THE BAR STANDARDS BOARD :
PARTNERSHIPS AND THE "CAB-RANK" RULE

SUPPLEMENTARY NOTE

1. I have been sent a number of comments and queries by the BSB' ABS group arising from my Opinion of 22 July 2008. Some of these serve to highlight the difficult aspects of this matter, and the borderline judgments that are involved in an area with scant precedent to furnish a guide. I respond to them below as best I can, and this Note should be read along with the list of queries in the two-page document dated 25 July. For convenience, I refer here to the "cab-rank" rule as the "CRR".

(1) Onus of proof

(a) Competition law (ie, Art 81 EC and similarly the Chap 1 prohibition of the CA)

2. The burden of proving that a decision by an association of undertakings (or an agreement) infringes Art 81(1) rests on the party alleging that infringement: Reg 1/2003, art 2. However, although that applies without qualification to the assertion that a rule of the Code of Conduct appreciably restricts or distorts competition, when one comes to the question of whether such a restriction may be objectively justified such that it should nonetheless should fall outside Art 81(1) – i.e. the *Wouters* test: paras 21 et seq of my Opinion – the UK Competition Appeal Tribunal has held that an evidential burden rests on the party claiming such justification: *Racecourse Association v OFT*, paras 132-133 ("he who asserts must prove").[1] This makes obvious sense.

3. As regards Art 81(3), the burden of proving that the conditions of that paragraph are satisfied rests on the party claiming the benefit of that provision: Reg 1/2003, art 2.

[1] [2005] CAT 29, [2006] CompAR 99.

4. If there is no conclusive evidence one way or the other, it seems to me that this does not affect the legal question of where the burden lies. It may of course (as in any other case) be material in determining whether the burden has been discharged.

(b) The LSA

5. The duty under sect 28 to promote the regulatory objectives rests on the Bar Council (through the BSB) as the approved regulator. The LSB can issue a direction to an approved regulator to take appropriate steps if it is satisfied that the regulator's act or omission is likely to have an adverse impact on one or more of the regulatory objectives: sect 32. Presumably, such steps could include an amendment to the Code of Conduct.

6. Also of direct relevance is the power of the OFT under sect 57. If the OFT is of the opinion that any part of the regulatory arrangements of an approved regulator prevents, restricts or distorts competition to any significant extent, or is likely to do so, the OFT may (it is not a duty) prepare a report to that effect, which must be published and also given to the LSB. It will be noted that this test mirrors Art 81 and does not correspond to the regulatory objective of the *promotion* of competition. The approved regulator is then entitled to make representations on the OFT's report to the LSB, which then must notify the OFT "of the action (if any) it proposes to take in response to the report": sect 58. If the OFT considers that the LSB has failed to to give "full and proper consideration" to its report, it may give a copy of the report to the Lord Chancellor, who then must seek the advice of the Competition Commission ("CC"): sect 59. The CC then conducts an investigation of the matter and prepares its own report, concluding what action, if any, ought to be taken by the LSB: sect 60.

7. This suggests to me that if the OFT felt that a rule of the Code of Conduct restricted competition, it would be unlikely to take direct enforcement action under EC or UK competition law but would rather proceed in accordance with these provisions of the LSA, cumbersome though they are. That would give the BSB the opportunity to justify the rule to the LSB and, if necessary, also to the

CC, which would become the ultimate arbiter. The CC's proceedings are of course investigatory not adversarial. However, none of this prevents anyone else from challenging a rule of the Bar under competition law before the courts, as indeed occurred in the Netherlands in *Wouters.*

(2) Barristers as managers or partners in an ABS/LDP/LLP

8. As regards the effect of potentially restricting competition, the same analysis applies, mutatis mutandis, to a prohibition on barristers becoming partners or managers in an ABS/LDP/LLP as to a prohibition of barrister-only partnerships. Indeed, the restrictive effect may be greater for the former than for the latter, and it was the effect of a prohibition on members of the Dutch Bar joining MDPs that was held to be potentially anti-competitive in *Wouters.*

9. However, as regards objective justification, the position here seems to me rather different from barrister-only partnerships. There may well be broader grounds to justify a prohibition on barristers being members of MDPs, which seem to me to raise various other considerations: see the *Wouters* judgment. This deserves further exploration. But there is an important aspect to be borne in mind. In *Wouters,* the Dutch government was involved in the adoption of the Bar rules and the government intervened in the proceedings before the ECJ, presumably in support of the position of the Bar Council.[2] Although neither of those factors is relied on in the judgment, I think that the view which may be taken of objective justification may be influenced in practice by the attitude of the public authorities. As regards ABS/LDPs, I note that the Clementi Report was unpersuaded that the prohibition on partnerships was justified, and the second bullet in the extract from the White Paper (see para 6 of my Opinion) envisages different types of legal professionals being included in these new structures. None of this is decisive: but they are factors to be taken into account. On the information before me, I find it impossible to predict how a challenge to a prohibition on barristers being managers or partners in these new structures would be determined, whether under competition law or the LSA. I would only

[2] The submissions of the Dutch government are not set out in the report.

add that if a good case can be made for maintaining the prohibition in that regard, I think this needs to rest on more than just the maintenance of the CRR.

(3) Application of the CRR to barristers in partnership

(a) Barristers in partnership with non-barristers

10. I can see the difficulty of applying the CRR to the barristers in that situation, and that if it were applied it would be a major obstacle to barristers becoming partners since the non-barristers involved may not be willing to accept the resulting restraints. Given the benefits that ABS/LDPs are seen to bring, including the provision of a "one-stop shop", I think that maintaining the CRR on barristers in that situation could well be seen to have the indirect effect of appreciably restricting competition, and more particularly conflict with the higher regulatory objective of the *promotion* of competition. See also para 13, below.

(b) Barrister-only partnerships

11. If barrister-only partnerships were free from the CRR, while it was maintained as an obigation on the self-employed Bar, that might have the effect in itself of distorting competition: para 45 of my Opinion. Thus maintenance of the CRR on barrister-only partnerships may be justifiable on competition grounds. I am not convinced that it would necessarily deter barristers from forming at least smaller partnerships: they would have to weigh up the benefits of partnership against the risks of being "conflicted out" of cases. For example, a group of barristers specialised in tax who were never instructed by the Revenue may see little problem by reason of the CRR in forming a partnership. To the extent that it deterred barristers from forming large partnerships, or some barristers from going into partnership at all, that would be a consequence of the maintenance of the CRR that was regarded as justifiable in support of several of the regulatory objectives in the LSA. On that basis, it seems to me strongly arguable that application of the CRR to barrister-only partnerships would be consistent with both the LSA and competition law.

(4) Limited prohibition on barristers joining ABS/LDPs

12. This seems to me to be subject to the same objections, in substance, as set out in para 10 above. Many ABS/LDPs are unlikely to be willing to be subject to the CRR, especially as solicitors are not subject to such a rule.

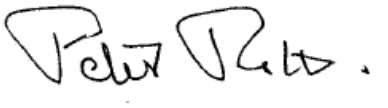
(5) ABS/LDPs without the CRR

13. It will of course be possible to form ABS/LDPs without the inclusion of barristers as partners or managers. It seems very likely that some ABS/LDPs will come to work only or principally for one side (eg "Tesco law" firms acting only for consumers), as do solicitors firms today. Accordingly, the question is whether such new structures should then provide representation in court only by solicitor advocates, employed barristers and by instructing the independent Bar, or whether on the other hand they can also include barristers as partners. I fail to see why including barristers as partners should have a material effect on the availability of independent barristers to act for "the other side" unless it is considered that allowing this to happen would be the beginning of the end of the independent Bar. I seem to recall that the same fear was raised when the Code was changed to allow barristers to be employed by solicitors' firms. Barristers of course can (and do) work for the CPS. It is not difficult to set out a scenario that would operate against the public interest. When this is raised as a ground to prevent a change that is likely to improve competition, an informed view has to be taken, as with much else in this discussion, of the likelihood of that particular scenario materialising.

(6) Barristers and handling client money

14. I do not see that the speculative possibility of an occasional scandal can justify a prohibition on the entire profession participating in structures introduced by legislation as conducive to the better provision of legal services. I consider that this would clearly be disproportionate and thus fail head (iii) of the test derived from *Wouters* (para 23 of my Opinion). I note also that barristers are entitled to be directors of companies. I appreciate that they are then not acting as barristers,

but there is nonetheless the possibility of some scandal for which they bear responsibility as directors.



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