

**THE BAR STANDARDS BOARD :
PARTNERSHIPS AND THE “CAB-RANK” RULE**

OPINION

1. I have been asked to advise the Bar Standards Board (“BSB”) on the compatibility with competition law of the current prohibition on barristers’ practising in partnerships and the application of the “cab-rank” rule in the light of the changes to legal professional practice being introduced by the Legal Services Act 2007 (“the LSA”). These questions have to be considered against two overlapping legal regimes: (a) the LSA; (b) competition law

(a) The LSA

2. In essence (and with some simplification of complex provisions), under the LSA the Bar Council, exercising its regulatory functions through the BSB, is an approved regulator;¹ and barristers authorised to exercise rights of audience before the courts by the Bar Council are “authorised persons”.² As an approved regulator, the BSB is required by section 28 of the LSA to discharge its regulatory functions, so far as is reasonably practicable, in a way which is compatible with the “regulatory objectives” of the LSA and which it considers “most appropriate for the purpose of meeting those objectives.”
3. Those “regulatory objectives”, prescribed by section 1 of the LSA, include:
 - i) protecting and promoting the public interest;
 - ii) improving access to justice;
 - iii) protecting and promoting the interests of consumers;
 - iv) promoting competition in the provision of services [of the kind that barristers provide, including representation before courts and tribunals and the provision of legal advice];³

¹ LSA, sect 20 and Sched 4, para 1.

² LSA, sects 12 and 18(1) and Sched 2, para 3.

³ LSA sect 1(1)(e) and (2), in conjunction with sects 12 and 18(1).

- v) encouraging an independent, strong, diverse and effective legal profession.
4. Further, Part 5 of the LSA makes provision for the establishment of what are called “Alternative Business Structures” (“ABSs”). In essence, an ABS is a body in which one or more of the owners or managers is entitled to provide legal services and one or more of the others is not. An ABS will have to be licensed by a licensing authority approved by the Legal Services Board (“LSB”), which may be an approved regulator designated for that purpose or the LSB itself. A partnership between only barristers, or between only barristers and solicitors (who are also authorised persons under the LSA), therefore would not constitute an ABS. It is contemplated that ABSs could include, for example:
- a) a firm of solicitors taking its IT or Accounting manager into partnership;
 - b) a multi-disciplinary partnership between solicitors, barristers and other professionals;
 - c) a law firm converting itself into a public company and issuing shares;
 - d) a major insurance company or supermarket setting up its own in-house lawyers.
5. It is not expected that Part 5 will be brought into force until about 2011-2012. The LSA also makes provision⁴ for an interim regime of what are known as Legal Disciplinary Practices (“LDPs”). An LDP is a body of which up to 25% is under non-lawyer ownership or control. The LSA provides that the Law Society, through the Solicitors Regulation Authority (“SRA”), may make rules for the regulation of LDPs.⁵ I am instructed that the SRA intends to have such rules in place by March 2009.

⁴ LSA Sched 16, paras 81-82, amending the Administration of Justice Act 1985.

⁵ The Bar Council has no equivalent powers. The question of whether it should seek such powers and related implications are fully considered in an Opinion for the BSB from Patricia Robertson QC.

6. The Explanatory Notes to the LSA indicate the basis on which Parliament came to establish ABSs, by reference to the Government's 2005 White Paper.⁶

“Potential benefits for consumers:

- more choice: consumers will have greater flexibility in deciding from where to obtain legal and some non-legal services;
- reduced prices: consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm;
- better access to justice: ABS firms might find it easier to provide services in rural areas or to less mobile consumers;
- improved consumer service: consumers may benefit from a better service where ABS firms are able to access external finance and specialist non-legal expertise;
- greater convenience: ABS firms can provide one-stop-shopping for related services, for example car insurance and legal services for accident claims; and
- increased consumer confidence: higher consumer protection levels and an increase in the quality of legal services could flow from ABS firms which have a good reputation in providing non-legal services. These firms will have a strong incentive to keep that reputation when providing legal services.

“Potential benefits for legal service providers:

- increased access to finance: at present, providers can face constraints on the amount of equity, mainly debt equity, they can raise. Allowing alternative business structures will facilitate expansion by firms (including into international markets) and investment in large-scale capital projects that increase efficiency;
- better spread of risk: a firm could spread its risk more effectively among shareholders. This will lower the required rate of return on any investment, facilitate investment and could deliver lower prices;
- increased flexibility: non-legal firms such as insurance companies, banks and estate agents will have the freedom to realise synergies with legal firms by forming ABS firms and offering integrated legal and associated services;
- easier to hire and retain high-quality non-legal staff: ABS firms will be able to reward non-legal staff in the same way as lawyers; and
- more choice for new legal professionals: ABS firms could contribute to greater diversity by offering those who are currently under-represented more opportunities to enter and remain within the profession.”

(b) Competition law

7. The prohibitions under UK competition law in the Competition Act 1998 (“CA”) mirror those in Articles 81 and 82 of the EC Treaty and are to be given the same interpretation: CA, section 60. Although it is highly likely that any restriction of competition that applies to the entire barristers’ profession would affect trade between Member States, and thus fall within the ambit of the EC rules as well as the domestic rules, it is therefore unnecessary for present purposes to give

⁶ *The Future of Legal Services: Putting Consumers First*, see Explanatory Notes to LSA, para 182.

separate consideration to EC and domestic competition law. The substantive test to be applied is the same and this Opinion will proceed on the basis of Article 81 EC.

8. Article 81(1) provides, in material part:

“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

....

(b) limit or control production, markets, technical development or investment;...”

9. Independent lawyers are “undertakings” for the purpose of competition law and the Bar Council is an association of undertakings: Case C-309/99 *Wouters*.⁷ Since professional rules issued by such an association of undertakings which affect the way in which a member of the association may conduct its economic activities come within the ambit of Article 81, it is not necessary to determine whether the Bar Council may itself be an undertaking or whether the Code of Conduct also constitutes an agreement between undertakings (i.e., individual barristers).

Discussion

10. I note that the BSB has reached the view that in the light of the provisions of the LSA that enable legal services to be provided through ABS firms, it would be wrong for its rules to prohibit barristers from being involved in such firms, and thus also in LDPs. That raises questions about the policy underlying the LSA and the wider implications for the Bar that are beyond the scope of this Opinion. I shall consider the rules in question only from the perspective of the regulatory objective of “promoting competition,” which of course has to be considered alongside the other regulatory objectives. In that regard, it is to be noted that whereas competition law prohibits only rules that *prevent, restrict or distort* competition, the objective under the LSA is a positive one, i.e. that the rules

⁷ [2002] ECR I-1577.

should *promote* competition. Accordingly, it is appropriate to consider first the position under competition law.

A. THE RULE PROHIBITING PARTNERSHIPS

(1) Does the prohibition of partnerships appreciably restrict competition?

11. Prima facie, a rule that prohibits economic operators (and it is immaterial whether they are professionals or other suppliers of goods or services) from engaging in one form of organisational structure in supplying their services to clients is restrictive of actual or potential competition. It may well be that barristers would not choose to form partnerships even if they were permitted to do so. I discuss this further below. To the extent that this is the case, the rule prohibiting partnerships has no restrictive effect, but equally its abolition would have no effect. However, to the extent that a not insignificant number of barristers would wish to form partnerships, they are denied the ability, available to almost all other suppliers of services, to achieve the level of profits, access to financing, degree of risk and any other benefits that can result from a particular structure. In addition to the more general points made in the Explanatory Notes to the LSA quoted above, the benefits that appear to me possible include the following:

- a) a partnership may be able to employ junior barristers as associates, and thus include a greater number of such juniors than under a Chambers structure since those juniors would not be taken in by a once-and-for-all tenancy decision that makes Chambers understandably cautious about admission of new members;
- b) although I believe that some Chambers have developed arrangements to share the risks involved in undertaking work on the basis of a CFA, a partnership structure may prove more suited to wider acceptance of cases under a CFA;
- c) although I am not familiar with the details, I understand that block contracting is being introduced for some criminal work, and also by

some insurance companies for personal injuries work; a partnership structure may be more suited to the entry into such contracts.

As regards enhancement of profitability, I should stress that being more efficient does not necessarily translate into higher earnings: a more efficient structure in that regard means that the partners could achieve the same level of earnings from lower fees. If effective competition operates on the market, bearing in mind that barristers' services are supplied to informed purchasers in the form of solicitors, an increase in efficiency should enable fees to be reduced.

12. In *Wouters*, the European Court of Justice ("ECJ") considered the professional rule of the Dutch Bar that prohibited members of the Bar from entering into multi-disciplinary partnerships ("MDPs"). The issue arose on a challenge to that rule under Article 81 brought by lawyers who sought to become partners in accountancy firms. The ECJ held that the rule clearly has an adverse effect on competition. The reasoning of the ECJ in this regard is worth setting out (paras 87-90):

“As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the one-stop shop advantage).

Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.”

The Court accordingly held that the prohibition of multi-disciplinary partnerships was liable to limit production and technical development within the meaning of Article 81(1)(b).

13. The same reasoning should apply to ABSs between barristers, solicitors and accountants. And it is indicative of the approach to be applied to the potential benefits that may flow from a partnership between barristers alone. The contrary argument largely rests on the proposition that formation of partnerships, particularly in a relatively small profession, would reduce the number of independent sources of advice and advocacy services, and thus lead to a reduction of competition. The rules of conflict would obviously prevent barristers in partnership from appearing on opposite sides in the same case, and even after a case was over the rules on protection of confidential information would sometimes prevent a barrister from acting for a client because of work previously undertaken by one of his or her partners. The need to assess such conflicts would complicate the acceptance of instructions and impose an additional cost burden. The reduction in access to barristers would be particularly acute in those areas of specialisation where there are relatively few Chambers, such as tax, defamation, intellectual property and, indeed, competition law. Even in larger fields like personal injuries there are particular specialisms, such as clinical negligence. Moreover, in a number of regional centres the Bar is now concentrated in a small number of large Chambers, so that if they became partnerships the choice of a local barrister available for litigation would be significantly reduced.
14. However, all these considerations provide powerful reasons why barristers in areas where conflict problems would be frequent would be most unlikely to form partnerships. It is difficult to see why barristers would choose to cut themselves off from many potential clients. In that regard, I note that the Bar Council in its response to the BSB consultation considers it unlikely that barristers in general would want to practise in partnerships.⁸ There is perhaps some analogy with the introduction of the right for solicitors to obtain advocacy rights in the higher courts. Although a not insignificant number of solicitors have chosen to qualify and exercise those rights, the majority have not and continue to instruct the Bar.

⁸ Response by the Working Group on behalf of the Bar Council to the Consultation Paper Issued by the BSB (“Bar Council Response”), para 14.

15. At most, if the partnership structure is seen to bring significant advantages, some larger Chambers might fragment into smaller units where that did not sacrifice the benefits of economies of scale (a feature that has assumed greater importance as Chambers come to employ their own IT managers, marketing managers, etc). Even if that were to happen, it would be on the basis that this enabled client need to be met with the benefit of a partnership structure. And if a consequential "conflicting out" of barristers created unmet client need, one would expect new Chambers or partnerships to be established. The argument that the prohibition of partnerships is pro-competitive proceeds on the assumptions that (a) there is a serious risk that a significant number of Chambers would convert to partnerships while maintaining their size; and (b) even if there was an unmet demand for barristers, the number of barristers in practice would not increase in response. Neither of those assumptions appears to me self-evident.
16. A similar argument was advanced in *Wouters* in view of the fact that the accountancy profession was much more concentrated than the barristers in the Netherlands. The Court responded as follows (paras 93-94):
- “... unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.
- Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.”
17. The ECJ does not explain further what it had in mind by its reference to “less extreme measures”, and I find it difficult to envisage what such measures might be in the present case (a limitation on the size of a partnership is one possibility, although any figure would be difficult to determine and somewhat arbitrary). Although the above-quoted paragraphs leave some scope for an argument that the prohibition is not anti-competitive, I think that this comes down to an assessment of likely developments. On balance, for the reasons set out above, I

consider that if partnerships at the Bar were permitted, it is very unlikely that this structure would be taken up to an extent that caused an appreciable restriction of competition, whereas in those circumstances where barristers did choose to form partnerships I think it would be to enable them to compete more effectively.

18. In that respect, it should be borne in mind that the effect of the rules has to be assessed in terms of anticipated developments over the foreseeable future. The use of CFAs and the introduction of block contracting for advocacy services, whatever one may think about such developments, seem likely to increase. Moreover, if the BSB reaches the view that barristers should be permitted to be partners in an ABS, retention of a prohibition on barristers forming partnerships alone would be anomalous. And it would enable barristers readily to avoid the prohibition by, for example, establishing an ABS with one accountant as a partner (or indeed, if that were permitted under the rules, their clerk).
19. Furthermore, although the present structure may enable clients to have the widest choice of counsel, it should I think be recognised that in other respects competition as between members of the same Chambers is limited. The increasing development in recent years of marketing by barristers is largely conducted for Chambers as a whole. And I think it must be questionable to what extent there is price competition between individual barristers in the same Chambers, especially when fee quotations and negotiations are conducted for all of them by the same clerk.
20. Altogether, I therefore consider that the prohibition on barristers entering partnerships, and also any prohibition upon them entering into ABSs, has the potential appreciably to restrict competition.

(2) Does the prohibition infringe Article 81(1)?

21. In *Wouters*, having found that the relevant rule of the Dutch Bar restricted competition, the ECJ concluded that it nonetheless did not infringe Article 81(1). The Court held (at para 97) that:

“... 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 [81(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 to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”

22. The Court found that the obligations on members of the Bar to advise and represent their clients independently and the observance of strict professional secrecy might be compromised if they belonged to an organisation that was also responsible for the auditing of their clients' accounts and certification of those accounts for the benefit of third parties. Therefore the restriction of competition involved in the prohibition on members of the Bar entering into MDPs with accountants did not appear to go beyond what was necessary in order to ensure the proper practice of the legal profession as it was organised in the Netherlands.
23. Although there are dicta in *Wouters* suggesting that the question whether the objectives of the rules cannot be attained by less restrictive means was a matter for the reasonable judgment of the Netherlands Bar itself, in subsequently applying *Wouters* the ECJ adopted an objective test. The questions are accordingly (i) whether the objectives pursued by the rule in question, having regard to its overall context, are legitimate; (ii) whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives; and (iii) whether having regard to those effects the rule is proportionate: see Case C-519/04P *Meca-Medina v Commission*⁹ at para 42.
24. Here, the objectives served by the rule which have been identified are:
 - a) to ensure the widest choice of Counsel to the public;
 - b) to enable effective operation of the “cab-rank” rule;

⁹ [2006] 5 CMLR 1023

- c) to enable barristers to sit as Recorders or deputy High Court judges in cases in which members of their Chambers are appearing as Counsel.
25. It should be acknowledged straight away that each of the above are legitimate objectives. Accordingly, the critical issues are whether a prohibition on partnership is inherent in the pursuit of those objectives and proportionate.

(a) Choice of Counsel

26. This has been considered at length above. For the reasons there set out, I do not think, on balance, that a complete prohibition on barristers practising in partnership is inherently necessary or proportionate in order to ensure that the public has a sufficiently wide choice of Counsel.

(b) “Cab-rank” rule

27. Although familiar in general terms, it is appropriate to set out the specific rules in the Code of Conduct in which this is prescribed. Paragraphs 601-602 of the Code are as follows:

“601. A barrister who supplies advocacy services must not withhold those services:

(a) on the ground that the nature of the case is objectionable to him or to any section of the public;

(b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;

(c) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).

“602. A self-employed barrister must comply with the ‘Cab-rank rule’ and accordingly except only as otherwise provided in paragraphs 603 604 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

(a) accept any brief to appear before a Court in which he professes to practise;

(b) accept any instructions;

(c) act for any person on whose behalf he is instructed;

and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.”

28. The “cab-rank” rule, strictly so-called, is in paragraph 602. However, it is important also to have regard to paragraph 601, which can conveniently be referred to as a “no discrimination” rule. There are a number of exceptions to paragraph 602 in the subsequent paragraphs, including in particular that a barrister is not obliged to accept a case for a fee that is not reasonable or on a CFA. Legal aid graduated fees for criminal and family work are now not deemed to be reasonable fees. The rule also does not apply to barristers employed by a firm of solicitors or approached under direct access.
29. I note that the Bar Council, in its response to the BSB consultation, considers that the “cab-rank” rule could continue to apply to barristers practising in partnership, whether with one another or in an ABS or LDP.¹⁰ By contrast, the BSB considers that it is not possible to apply the rule to ABSs or LDPs. I have not been asked to assess the strength of these differing views, and for the purpose of this discussion I shall assume that the latter view is correct. It is based on the consideration that applying the rule would mean that a firm could be “conflicted out” of litigation by instructing a relatively junior member of the firm to undertake a minor piece of work: BSB Consultation paper, para 59.
30. There have been many justifications for the “cab-rank” rule. These include¹¹:
- a) It maintains and reinforces the independence of advocates who take cases because it is their professional duty, not because they support or approve of their client;
 - b) It facilitates access to justice by ensuring that unpopular individuals and causes are able to obtain appropriate legal representation.

¹⁰ Bar Council Response, paras 45 and 88. Cp the Report of the Kentridge Committee, *Competition in the Professions*, para. 3.15, which considered that a profession with a partnership structure cannot readily apply such a rule.

¹¹ Report of the Kentridge Committee, paras 2.24-2.25

31. I think it is indisputable that both of these objectives are of fundamental importance. They also fall squarely within the regulatory objectives set out in section 1(1)(a), (c) and (e) of the LSA.
32. However, it is not evident why these objectives would not be sufficiently secured by the “non-discrimination” rule in paragraph 601 of the Code. There is no suggestion that that rule cannot equally apply to barristers in a partnership, whether an ABS, LDP or a partnership only of barristers. I can see that provision (iii) in paragraph 602 may also be important in supporting these objectives. On the information before me, I can see no reason why such a provision could not be incorporated in an amended “non-discrimination” rule and accordingly apply to barristers in partnerships.
33. It may be suggested that the fact that paragraph 601 is framed in negative terms whereas paragraph 602 is in positive terms means that it is the combination of these provisions which makes the non-discrimination rule effective in practice. Once a barrister is no longer under a positive duty to accept instructions, it is harder to determine the reason for which he declined to act. But it seems to me disproportionate to impose a prohibition on barristers practising in partnership, with all the attendant consequences for competition, simply in order to render the non-discrimination rule easier to enforce. There does not appear to be any basis for asserting that barristers would violate an enhanced non-discrimination rule simply because they were not under an obligation to take the case in other circumstances.
34. Those provisions apart, the main force of the “cab-rank” rule is to require a barrister to act on a “first come, first served” basis. Thus, a barrister cannot refuse to act for one party in a case in the hope that another of the parties with larger resources and able to pay a higher fee may instruct him instead. Similarly, a barrister cannot refuse to accept instructions on the basis that this would conflict him from acting in a more lucrative case in the future. To pursue the taxi analogy, he must accept a client who does not want to travel very far and so will not run up a high fare. To that extent, the “cab-rank” rule supports the wider availability of Counsel to the public.

35. I do not know to what extent this aspect of the “cab-rank” rule, as distinct from the "non-discrimination" rule, is significant in ensuring that the public has adequate access to the Bar. That is a question of empirical evidence, which does not appear to be available. However, I am sceptical of any suggestion that removal of this rule would cause smaller clients to be significantly hampered in securing Counsel of the appropriate skill and experience. Unlike a taxi, the barrister’s fee is not regulated, and under the current regime he can refuse to act if the fee offered is not reasonable. The fact that graduated legal aid fees for family and criminal work are no longer deemed to be "reasonable" appears to remove a large number of cases from the ambit of the rule. Moreover, the (necessary) exception that a barrister may decline instructions if he is too busy¹² inevitably gives scope for successful practitioners to avoid a case that will be less well rewarded. Accordingly, if removal of the prohibition on partnerships is in itself unlikely to lead to a significant curtailment in the availability of Counsel, I do not see that removal of this aspect of the “cab-rank” rule would significantly reduce the willingness of barristers to undertake smaller or less well remunerated work.

Barristers as part-time judges

36. A barrister practising in a partnership would be unable as a Recorder or Deputy High Court judge to hear a case in which a member of his firm was appearing, or where his firm had acted for one of the parties. In that regard, his position would be no different from that of a solicitor sitting in such a judicial capacity. Although a solicitor has to carry out the necessary conflict checks, there are now many solicitors sitting as Recorders and I am not aware that this has given rise to particular difficulties. It may be that in regional centres where Chambers are fewer in number there would be greater difficulties in terms of Counsel coming from the same Chambers as the judge. Although it would be helpful if information was available as to the number of times part-time judges have members of their own Chambers appearing before them, I suspect that this would only be a significant problem if many of the large regional Chambers

¹² Code of Conduct, para 603(b).

converted into partnerships, which seems inherently unlikely for the reasons discussed above.

37. It would be curious if a rule that was regarded as having an adverse effect on competition in the supply of barrister services had to be retained to enable a minority of barristers to fulfil an occasional judicial function (i.e., supplying non-barrister services). Taken as a whole, the effect on the availability of barristers to hear cases as part-time judges does not appear to be such as to make it proportionate to maintain the adverse effect on competition of a prohibition on barristers forming partnerships.

(3) Does the prohibition satisfy the conditions of Article 81(3)?

38. If the rule against partnerships therefore falls within Article 81(1), it can nonetheless escape the consequences of that provision if it satisfies the conditions of Article 81(3). Insofar as material, this provides:

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

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— any decision or category of decisions by associations of undertakings;

.....
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;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

39. In that regard, the key issue here is whether the prohibition of partnerships can be shown to be indispensable to improving the “distribution” (i.e., the making available) of barristers’ services. Accordingly, in the present case the issue under Article 81(3) is effectively the same as the considerations that arise in addressing under Article 81(1) whether the prohibition appreciably restricts competition. For the reasons discussed at length above, I doubt that such an argument is likely to succeed.

(4) The regulatory objectives of the LSA

40. On the basis that the rule against partnerships appreciably restricts competition, it clearly does not meet the regulatory objective of promoting competition set out in section 1(1)(e) of the LSA. Where on a particular matter the various regulatory objectives in the sub-section conflict, it seems that the BSB has to take a balanced view of what is best suited to achieve the various objectives overall: cp *R v. Director General of Telecommunications ex p. Cellcom*, para 25.¹³ As regards such conflict with the competition objective, I think that this exercise is similar in effect to the considerations that arise under the EC law test set out in paragraph 23 above, and that the LSA should be interpreted and applied in a manner that is consistent with Article 81 EC.

B. SELECTIVE APPLICATION OF THE CAB-RANK RULE

41. If it is decided that the “cab-rank” rule should not apply to barristers in ABSs or LDPs, two further questions arise: would it be contrary to competition law to maintain the rule either (i) for barristers in partnership as well as self-employed barristers, or (ii) solely for self-employed barristers? These are not easy questions to answer since much will depend on the extent and forms of structure that would emerge in the post-LSA world. That is inevitably a matter of speculation and others are doubtless in a much better position than I to anticipate the likely developments. Moreover, a decision as to whether or not to maintain the “cab-rank” rule could influence barristers’ choices of whether to set up partnerships, because of concern about being “conflicted out”, and thus may itself have an effect on the way the post-LSA world will develop. Doing the best I can on the information before me, I set out my views below.

(1) Barristers in partnership

42. For this purpose, I assume that application of the “cab-rank” rule is not regarded as intrinsically inappropriate for a partnership, but that the BSB considers that it should not be applied to barristers in an ABS or LDP.

¹³ [1999] ECC 314.

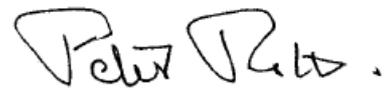
43. If the reason for this is to preclude a risk of “conflicting out”, the same risk might be considered to apply to barristers in partnership. If that is so, maintenance of the rule on barrister-only partnerships could be said to distort competition between such barrister partnerships and ABS/LDPs. However, so far as I can tell, it seems likely that in most cases where an ABS or LDP includes barristers it will also include solicitors, since the primary objective of these new structures is to provide a “one stop shop” for clients. In those circumstances, ABSs and LDPs will be competing with independent solicitors plus the independent Bar, and not directly with barrister partnerships. Therefore, I doubt that maintenance of the “cab-rank” rule on partnerships comprising only barristers would *appreciably* distort competition. If that is correct, the same conclusion clearly applies to the application of the rule also to self-employed barristers.

(2) Self-employed barristers

44. If, on the other hand, the “cab-rank” rule is regarded as inappropriate for a partnership and barristers in partnership are therefore exempted, can the rule be maintained *solely* for self-employed barristers?
45. There seems no doubt that barrister partnerships and self-employed barristers would be in direct competition for the custom of solicitors. Again, the matter is speculative, but I can see a concern that partnerships might turn away less lucrative instructions and confine their practice to the better remunerated cases. I do not see any risk that partnerships could thereby “cream off” the best paid cases, since a well-resourced client will doubtless continue to seek out the best barrister for its case, irrespective of whether that barrister was in a partnership or self-employed. Moreover, the “cab-rank” rule does not require a barrister to accept instructions for less than his usual fee (save for legal aid work in the limited fields where those fees are still deemed to be reasonable). Nonetheless, if it is thought that there is a realistic prospect that self-employed barristers would be placed at a serious disadvantage since they would be obliged to accept instructions also for lesser cases that barristers in partnership could refuse, then maintenance of the “cab-rank” rule only on the self-employed Bar could

appreciably distort competition - and in consequence drive barristers to set up partnerships whereas otherwise they would find sole practice a preferable model.

46. For these reasons, I do not feel able to reach a clear conclusion on this issue. Given all the uncertainties, one possibility that the BSB might wish to consider is to maintain the “cab-rank” rule on the self-employed Bar in any event and keep the situation under review.

A handwritten signature in black ink that reads "Peter Roth". The signature is written in a cursive, slightly stylized font.

PETER ROTH QC

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

22 July 2008