohibiting the imposition of unjustified or disproportionate terms that is saved by Art 3(3).

Lord Diplock delivered the other key judgment in *Schroeder*. Without equivocation, he asserted that the contract was in “restraint of trade” and that the courts had power to relieve the songwriter of his legal duty to fulfil the promises he made. In his view, the Court must:

“ ... assess the *relative bargaining power* of the publisher and the song writer at the time the contract was made and .. decide whether the publisher had used his *superior bargaining power* to exact from the song writer promises that were *unfairly* onerous to him.”<sup>781</sup>

This approach envisages qualitative assessments of the power balance within the relationship and the identification of “unfairly” onerous burdens. The centrality of the qualitative impact of the restrictions on the restrained professional is very

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778 [1974] 1 W.L.R. 1308, 1314.

779 [1974] 1 W.L.R. 1308, 1315.

780 [1974] 1 W.L.R. 1308, 1313-1314. The concept of “sterilisation” echoes back to Lord Pearce judgment in *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 325.

781 [1974] 1 W.L.R. 1308, 1315 (emphasis added).



evident in Lord Diplock's core question which is: "[w]as the bargain fair?"<sup>782</sup> He explained that the test of fairness is "whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract?"<sup>783</sup> This enquiry evidences the ROTD's concern to ensure that the restrained party makes a *fair* bargain. National laws that prohibit conditions/terms on the basis that they were unfairly exacted from a weaker party are in line with Recital 9's examples of national laws falling within Art 3(3). Lord Diplock agreed with Lord Reid's analysis of the terms of the contract and that the contract was unenforceable. In his view the contract did not satisfy the fairness test.

The third case is *Proactive Sports Management Ltd v. Wayne Rooney, Stoneygate 48 et al.*<sup>784</sup> Here, the dispute between Proactive and Stoneygate 48 concerned the exclusive rights contained in an Image Rights Representation Agreement to represent professional footballer Wayne Rooney.<sup>785</sup> Whether the agreement was "in restraint of trade" was contested. The High Court (Hegarty QC) admitted difficulty in extracting from the case law "any judicial definition which can be applied to all situations."<sup>786</sup> The judge emphatically rejected the argument that the ROTD did not apply on the grounds that the agreement only restricted image rights and did not restrict footballing activities. It had been argued that the professional footballer could earn a very good living from his primary skills (playing football) and that, consequently, his earning capacity was not really sterilised by the contract.<sup>787</sup>

In deciding that the ROTD could apply, the High Court cited and applied the principles from the House of Lords' judgments in *Esso* and *Schroeder*. The Court interpreted *Esso* to mean that whether the ROTD applies to an exclusivity contract depends on factors such as whether it is a "common and accepted form of commercial arrangement" and whether there is any "exorbitance or special

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782 [1974] 1 W.L.R. 1308, 1316 .

783 [1974] 1 W.L.R. 1308,1315.

784 [2010] EWHC 1807 (QB) Manchester District Registry Mercantile Court, Judge Hegarty QC: on appeal [2011] EWCA 1444.

785 Proactive sued Stoneygate 48 for arrears of commission due under the agreement. In defence, Stoneygate 48 argued, *inter alia*, that the agreement was contrary to public policy as an unreasonable restraint of trade.

786 [2010] EWHC 1807, para 624.

787 [2010] EWHC 1807, para 652.

feature”<sup>788</sup> which may arise where there is inequality of bargaining power.<sup>789</sup> Then, it cited Lord Reid’s view that courts have greater freedom to find restrictions unreasonable in situations where although the restrained party accepted the main contractual terms he is at a disadvantage as regards other terms. For example, where a set of conditions had been incorporated which has not been the subject of negotiation.<sup>790</sup> In addition, the Court quoted extensively from and applied the judgments of Lord Reid and Lord Diplock in *Schroeder*. It accepted Lord Reid’s readiness to apply the ROTD if the restrictions appear to be unnecessary or reasonably capable of oppressive enforcement and Lord Diplock’s test of fairness and the significance of unequal bargaining power.<sup>791</sup>

The High Court and Court of Appeal closely reviewed the terms and the negotiating circumstances of the Image Rights Representation Agreement. The High Court found that the terms were “effectively dictated” by one party (the company). Moreover, the contract was not a standard tried and tested one and was unique in its lengthy duration.<sup>792</sup> The High Court and Court of Appeal gave considerable attention to the impact of the lengthy duration of the restrictions on the footballer. They specifically noted that the obligations began when the footballer was 17 years old, new to football and could continue for eight years, a period that would “probably cover about half of his career.”<sup>793</sup> The Courts highlighted the inequality in bargaining positions between the parties.<sup>794</sup> Although (unlike the situation in *Schroeder*) there were “quite extensive obligations” on the restraining party, the High Court had no doubt that the contract imposed very substantial restraints on the professional footballer’s “freedom to exploit his earning ability over a very long period of time on terms which were not commonplace in the market and which were not the outcome of a process of

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788 [2010] EWHC 1807, para 633. The phrase “exorbitance or special feature” was mentioned by Lord Wilberforce in *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 333 as a ground for denying a dispensation from justification.

789 [2010] EWHC 1807, para 633.

790 [2010] EWHC 1807, para 633 citing Lord Reid in *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 300.

791 [2010] EWHC 1807, para 633.

792 [2010] EWHC 1807, para 650.

793 [2010] EWHC 1807 para 647 and similarly [2011] EWCA Civ 1444, para 2.

794 See [2011] EWCA Civ 1444, para 17 where the Court of Appeal stated that the footballer and his parents were “wholly unsophisticated in legal and commercial matters.”

commercial negotiation between equals.”<sup>795</sup> The High Court was satisfied that the contract terms were not justified<sup>796</sup> and the appeal on this point failed.<sup>797</sup>

In the appeal, it was argued, *inter alia*, that the ROTD could not apply to this image representation rights agreement because it only restricted the professional’s off-pitch activities and not his footballing career. This point was emphatically rejected by the Court of Appeal on the grounds of public policy. Lady Justice Arden stated:

“ ... a person’s ancillary activity of exploiting his image rights is just as capable of protection under the doctrine of restraint of trade as any other occupation. *Public policy* is concerned with the manner in which a person may properly realise his potential, not only for the good of that individual but for the economic benefit of society generally.”<sup>798</sup>

This recent judgment clearly demonstrates that the ROTD, on the basis of public policy, safeguards some persons who agree to unfair obligations that were not properly negotiated by equals.

The fourth judgment that is examined in detail in order to show the public policy based objective of the ROTD is the “seminal decision,”<sup>799</sup> of Wilberforce J. in *Eastham v. Newcastle United Football Club Ltd and Ors.*<sup>800</sup>

Eastham, a professional footballer, refused to sign again with his football club which placed him on the “retain” list. The “retain” mechanism allowed a club to retain a player for the next season if it offered him a minimum wage. Wilberforce J. found that if a player, who does not want to re-sign with his club, is placed on the “retain” list, it substantially interfered with the player’s “right” to seek other employment at a time when he is no longer an employee of the retaining club.<sup>801</sup> Wilberforce J. decided that the “retain” scheme operated substantially in “restraint of trade.”<sup>802</sup>

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795 [2010] EWHC 1807, para 651.

796 [2010] EWHC 1807, paras 640 and 651.

797 [2011] EWCA Civ 1444.

798 [2011] EWCA Civ 1444, para 58 (emphasis added).

799 J.D. Heydon, *The Restraint of Trade Doctrine* (Sydney: Butterworths, 2nd ed. 1999) 205.

800 [1964] Ch 413.

801 [1964] Ch 413, 430.

802 [1964] Ch 413, 430.

This judgment radically enhanced the ROTD's availability to individuals who are restrained by third party measures. Wilberforce J. allowed the footballer to sue not only his former club but, also, the Football League and Football Association. This is highly significant because strangers or "third parties" do not ordinarily have *locus standi* under contract law which means that litigation would occur only if a party sought to enforce a contractual provision. This judgment has been followed so that other authoritative sporting authorities have been sued by either a restrained sports professional<sup>803</sup> or by another non-party litigant, such as a rival seeking a declaration and/or injunction.<sup>804</sup>

The relevant point of this *locus standi* development for this chapter is the *basis* upon which the ROTD was made available because it evidences the ROTD's peculiar objective. Wilberforce J. rejected arguments that the professional footballer, as a stranger, could not take action.<sup>805</sup> Tellingly, he asked whether the "the defence" of the footballer's interest is:

"to be left exclusively in the hands of the employers themselves, who have set up a ring against the employees and who have (as here) shown every intention of maintaining it as long as they can; left to the chance that one day there may be a blackleg among the employers who will challenge it."<sup>806</sup>

It seems clear that Wilberforce J. wanted the ROTD to *redress* the interference with the rights of the professional. Yuen commented that in "typical common law fashion it was remedy before right. If the plaintiff could ask for relief, he had a 'right to work.'"<sup>807</sup> It is here suggested that this judgment reveals that the ROTD's

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803 *Hendry v. World Professional Billiards and Snooker Association Ltd. Sub.nom. Hendry v. WPBSA* [2002] U.K.C.L.R.5; [2002] E.C.C. 8 Ch D, the plaintiffs were two snooker players restricted by the association's ban on participating in tours organised by rival tour organiser. Also see *Buckley v. Tutty* (1971) 125 CLR 353, 373 HC (Aus).

804 In *Greig v. Insole* [1978] 3 All ER 449 Slade J. granted a declaration to one promoter in respect of the exclusive arrangements between another promoter and individual sports professionals. Slade J. noted that the restraints were "specifically directed against that company, in the sense that one of their principal objects is to persuade cricketers not to perform their existing contracts with it and to prevent others from contracting with it in the future."

805 [1964] Ch 413, 441. Wilberforce J. deftly treated earlier cases as authority for preventing actions for damages for conspiracy He averred, at p 446, that the declaratory judgment "is a comparatively modern remedy which is being found to have a usefulness which was probably not appreciated when those cases were decided." Wilberforce J. held that to grant a declaration to "the persons whose interests are vitally affected would be well within the spirit and intent of the rule as to declaratory judgments." He relied on dicta of Denning M.R. in *Boulting v. Association of Cinematographers* [1963] 2 QB 606, 629 noting the "power of the court in its discretion to make a declaration of right whenever the interest of the plaintiff is sufficient to justify it."

806 [1964] Ch 413, 443.

807 C. Yuen, *Exclusive Purchasing at Common Law and under Antitrust Law: A Re-examination of the Restraint of Trade Doctrine* (1987) 16 *Anglo Am Law Rev* 1, 22.

objective, based on public policy, is to be widely available to assist comparatively weaker individuals.

The foregoing four studies show that an expansive and inclusive approach can be taken, on public policy grounds, when courts decide on the ROTD's scope. Whish has drawn attention to the ROTD's extension to situations where "various organisations exercised *de facto* monopoly power over entry to a trade or profession" and their activities might otherwise be challenged only under the benign provisions of fair trading legislation.<sup>808</sup> It is notable that the ROTD is made available to resist not only *contractual* restrictions but, on the basis of justice, various restrictions of associations that have been imposed on "captives."<sup>809</sup> In order to ensure the ROTD's differentiation from competition law, courts must explain *why* the ROTD takes an inclusive attitude to its scope and "*locus standi*" by emphasising its public policy basis.

The next six specific proposals suggest how courts should apply the test. They aim to ensure that the ROTD distinctiveness is clearly conveyed. These proposals give specific expression to the ROTD's public policy based objective of allowing restrained persons to resist unreasonable restrictions on their freedom. They are i) express antipathy towards "restraints of trade"; ii) take a broad and personal view of the interests of the restrained party; iii) examine the negotiating circumstances; iv) analyse the "public interest" in distinctive terms; v) stipulate that the restraining entity must justify and vi) keep separate the two limbs of the reasonableness test.

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808 R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 53. See also *Nagle v. Fielden* [1962] QB 633, [1966] 2 WLR 1027; *Pharmaceutical Society of Great Britain v. Dickson* [1970] AC 403, [1968] 3 WLR 286 affirming [1967] Ch. 708 (CA) affirming [1966] 1 WLR 1539, [1966] 3 All ER 404 and *Cheall v. Professional Executive Clerical and Computer Staff* [1983] 2 AC 180. *Mogul Steamship Shipping Co. Ltd. v. Mc Gregor Gow & Co* [1892] AC 25 decided that where the restriction was contained in a third party measure, a tortious action by a restrained non party plaintiff could only be maintained if malice was established. R. Whish, *Competition Law* (London: Butterworths, 3rd ed. 1993) 58 notes the ROTD's value to many sports professionals where the regulatory bodies were not subject to judicial review.

809 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242, para 31 Gummow J. describing the rules agreed by clubs that restrict rugby players freedom to choose which club to play for.

#### 7.4.2.2 Specific Proposal No. 2: Express Initial Antipathy

It is here proposed that judgments commence by noting the ROTD's general antipathy towards "restraints of trade." Courts need to re-iterate that the ROTD presumes all "restraints of trade" to be void unless they have been justified. Such an opening observation sets the tone and shows that the ROTD "leans against covenants in restraint of trade and there are sound reasons for doing so."<sup>810</sup> A court in England or Wales could echo the Australian High Court's statement that "...the common law has fixed the appropriate balance between the competing claims and policies generally in favour of striking down restraints unless they can be justified."<sup>811</sup> Recently, in *Proactive Sports Management Ltd v. Wayne Rooney, Stonegate 48*, the Court of Appeal judgment on the ROTD commenced by stating that *public policy*:

"is an important but amorphous concept which the courts must keep within its proper limits. However, the courts have repeatedly held that it is against the *public interest and policy* of the common law for there to be restraints on trade unless there are special circumstances."<sup>812</sup>

The proposal is for courts to accentuate this starting position for analysis because it conveys the ROTD's distinctive objective of resisting unreasonable restrictions.

#### 7.4.2.3 Specific Proposal No. 3: Broad and Personal view of Interests

The third specific proposal relates to the *interests* that are taken into account when the *inter partes* reasonableness of a "restraint of trade" is assessed. It is here proposed that courts take a broad attitude to the types of interests of the restrained and not confine themselves to assessing only *economic* interests.

In the Australian case of *Adamson*, two judges stated that the ROTD was not confined to considering the economic effect of the rules and insisted that non-economic effects of the rules "ought not be disregarded."<sup>813</sup> This approach would allow courts to take into account any injury to social or domestic interests and other

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810 *Office Overload Ltd v. Gunn* [1977] FSR 39 (CA).

811 *Peters (WA) v Petersville Ltd* [2001] HCA 49, para 37.

812 [2011] EWCA 1444, para 53 (emphasis added).

813 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242 Wilcox J. and Gummow J.

freedoms of the restrained person. In *Adamson*, Wilcox J. emphasised the significance of the *right to choose between prospective employers* because it “is a fundamental right of a free society. It is the existence of that right which separates the free person from the serf.”<sup>814</sup> This approach of describing the personal impact of a restriction in the language of freedom and justice clearly differentiates the objective of the ROTD from the market centred objective mainly pursued by competition law. Similarly, in *Vendo plc v. Adams*,<sup>815</sup> the High Court of Northern Ireland remarked that the restraint deprived the franchisee “effectively of earning a livelihood in a field where he has acquired an expertise.”<sup>816</sup> The Court distinguished between franchises for services and franchises for goods. This distinction implicitly recognises that the franchisee’s personal expertise plays a role in a service franchise (unlike a franchise for goods which sell themselves) and this personal dimension merits protection from undue restriction. Paying attention to the inherent skills of the individual (and accepting it needs protection) indicates the distinctively *personal* aspect of the ROTD’s objective and, for this reason, should be emphasised.

Some of the judgments in *Esso* are interesting for how they cast or articulate an obligation in *personal* and *restrictive* terms. *Esso* argued that the ROTD was not applicable because the restrictions related to land. This argument was not accepted by Lord Pearce who rejected the earlier reasoning of Mocatta J. who decided that the restrictions did not come within the ROTD as they were merely restrictive of the use to be made of a particular piece of land. Lord Pearce took a different tack. He noted that the garage owner had a positive obligation to carry on the business (or find a transferee) and the “*practical effect* was to create a *personal* guarantee.”<sup>817</sup> Similarly, Lord Morris of Borth-y-Gest refused to accept the argument that the ROTD did not apply where land was involved. He characterised the restrictions as being more of a personal character than of a property character because they affected how the garage owner ran his business.<sup>818</sup> Lord Wilberforce emphatically stated that this is “not a mere transaction in property... it is not a mere

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814 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242 para 60 .

815 [2002] NI Ch D 5.

816 [2002] NI Ch D 5, 8 (emphasis added).

817 *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 327.

818 *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 309.

transaction for the exclusive purchase of a commodity - if it was there would be a strong case for treating it as a 'normal commercial agreement of an accepted type.'"<sup>819</sup> Lord Wilberforce took account of the other restrictive elements of the agreement which included a tie with no provision for termination by notice. He emphasised the importance of ascertaining the reality of the restriction over any theoretical freedom such as, for example, the possibility that the garage owner could either find a successor or trade freely at other locations while tied to Esso in these two locations. In his opinion, the reality of the restraint on the garage owner was more relevant than his "theoretical liberty to depart."<sup>820</sup> Characterising the obligation according to its *personal* impact on the restrained indicates the ROTD's objective is oriented more towards the restrained person rather than towards markets and, thereby, distinguishes the ROTD.

#### 7.4.2.4 Specific Proposal No. 4: Examine the Negotiations

The fourth specific proposal is for courts to pay express attention to and draw inferences from the whole circumstances in which a contested "restraint of trade" came into existence. The quality of the negotiating process is an important factor when the ROTD is applied. In *Esso*, Lord Reid recognised that there may be situations where the restrained party accepted the main contractual terms but would be at a disadvantage regarding other terms, "for example where a set of conditions had been incorporated which has not been the subject of *negotiation*" and that, in such cases, the court has greater freedom to find these terms unreasonable.<sup>821</sup> This focus on the reality of how the whole deal was negotiated and how this focus adjusts the courts' attitude to the question of its justification is significant because it shows the ROTD's concern for the less able party.

The quality of negotiating was central in deciding whether the restrictions received the dispensation from justification. In *Schroeder*, Lord Reid rejected the argument

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<sup>819</sup> *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 337.

<sup>820</sup> Relying on *McEllistrem* (1919) AC 548, 565), Lord Wilberforce in *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 338 dismissed as "artificial and unreal" the appellant's argument that the covenant is not in restraint of trade because it relates to the use of the respondent's land.

<sup>821</sup> *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269, 300.



that every standard form agreement benefits from the dispensation envisaged by Lord Wilberforce in *Esso*<sup>822</sup> and noted his stipulation that the contracts must be “moulded by negotiation, competition and public opinion.”<sup>823</sup> Lord Reid found no evidence that the restrictions on the songwriter were so moulded. Lord Reid further limited the dispensation, by quoting from Lord Pearce’s reference in *Esso*, to “contracts made freely by parties bargaining on equal terms.”<sup>824</sup> In effect, Lord Reid narrowed the availability of any dispensation to contracts freely negotiated by parties on equal bargaining terms.<sup>825</sup> This tight approach to the dispensation based on the quality of the negotiation shows the concern of the ROTD for the interests of relatively weak persons.

In *Schroeder*, Lord Diplock rejected the publishing company’s argument that every standard form contract in common use must be presumed to be fair and reasonable. He went so far as to categorise standard form contracts into two groups. The first group comprises common place mercantile transactions such as insurance contracts and charter parties whose widely adopted clauses had been negotiated over many years and their terms were presumed to be fair and reasonable. By contrast, his second group comprises “take it or leave it” standard contracts that originated from “the concentration of particular kinds of businesses in relatively few hands.”<sup>826</sup> Typically their terms were not negotiated and were “dictated by that party whose bargaining power enables him to say: ‘If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.’”<sup>827</sup> Lord Diplock commented that while the strength of bargaining power necessary to “adopt this “take-it-or-leave-it” attitude did not raise a presumption that it was used to drive an unconscionable bargain,” in the field of restraint of trade, it called “for

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822 *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 332-3.

823 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308, 1315.

824 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308,1314, referring to Lord Pearce in *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269, 323.

825 In *Watson v. Praeger* [1991] 3 All ER 487, Scott J. did not grant a dispensation to an exclusive services contract in the standard form prescribed by a regulatory association (*i.e.* British Boxing Board of Control).

826 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308, 1316.

827 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308,1316.

*vigilance* on the part of the court to see” that it did not.<sup>828</sup> This remark is notable for the active responsibility of vigilance it places on courts when they are presented with “take it or leave it” type terms and it evidences the ROTD’s objective of safeguarding persons. The *Schroeder* judgments have been followed in many cases involving restrictions on professionals in the music business.<sup>829</sup> They have also been followed in other professional sectors. Moreover, the High Court, when assessing a more mainstream commercial contract between two business men, referred to the emphasis placed by Lord Reid in *Esso* on the importance of whether the clause had been negotiated.<sup>830</sup> It further commented on how the lack of reciprocal obligation may be important in deciding the reasonableness of the restriction.<sup>831</sup>

The Court of Appeal in *Proactive Sports Management Ltd v. Wayne Rooney, Stoneygate 48* conducted very detailed scrutiny of the negotiating circumstances.<sup>832</sup> It expressed the view that the absence of independent legal advice to the restrained parties:

“deprives the fact that [they] were content with the terms of the agreement of probative weight on the restraint of trade issue. It underscores the inequality of bargaining power between the parties. Moreover, it predisposes the agreement to a finding that it was *one-sided, unfair and oppressive*.”<sup>833</sup>

The Court further noted that the restraining side had waved aside legal advice that the other party should have independent legal advice and that the agreement might be unenforceable under the ROTD and went so far as to state that it was “a relevant part of the picture” that the restraining party entered the contract knowing there was a risk that it might be unenforceable.<sup>834</sup>

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828 *ibid*

829 *Clifford Davis Management v. WEA Records Ltd* [1957] 1 WLR 61; *Silvertone Records v. Mountfield* [1993] EMLR 152, 163; *Zang Tumb Tuum Records v. Johnson* [1993] EMPL 61.

830 *Societa Esplosivi Industriali Spa v Ordnance Technologies (UK) Ltd* [2004] EWHC 48 (Ch) para 120 referring to *Esso Petroleum Co. Ltd v. Harper’s Garage (Stourport) Ltd* [1968] AC 269.

831 *Societa Esplosivi Industriali Spa v Ordnance Technologies (UK) Ltd* [2004] EWHC 48 (Ch) para 145.

832 [2011] EWCA 1444.

833 [2011] EWCA 1444, para 100 (emphasis added)

834 Para 101.

Enquiring into how a contested restriction was negotiated and drafted is important because it shows the concern of the ROTD for the position of the weaker party. This is a distinctive aspect of the ROTD which needs to be emphasised.

#### 7.4.2.5 Specific Proposal No. 5: “Public Interest” in Distinctive Terms

The fifth specific proposal deals with the “public interest.” If a “restraint of trade” is not justified as being reasonable in the parties’ interest, the “public interest” limb does not need to be considered. In those cases where the “public interest” is considered, it is here proposed that courts determinedly avoid classic competition law concepts and language. Instead, the “public interest” should be articulated using the distinctive lens and language of the ROTD. Thus, when dealing with economic issues, the ROTD should characterise them in its own terms. A good example of this proposal is found in the Ontario High Court of Justice’s assessment of a post termination restriction in an employment contract of a gynaecologist.<sup>835</sup> Its judgment stated that choosing “.. a physician or surgeon is not akin to commercial transaction”<sup>836</sup> and expressly refuted the argument that the patients “can easily find another specialist.”<sup>837</sup> That the Court rejected the economic substitutability perspective shows that the ROTD does not follow the classic competition law market analysis.

Moreover, a “public interest” analysis under the ROTD should highlight, as far as possible, connections between public policy, “public interest” and a restrained person’s freedom. For example, a judge in an Australian court stated that where a restraint is imposed:

“which is more than that which is required ... to protect the interests of the parties, that is a matter which is relevant to the considerations of *public policy* which underlie the whole doctrine, since to that extent the deprivation of a person of his *liberty of action* is regarded as detrimental to the ‘*public interest*.’”<sup>838</sup>

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835 *Sherk v. Horwitz* [1972] 2 O.R. 451, 454.

836 *Sherk v. Horwitz* [1972] 2 O.R. 451, 454.

837 *Sherk v. Horwitz* [1972] 2 O.R. 451, 454.

838 *Amoco Australian Pty Limited v. Rocca Bros Motor Engineering Co Pty Ltd* [1973] 133 CLR 288, 307 per Walsh J. Early English case law, *Leather Cloth Co. v. Lorsche* (1869) 9 Eq. 345, 354, pithily connected personal interest with the State’s interest with the statement that every man “ ...

This stance echoes Lord Reid's view in *Esso* that courts will not enforce a restriction which goes further than adequately protecting the legitimate interest of the restraining party because "too wide a restraint is against the public interest."<sup>839</sup> Later, in *Schroeder*, Lord Reid asserted that it is in the "interests both of the public and the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities."<sup>840</sup> In *Bull v. Pittney Bowes*, Thesiger J remarked on how it "may be very much in the public interest that the services of experienced salesmen skilled in a particular technique should be available to promote sales from this country overseas in competition with other sellers from elsewhere."<sup>841</sup> In *Eastham*, Wilberforce J. stated that individuals' "liberty to seek employment is considered by the law to be an important public interest."<sup>842</sup> Post-employment restraints have been described as threats to commonly shared community values because even a "small degree of servitude is distasteful" and is "particularly distasteful if there is no effective bargaining between the parties."<sup>843</sup> Lord Salmon accepted that the "courts use their powers in the interest of the individual and of the public to safeguard the individual's right to earn his living as he wills and the public's right to the benefit of his labours."<sup>844</sup>

These conceptions of the "public interest" are very supportive of the individual's interests. The ROTD's recognition that restrictions on personal freedom are, as a matter of public policy, against the "public interest" should be expressed in common law terms. The texture of the "public interest" analysis under the ROTD should not follow competition law analyses. Instead the discussion should refer to values in terms and language that distinguish the ROTD's objectives from that pursued by competition law.

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shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." This sentence was cited with approval by Younger L.J in *Attwood v. Lamont* [1920] 3KB 571, 583.

839 *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269,301.

840 *A. Schroeder Music Publishing Co. Ltd v. Macauley (formerly Instone) sub nom. Macauley (formerly Instone) v A. Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308, 1313.

841 [1966] 3 All ER 384, 388.

842 [1964]Ch 413, 442.

843 H.M. Blake, "Employee Agreements Not to Compete" (1962) 73 Harv LR 625, 649.

844 *Nagle v. Feilden* [1966] 2 QB 633, 648.

#### 7.4.2.6 Specific proposal No. 6: Discharge the Onus of Justification.

The sixth specific proposal pertains to restrictions contained in rules of associations or entities. It is here proposed that courts clearly stipulate that the restraining entity must discharge the onus of justification. This proposal eliminates the possibility of courts misapplying the test by adopting some sort of “balancing” approach to the interests of the restrained and the “public interest.”

How the test may, otherwise, be mis-applied (to the detriment of the restrained person) is illustrated by a majority judgment of the Irish Supreme Court in *Macken v. O’ Reilly*.<sup>845</sup> Here, a professional show-jumper challenged the Equestrian Federation of Ireland’s policy which obliged Irish competitors in international competitions to use only Irish horses. His action succeeded before the High Court because the defendants did not discharge the onus of showing the inflexibly applied ban was reasonable.<sup>846</sup> The High Court judgment was overturned by the Supreme Court majority decision of 3:2.

One of the majority judgments (O’Higgins C.J.) stated that a restraint which is reasonable, having regard to all interests affected, including the public cannot be unjust and unfair “simply because in its particular application to one individual an inconvenience or loss is experienced.”<sup>847</sup> In his view, applying the ROTD entails:

“.... a careful examination of all the circumstances - the need for the restraint, the object sought to be attained, the interest sought to be protected and the general interest of the public. What is done or sought to be done must be established as reasonable and necessary and *on balance to serve the public interest.*”<sup>848</sup>

The Chief Justice apparently placed the restriction’s potential harm to the riders in opposition to the potential injury to the horsebreeding industry that would arise if there was no restriction. He specifically stated that the potential harm to the horsebreeding sector ought to have been considered *as a balance* to the harm and

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845 [1979] ILRM 79.

846 [1979] ILRM 79, 82 where High Court (Hamilton J.) stated that the policy interfered with the rider’s “right to earn a living as he wills” and was a restriction of his freedom of choice of the horses. It accepted that there were insufficient Irish bred horses of the requisite standard to enable the professional show jumper to maintain his standing as a world class showjumper but decided that the policy inhibiting Macken maintaining this position was unjust and unfair.

847 [1979] ILRM 79, 91.

848 [1979] ILRM 79, 90 (emphasis added).

inconvenience caused to the plaintiff.<sup>849</sup> This *balancing* approach has been criticised on the grounds that if a rule is unreasonable *inter partes* it is not necessary to consider the “public interest.”<sup>850</sup> Furthermore, O’Higgins C.J. failed to take account of the impact of the restriction on the restrained person who did not even have the opportunity of negotiating its terms. This omission is further aggravated by O’Higgins C.J. apparently viewing the restraining entity as acting, somehow, in the “public interest.” He expressly stipulated that consideration must also be given to the “the interest of the public *as represented* by those concerned with the horsebreeding industry in Ireland and also the interests of those already engaged in showjumping in this country who are looking for recognition and advancement in international events.”<sup>851</sup>

Balancing the interests of the restrained professional with those of the restraining entity (seen as quasi-public interest entity) is a problem if it causes the restriction to be assessed unduly benignly. The main danger of a balancing approach, in the context of this research, is that, by failing to consider thoroughly the impact on the restrained party, the ROTD fails to pursue its distinctive objective. The approach of the Federal court of Australia in the next study (*Adamson & Ors v New South Wales Rugby League & Ors*) is to be preferred.<sup>852</sup>

In *Adamson*, professional rugby players challenged rules agreed among clubs of the Rugby League. Under these rules, a player who played in the prestigious “Competition” for one club could not contract with another club to play in the “Competition” unless he was selected at an “Internal Draft” meeting. Any players who were not so selected were, in practice, severely restricted from negotiating for employment with another club.

In this case, Gummow J. stipulated clearly that the Rugby League had to discharge the onus of convincing the Court that restrictions on rugby players’ freedom were justified as being reasonable.<sup>853</sup> He expressly recognised that the restraint struck at

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849 [1979] ILRM 79, 91.

850 R. Clark, *Contract Law in Ireland* (Dublin: Thomson Round Hall, 6th ed.2008) 474.

851 [1979] ILRM 79, 92.

852 (1991) 31 FCR 242 Federal Court of Australia.

853 (1991) 31 FCR 242 para 31.

players' freedom to choose a club. On this basis, he decided that the restraint is void unless it is shown to provide:

“no more than adequate protection to the interests of the sporting body. This inquiry... may require the court to have regard to the ‘special interest of those concerned with the organisation of professional football.’ In so doing, the court, perhaps inevitably will have to consider aspects of position of players because what is put forward as constituting those ‘special interests’ of the organisers will include contentions as to why their dealings with players... have to take, or should take, a particular form. *But that is not to undertake a “balancing” exercise with a comparative evaluation of the weight of the interests of the organisers and players. It is to test the justification attempted by those in adverse litigations, to the players.*”<sup>854</sup>

This quotation neatly knits in the reference to “special interest of the organisers” (made first by Wilberforce J. in *Eastham*) with their restrictive effect on the players. Most importantly, this approach means that courts do not pit the interests of the players in direct balance with the “public interest” *as represented by the restraining entity*. Gummow J. specifically criticised the approach of the primary judge who referred to “the legitimate interests of the League and the clubs on the one hand and the players on the other” and then balanced those interests.<sup>855</sup> Gummow J. objected to this approach because it impermissibly lightens the burden to be discharged by the restrainer.<sup>856</sup> The proper approach, he suggested, is for the restraining League to convince the Court that the restraint was “reasonably related” to its objects and that the “restraint afforded no more than adequate protection to the interest of the League and clubs. Otherwise it would fail.”<sup>857</sup> This approach squarely puts the burden of justification to be discharged on the restraining association.

In the same case, Wilcox J. framed the issue as “the more fundamental question is; how, in a free society, can anyone justify a regime which requires a player to submit such intensely personal decision to determination by others.”<sup>858</sup>

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854 (1991) 31 FCR 242 para 32 (emphasis added).

855 27 FCR 568, Hill J.

856 (1991) 31 FCR 242 para 35.

857 (1991) 31 FCR 242 para 36.

858 (1991) 31 FCR 242 para 113.

Wilcox J. also took a strict approach to the justification aspect. He stated that restraining:

“a person from entering the employment of a particular person, or from following a particular trade or occupation, so as to safeguard the interests of the covenantee by whom that person was once employed or to whom the covenantor has sold a business is one thing; to compel a person – on pain of surrendering his or her occupation altogether - to enter the service of someone whom he or she has not chosen is another. If the rule which has the latter effect can ever be said to be reasonable, the case in justification must be extraordinarily compelling.”<sup>859</sup>

This insistence on justification is to be commended. Courts in England and Wales could take a similar tack in order to safeguard the distinctiveness of the ROTD as a protector of professionals restrained by rules of an association.

#### 7.4.2.7 Specific Proposal No 7: Separately Assess Each Limb

The final proposal is that each of the two limbs of the reasonableness test be assessed separately. Courts should not follow Lord Pearce’s global test of “one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable.”<sup>860</sup> Instead, it is here proposed that the two limbs not be amalgamated into a melting-pot type of analysis. The reason is that any such amalgamation could obscure the distinctiveness of the *inter partes* assessment which must be preciously guarded on the grounds that it renders the ROTD (and its objective) patently distinct from competition law.

The two limbs of the test ensure that the interests of the restrained cannot be ignored or sidelined. Moreover it confines courts’ consideration of the interests of the restraining entity to the *inter partes* limb and, thereby, prevents it from re-appearing under the “public interest” tranche. This segregation avoids the risk that courts treat the restriction more benignly on the basis that the restraining entity is

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859 (1991) 31 FCR 242, para 61.

860 *Esso Petroleum Co. Ltd v. Harpers Garage (Stourport) Ltd* [1968] A.C. 269, 324.



somehow, a protector of the “public interest.” For example, in *Greig v. Insole*, Slade J. found the Football League and Football Association had interests which were entitled to protection, “because the two bodies were, in a sense, *custodians of the public interest*.”<sup>861</sup> This attitude must be avoided because it blurs the separation between the two limbs. The problem, from the perspective of this research, is that conflating the two limbs degrades the perception of the distinctiveness of the ROTD’s objective. Simply put, the *inter partes* element of the test must never be undermined or obscured, because it is the single element that clearly and unequivocally shows the particular objective pursued by the ROTD. The “public interest” limb of the ROTD must be maintained as the supplementary or follow-on step to the *inter partes* element of analysis.

These general and specific proposals aim to copperfasten the distinctiveness of the ROTD. This is important within the domestic context because the ROTD should not be seen as a doctrine that has been somehow either codified or superceded by UK competition legislation. As regards EU competition law, the proposals intend to bring the ROTD within the saving provision of Art 3(3), as interpreted with the assistance of Recital 9.

## 7.5 CONCLUSION

This chapter sought solutions to problems identified in earlier chapters. Section 7.2 considered some options that might produce more favourable interfaces for the ROTD with UK competition legislation. It, firstly, discussed the possibility of UK competition law taking divergent approaches to EU competition law. Secondly, it identified two canons of statutory interpretation which would allow the ROTD to apply in the overlap area without negative impact from competition legislation. The “presumption against casual change” and the “mischief rule” support the argument that the ROTD should not be emasculated by the competition legislation, for the reason that the legislation was enacted to fulfil different ambitions. This second

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<sup>861</sup> *Greig v. Insole* [1978] 1 WLR 302, 317 (emphasis added).

route (statutory interpretation) offers the more viable solution than one involving UK competition law diverging from EU competition law.

Section 7.3 dealt with the ROTD's interface with EU competition law. It identified Art 3(3) of Reg. 1/2003 as the best mechanism to resolve the ROTD's interface with Art 101. After tracing the linked evolution of Art 3(3) and Recital 9, it argued that Art 3(3) intends to save national laws that, without regard to effects on the market, strike down restrictions because they are unfair, unjustified or disproportionate and may have been imposed (rather than thoroughly negotiated by equals).

Section 7.4 presented proposals designed to ensure that the distinctiveness of the ROTD is not doubted. The general and specific proposals intend that the impact of a measure on the restrained person is emphasised in ROTD judgments. In this way, the ROTD is emphatically distinguished from competition law. This allows the argument that it is legitimate for the ROTD, in pursuit of its peculiar mission, to be stricter than competition law, whether it is UK or EU competition law.

The two general proposals advocate that courts i) expressly refer to the ROTD's public policy foundations and ii) use the language of rights, freedoms and justice. Public policy gives the ROTD a distinctive voice because the doctrine's peculiar objectives can be articulated in the language of rights, choice, fairness and justice. These general proposals are intended as foundational ones to be followed in all cases where the ROTD is applied.

Seven more specific proposals were advanced to guide the courts' approach to the scope/availability of the ROTD and its test. Essentially, they direct courts towards portraying the crucial issue in terms of the restriction's potential impact on the *restrained person*. The first specific proposal is that the basis for the ROTD's expansive scope must be clearly expressed in order to show its concern for restrained persons. In particular, the ROTD's availability to i) non-employees, in the absence of undue influence or unconscionable conduct and ii) to persons who are restrained by third parties must be articulated because this reveals the ROTD's objective of safeguarding individuals. The remaining six specific proposals are

directed towards how the test is *applied*. They aim to ensure that the objective of protecting persons is clearly conveyed. It was proposed that judgments start by noting the ROTD's antipathy towards restrictions. When assessing the *inter partes* reasonableness of a restriction, it was proposed that a broad inclusive view be taken of the person's interests to include non-economic interests. Additionally, it was advocated that the impact of a restriction be articulated in personal terms. Also, close attention should be paid to the realities regarding the negotiation of the restriction. When analysing the "public interest," courts should use the ROTD's traditional language. The penultimate proposal insists that restraining entities such as associations must discharge the onus of justification and, importantly, must not be regarded as custodians of the "public interest" whose interests deserve to be balanced with those of the restrained person under the "public interest" limb. The final proposal is to maintain staunchly the separation between the *inter partes* and the "public interest" limbs of the test.

The proposals were supplemented by studies of selected judgments in order to illustrate that the ROTD's objective is more oriented towards restrained persons than towards markets. The studies endorse the proposals as regards the ROTD's public policy foundations, its concern for "fairness" to the restrained party, the foundations of its scope, its piercing enquiry into the realities of "negotiation," its insistence that restraints be justified as reasonable in the parties' interests and in the "public interest." The studies show that decisions under the ROTD can be reached without taking any account of the "actual or presumed effect" of the measure on competition in the market.

The proposals aim to ensure that the ROTD is not seen as a version of competition law. The ROTD's person-oriented objective is evidenced by its deliberately expansive jurisdictional reach, its generous delineation of *locus standi* and its preparedness to offer remedies to persons who may not otherwise have any possibility of redress. The *inter partes* component is a pivotal element of the ROTD test because it is patently distinct from the competition law test. This component insists that discrete consideration be given to the implications of the restriction for the *parties* which contrasts with competition law's focus on the effect of the restriction *on the market*. The ROTD's interest in the fairness of

restrictions and in whether a contractual clause was truly negotiated by parties on equal bargaining terms must be emphasised because it shows its aim of prohibiting one party “imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate ...” The proposals ensure that the ROTD is seen to operate without either defining markets or identifying any implications of the measure for the market

This chapter sought and presented solutions to the ROTD’s interface problems with competition law in England and Wales. It identified mechanisms in Section 7.2 (domestic interface) and in Section 7.3 (EU interface) that would allow courts to delineate a more satisfactory interface for restrained professionals between the ROTD and competition law. These mechanisms will succeed only if the ROTD is seen as being different to competition law. Section 7.4 presented proposals to assist courts to portray the ROTD as a distinct legal regime that pursues a different function or objective to that pursued by competition law. They aim to ensure that the ROTD may be called on by restrained professionals to resist the enforcement of unreasonable restrictions that do not infringe competition law in England and Wales.

## CHAPTER EIGHT

# CONCLUSION

The focus of this research has been the interfaces between the longstanding common law restraint of trade doctrine (ROTD) and competition law in England and Wales. These interfaces are interesting because they can be problematic for some restrained professionals. This research aimed, firstly, to show why these interfaces are significant and, secondly, to propose solutions for the resolution by courts of interface problems.

The interfaces are important because the ROTD and competition law in England and Wales are not equivalent legal regimes. Part I (Chapters One, Two and Three) demonstrated how the interests of restrained professionals may be treated differently by the ROTD and by competition law. By taking the perspective of restrained professionals, Part I examined the different tests and concerns of the ROTD and competition law. It highlighted how the interests of restrained persons are not as central to competition law analyses as they are to assessments under the ROTD.

The analysis of the ROTD (Chapter One) emphasised how widely the ROTD has been made available in order to allow professionals to resist the enforcement of many types of restrictive provisions contained in either personal contracts or in measures of third parties. It remarked on how the potential impact of a provision on a restrained person's economic interests is taken into account by courts when deciding whether a provision is a "restraint of trade" and, consequently, subject to the ROTD. By recognising *de facto* burdens on individuals as "restraints of trade", courts have applied the ROTD to a very wide variety of restrictions, even if they are not drafted in expressly restrictive terms. The ROTD's test assesses the impact of a restriction *inter partes* which guarantees that specific attention is paid to the interests of restrained persons. The analysis of EU competition law (Chapter Two) highlighted how it is can be applied in ways that do not safeguard the interests of

restrained professionals. The clearest example is where Art 101(1) does not prohibit a restrictive provision on the grounds that it is “necessary.” This test has been applied in practice to permit restrictions that are convenient rather than strictly necessary. Such determinations fail to defend fully the interests of the restrained persons. The same observation may be made about UK competition law’s attitude to restrained persons as it is deeply influenced by EU competition law. In order to illustrate some substantive and procedural differences between the ROTD and (EU/UK) competition law, Chapter Three discussed judgments applying the ROTD and competition law to the same restriction.

Chapters One to Three demonstrated why and how the interests of restrained persons are treated differently by the ROTD and by competition law in England and Wales (comprising EU competition law and UK competition law). It illustrated why some restrained professionals may prefer to rely on the ROTD. In this light, the concurrent applicability of the ROTD and competition law in England and Wales to some restrictions on persons makes the question of interface an important issue.

Part II aimed to identify the extent of the problematic interfaces between the ROTD and competition law. It traced how the problems emerged and speculated as to how they may further increase with the expansion of the overlap between the ROTD and competition law. The most acute problem arises if a person is not allowed to rely on the ROTD to resist a restriction in situations where competition law applies but, importantly, does not prohibit the restriction. Chapter Four focussed on the interface between the ROTD and UK competition law. Chapter Five examined the delineation of the interface between EU competition law and the ROTD. Chapter Six explored the potential increase in the interface problem if the jurisdiction of competition law expands.

In order to identify the problematic interface between the ROTD and UK competition law, Chapter Four examined traditional approaches to statutory interpretation, including the residual applicability approach which has been depicted using a rug metaphor. It showed how this approach can exclude the ROTD. This is especially the case where unreasonable “restraints of trade” that

would fall foul of the ROTD are not prohibited by competition legislation because, for example, of the “necessity” approach. Taking a historical perspective and by tracing the traditional interfaces between the ROTD and the restrictive practices/fair trading legislation, it was argued that this current problematic interface developed as an incidental consequence of legislative reform that did not intend to oust the ROTD but to cure other problems under previous legislative models (including poor fit with EU competition law).

Chapter Five examined Art 3 of EU Reg. 1/2003 which delineates the interface between ROTD and EU competition law. Art 3 intends to secure the priority of Art 101 over stricter national *competition* law but allows the unimpeded application of stricter national law that “predominantly pursues an objective different from that pursued” by EU competition law. Chapter Five criticised the interpretation of Art 3 offered by the High Court which stated that a contrary conclusion cannot be reached under the ROTD once EU competition law has been applied to a particular restriction even if competition law does not prohibit the restriction. This conclusion creates a significant problem for persons wishing to call on the ROTD to resist a restriction that is not prohibited by competition law.

The same conclusion may, due to obligations on courts to ensure consistency, operate in relation to s. 2 of the Competition Act 1998 which is the national equivalent of Art 101. The result is to quench the ROTD’s capacity to void “restraints of trade” that also come within the reach of either EU and/or UK competition law. Thus, some persons are deprived of the protection that may be available to them under the ROTD. The scale of this problem becomes even larger if the overlap between ROTD and competition increases as the jurisdiction of competition law in the UK (comprising EU competition law and UK competition law) expands.

In order to illustrate the possibility of an increased overlap and interface between the ROTD and competition law, Chapter Six examined the scope of the jurisdictional concept of “undertaking.” It challenged the traditional view that employees cannot be “undertakings” and set out arguments supporting the classification of some professionals in employment as “undertakings” under EU

competition law and, consequently, under UK competition law. It emphasised the readiness of some Advocates General to recognise “borderline” employees as “undertakings” and argued that this category could extend beyond members of the liberal professionals. It concluded that UK courts could, even in the absence of any EU Court judgment, decide to take the same approach as the Advocates General. The key consequence of classifying an employee as an “undertaking” is to increase the overlap between the ROTD and competition law. This extension of overlap (to include, for example, employment agreements) would increase the range of persons who become affected by the interface problem.

Part III in Chapter Seven sought and offered solutions to the interface problems which are based on conveying the distinctiveness of the ROTD so that it may legitimately be applied against restrictions which do not infringe competition law.

Chapter Seven started by seeking mechanisms or routes under, firstly, national law and, then, EU competition law that could safeguard the ROTD’s applicability. Section 7.2 explored the viability of s.2 of the Competition Act 1998 taking a stricter attitude than has been taken under Art 101(1). While this route may be possible, it would entail overcoming obstacles including the obligations of consistency contained in s.60 of the Act. Moreover, divergent outcomes under UK competition law and EU competition law create uncertainty and inconsistencies for some litigants. Thus, other routes were explored. Chapter Seven examined two canons of statutory interpretation (the “presumption against casual change” and the “mischief rule”) as mechanisms to interpret UK competition legislation so that ROTD might apply cogently where it overlaps with UK competition law. This option entails interpreting the competition legislation narrowly so that it does not casually oust the applicability of the ROTD. Consequently, determinations under the domestic competition legislation would not affect the operation of the ROTD. This route, it was argued, offers the best solution in cases where there is an overlap and interface with only UK competition law.

Section 7.3 explored solutions for the most problematic interfaces with EU competition law. It identified Art 3(3) of Reg. 1/2003 as the most viable solution because it allows the unimpeded application of national laws “that predominantly pursue an objective different from that pursued” by EU competition law. In effect,



Art 3(3) provides an exception to the “convergence” rule of Art 3(2) which precludes the application of stricter national competition law than Art 101. It argued Art 3(3), interpreted with the assistance of Recital 9 of Reg.1/2002 covers national laws that prohibit unfair or unjustified terms irrespective of the terms’ effects on the market and that it could save the ROTD.

Section 7.4 presented two general and seven specific proposals to assist judgments under ROTD to articulate its essence in a distinctive manner. They seek to ensure that the ROTD is not conflated or, otherwise, confused with competition law in order that the ROTD may be legitimately applied within the areas of overlap with national competition law and/or EU competition law. The proposals help judgments emphasise that the impact of a measure *on the restrained person* is a crucial and distinguishing element of analysis under the ROTD. By highlighting this aspect, courts will ensure that the ROTD’s predominant objective is set apart from the market oriented objective pursued by competition law.

The two general proposals advocate that courts, firstly, expressly refer to the ROTD’s public policy foundations and, secondly, use its distinctive language of rights, freedoms and justice. The seven specific proposals seek to highlight the significance of any adverse impact on the *restrained person* and its indifference to market effects. Specific proposals were offered to guide courts’ approach to i) the scope/availability of the ROTD and ii) its test.

The first specific proposal advocated that the *basis* for the ROTD’s expansive scope must be clearly explained because it takes account of the interests of restrained persons. This attitude makes it widely available to include, for example, persons who are not employees and, also, persons who are restrained by third party measures. That the ROTD is available where terms are unfair (even in the absence of undue influence or unconscionable conduct) reveals its objective to safeguard individuals.

The remaining specific proposals are directed as how the ROTD’s *test* is applied and aim to ensure that the ROTD’s objective of protecting persons is clearly conveyed. They propose that (i) ROTD judgments should start by expressing the ROTD’s antipathy towards restrictions; (ii) assessments of the *inter partes*

reasonableness of a restriction should include a broad spectrum of personal interests including economic and non-economic interests; (iii) close attention should be paid to the realities of the negotiation of the restriction; (iv) any analyses in the “public interest” should avoid typical competition law language and concepts; (v) judgments should expressly insist that restraining entities such as associations discharge their onus of justification: (vi) judgments must maintain the separateness of assessments under the *inter partes* and the “public interest” limbs of the test.

These proposals were supplemented by studies of cases in order to illustrate clearly that the ROTD’s concern is for *persons* rather than for markets when it analyses restrictions on persons. The studies endorse the viability of the proposals in terms of the ROTD’s public policy foundations, its concern for fairness to the restrained party, the foundations of its scope, its piercing enquiry into the realities of negotiation, its insistence that restraints be justified as reasonable in the parties’ interests and in the “public interest.”

By emphasising why and how the ROTD is concerned with persons and not with markets, the proposals seek to ensure that the ROTD is not seen as a version of competition law. The nature of the objective of the ROTD must be accentuated by explaining the basis for its deliberately expansive jurisdictional reach, its generous delineation of *locus standi* and its preparedness to offer remedies to persons who may not otherwise have any possibility of redress. The *inter partes* component is the pivotal and crucial component of the ROTD because it is patently distinct from the competition law test. This component insists that discrete consideration must be given to the implications of the restriction for the *parties* which contrasts with competition law’s focus on the effect of the restriction on the *market*. The ROTD’s interest in whether a measure is fair and truly negotiated by parties on equal bargaining terms evidences its objective to prohibit one party from, as Recital 9 puts it, “imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate ...”

The proposals intend to ensure the ongoing availability of the ROTD as an effective instrument to resist unreasonable restrictions which are not prohibited by competition law. This outcome is achievable by means of either the principles of

statutory interpretation (detailed in Section 7.2) and/or the saving provision in Art 3(3) of EU Reg.1/2003 (detailed in Section 7.3). The proposals are designed to secure either or both routes.

This research does not accept that the ROTD occupies only a limited and residual position in relation to competition legislation. It does not share the view expressed by Kamerling and Osman that the ROTD applies only if competition law does not apply.<sup>862</sup> It dissents, too, from the observation of Furse that “... the common law occupies only a residual role in relation to competition law generally.”<sup>863</sup>

Moreover, this research does not accept the High Court’s view that the Art 3 precludes courts from reaching a contrary determination under the ROTD once EU competition law is applied.<sup>864</sup> This research does not follow some commentators who seem to have accepted the High Court’s view without criticism. For example, Kammerling & Osman stated that the ROTD has been held to have the same objective as EU competition law and that it cannot be relied upon to lead to a different conclusion on the validity of an agreement.<sup>865</sup> Scott noted that in *Days Medical Aids* the ROTD has “been interpreted as serving the same ends as competition law.”<sup>866</sup>

This research highlights and addresses the failure by the UK legislature and judiciary to appreciate and defend the unique role of the ROTD in the face of competition law developments in the UK and at EU level. After reviewing UK and EU sources, it argued that the ROTD’s traditional protection is not necessarily threatened by competition law. It offered solutions to assist persons who are restricted by measures which fall under ROTD and also under UK competition law and/or EU competition law. The proposals would allow the ROTD to apply meaningfully within the overlap area, however large that area becomes. The ROTD

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862 A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Thomson Sweet & Maxwell, 4th ed. 2004) Preface xvi.

863 M. Furse, *Competition Law of the UK and EC* (Oxford: Oxford University Press, 2003, 4th ed.) 361.

864 *Days Medical Aids Ltd v. Pihsiang* [2004] EWHC 44 (Comm) Langley J and also *Jones v. Ricoh (UK) Ltd* [2010] EWHC 1743 (Ch) Roth J.

865 A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London: Sweet & Maxwell, 4th ed. 2004) 289.

866 A. Scott, “The Evolution of Competition Law and Policy in the United Kingdom” LSE Working Papers 9/2009 p.5. Available at SSRN: <http://ssrn.com/abstract=1344807>

based solutions have the advantage that judges enjoy more freedom when interpreting the ROTD than UK competition law. For this reason, ROTD solutions provide a more complete and more viable resolution of the interface problems than proposals based on national competition law which involve diverging from EU competition law.

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All ER	All England Law Reports
CAT	UK Competition Appeal Tribunal
Chi-Kent L. Rev	Chicago- Kent Law Review
CMLRev	Common Market Law Review
CMLR	Common Market Law Reports
CompAR	Competition Appeal Reports
DG COMP	Directorate General for Competition
DoJ	Department of Justice (United States)
DGFT	Director General for Fair Trading
DTI	Department of Trade and Industry
ECLR	European Competition Law Review
ECN	European Competition Network
ECR	European Court Reports
EIPR	European Intellectual Property Review
EL Rev	European Law Review
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
Harv. LR	Harvard Law Review
ILCQ	International and Comparative Law Quarterly
ILTR	Irish law Times Reports
IR	Irish Reports
IRLM	Irish Law Reports Monthly
IRLR	Industrial Relations Law Reports
IPR	Intellectual Property Rights
KB	Kings Bench
LIEI	Legal Issues in European Integration
MLR	Modern Law Review
OFT	Office of Fair Trading
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
QB	Queens Bench
SI	Statutory Instrument
TFEU	Treaty on the Functioning of the European Union
UKCLR	United Kingdom Competition Law Reports