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Editorial comments

“Between the public interest and the free market: would the liberalisation of the legal profession bring benefits to the client—and to the market?”

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1. Introduction. The legal profession between Brussels, Luxembourg and the Member States—a moving target?

On 12 September 2007, the International and European Law Unit based in Liverpool Law School at the University of Liverpool hosted a conference on the topic of the impact of the application of the EC and national rules on the protection of competition on the regulation of legal services. This theme has been at the forefront of the debate in the EU and in the Member States for a number of years. In 2004, the Commission published a report on “Competition in Professional Services”, followed in 2005 by a second paper on the topic “Professional Services—scope for more reform”.¹ The Commission efforts were prompted by the adoption at the Lisbon European Council in March 2000 of an agenda of economic reform (the Lisbon Strategy) aimed at “making the EU the most competitive and dynamic knowledge-based economy in the world by 2010”.²

Among the goals pursued by that Strategy was the promotion of “better regulation” in professional services. In the words of Commissioner Kroes:

“Regulation should support European competitiveness rather than hinder it, and foster growth and jobs. This means regulation that is proportionate, grounded on clear evidence, and where the benefits of the rules clearly justify the cost. The better regulation agenda therefore rightly includes both improving new legislation and simplifying existing regulation too, as well as reviewing or abolishing obsolete rules.”³

¹ See http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html. Accessed on 12 March 2008.

² Communication from the European Commission, “Report on competition in professional services”, COM/2004/0083/final, executive summary, section 6.3.

³ Commissioner Opening Speech to the EP JURI Committee on 29 November 2005, available at: http://ec.europa.eu/comm/competition/speeches/text/sp2005_022_en.pdf. Accessed on 12 March 2008.

Although the Commission recognised that in certain economic areas regulation may be justified, it called for the scrutiny of regulatory restrictions impinging upon the economic freedom of these professionals based on the principle of proportionality.⁴ According to the 2004 Report:

“Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective. Such rules serve the interests of users and of the professionals alike.”⁵

Alongside action at EU level, individual Member States also investigated the issues arising from the implications of the competition rules for the regulatory structure governing the legal profession. Among the documents published at domestic level, the *Report of the Review of the regulatory framework for legal services in England and Wales*, commissioned by the British Department for Constitutional Affairs and carried out by Sir David Clementi (hereinafter referred to also as the Clementi Report), and published in 2004 provided an accurate and thought provoking snapshot of these issues in England and Wales.

The Clementi Report envisaged the establishment of a regulatory framework that could reconcile the promotion of “competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector” with the public interest in the independence, accountability and transparency of the legal profession and for the purpose of protecting the sound administration of justice.⁶ It was argued that the regulation of the legal profession should ultimately ensure access to justice for all individuals through the establishment of a regulatory framework aiming to provide sound legal advice in a cost-effective and consumer friendly manner.⁷

The case law of the ECJ has also contributed substantially to the debate concerning the extent to which the EU competition rules should be applicable to the legal profession. Decisions such as *Arduino*,⁸ *Wouters*,⁹ *Mauri*¹⁰ and

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Foreword, “Report of the Review of the regulatory framework for legal services in England and Wales”, Sir David Clementi, December 2004 (hereinafter referred to as Clementi Report) available at: <http://www.legal-services-review.org.uk/content/report/foreword.htm>, para. 2. Accessed on 12 March 2008.

⁷ *Id.*, para. 10.

⁸ Case C-35/99, *Criminal proceedings against Manuele Arduino*, [2002] ECR I-1529.

*Fazari*¹¹ have raised significant questions on the objectives of regulation, on the assessment of the limits it places on the freedom to provide legal services enjoyed by each legal professional and the manner in which regulatory measures should be adopted.

These judgments have also provoked debate on more general issues concerning the interpretation of the Treaty competition rules. The decision in *Wouters* raises the question of the extent to which “non-economic”, “public interest based” considerations should play a part in the competition scrutiny of the existing regulatory restrictions imposed on legal professionals.¹² The preliminary rulings in the *Arduino* and *Mauri* cases, which confirmed that Member States remain entitled to exercise regulatory powers on the provision of legal services, raised issues in regard to the scope of applicability of Articles 81 and 82 to these regulatory restrictions.¹³ The ECJ seemed to suggest that an “active supervision” requirement may have to be fulfilled to determine whether any regulatory restriction should come within the reach of the competition rules in cases in which domestic law provides for the involvement of national authorities in the adoption of, for instance, fee scales.¹⁴

The recent CFI judgment in *AKZO Nobel* also shed light to an allied but no less important issue concerning the provision of legal advice, namely the scope of legal professional privilege (hereinafter referred to also as LPP) in Community law.¹⁵ Although the Court declined to reformulate the conditions governing privilege so as to allow its protection to cover communications emanating from employed counsel, the judgment, which is now under appeal,¹⁶ forcefully reaffirmed the principle of the “special status of lawyers” as intermediaries between the public and the courts and as professionals

⁹ Case C-309/99, *Wouters and others v Algemene Raad de Nederlandse Orde van Advocaaten*, [2002] ECR I-1577.

¹⁰ Case C-250/03, *Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'Appello di Milano*, [2005] ECR I-1627.

¹¹ Joined cases C-94/04 and C-202/04, *Cipolla v Fazari and others*, [2006] ECR I-11621.

¹² Case C-309/99, *Wouters and others v Algemene Raad de Nederlandse Orde van Advocaaten*, [2002] ECR I-1577, para. 97-99. Cf. case T-112/99, *Metropole Television (M6) SA and others v Commission*, [2001] ECR II-2549, especially paras. 72, 74-77. See also Commission Guidelines on the application of Article 81(3) EC Treaty, [2004] OJ C97, para. 10-11.

¹³ See case C-35/99, *Criminal proceedings against Manuele Arduino*, [2002] ECR I-1529, paras. 37-39; also, case C-250/03, *Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'Appello di Milano*, [2005] ECR I-1627, paras. 31-34.

¹⁴ See, *inter alia*, case C-250/03, *Mauri*, cit. (footnote 13), para. 35-37.

¹⁵ Joined cases T-125/03 and 253/03, *AKZO Nobel and Ackros Chemicals v Commission*, judgment of 17 September 2007, not yet reported.

¹⁶ Case C-550/07, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, appeal brought on 8 December 2007, [2008] OJ C37/19.

responsible for the provision of legal advice in the interest of the sound administration of justice.¹⁷

The above remarks indicate that a general theme emerges from the debate, namely how the regulation of the legal profession can be balanced against the needs of competition in this market, in a manner which allows individuals to obtain reliable and good-quality legal advice for the purpose of exercising their right to access to justice.¹⁸

2. The goals and forms of regulation in the EU and in the Member States

The above discussion suggests that paramount to the assessment of any framework for the regulation of the legal profession should be an examination of its goals and justifications. In this respect, the arguments based on the need to correct the risk of “market failure” in the provision of legal and, more broadly, professional services are well established. The need to correct the information asymmetry between the provider and the consumer, arising from their nature of “credence goods”, whose quality cannot be immediately and perceptibly assessed at the moment of acquisition, as well as the “negative external effects” potentially caused by the supply of “bad-quality” legal advice or by conflicts of interest are widely accepted as justifying the establishment of entry requirements, of fees and fees’ scales and limitations on the freedom to determine the business form through which to provide these services.¹⁹

However, it is essential that any regulatory structure assists rather than hinders the efficient provision of good-quality legal services. It is in this context that the “competition scrutiny” should take place, to ensure that a strict relationship of proportionality between the restrictions imposed on the conduct of the service providers and the legitimate interests they pursue is satisfied.²⁰ In this specific respect, “public interest considerations”, namely the protection of confidentiality, the enforcement of appropriate standards of ethical integrity and of safeguards against conflicts of interests for the purpose of unfettered

¹⁷Joined cases T-125/03 and 253/03, *AKZO Nobel and Ackros Chemicals v Commission*, judgment of 17 September 2007, not yet reported, especially paras. 77-79

¹⁸ *Inter alia*, Foreword, Clementi Report, cit. (footnote 6), para. 10. Accessed on 12 March 2008.

¹⁹ See, *inter alia*, Clementi Report, cit. (footnote 17), paras. 7 and 11.

²⁰ E.g., Communication from the European Commission, “Report on competition in professional services”, COM/2004/0083/final, para. 49-51.

access to independent and properly qualified legal advice and the sound administration of justice play a key role.²¹

In addition, the enactment of the Modernisation Regulation, with its emphasis on the decentralised enforcement of competition law, has highlighted the importance of the role of national competition authorities in the process of “competition scrutiny” of the restrictions on business freedom imposed on lawyers in the public interest. The 2003 reforms have in turn resulted in lively debate and painstaking review being initiated at national level. For instance, in England and Wales, the Office of Fair Trading 2001 “Competition in professions”²² and the already mentioned 2004 Clementi Report paved the way for the adoption of the 2007 Legal Services Act. The Irish Competition Authority also launched its own Report on the legal profession in 2006.²³

The scrutiny currently taking place at national level should also be examined in the light of the principles affirmed by the ECJ in its recent case law, according to which any reform in the field of the regulation of the legal profession should take place first and foremost at national level, albeit within the framework of objectives established at EU level, including those laid down in the 2000 “Lisbon Strategy”.²⁴

This position was also forcefully endorsed by the European Parliament. Its 2006 resolution emphasised that “any reform of the legal profession has far-reaching consequences going beyond competition law into the field of freedom, security and justice”²⁵ since it affects fundamental human rights such as that to access to justice and to a fair trial, which, under the EU constitutional framework, are left to the jurisdiction of the Member States.²⁶ The European Parliament therefore called upon the Commission to exercise restraint in applying competition law to some of the restrictions on the economic freedom

²¹ *Inter alia*, case C-309/99, *Wouters and others v Algemene Raad de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para. 98-99.

²² OFT328 (March 2001), available at: http://www.oft.gov.uk/shared_ofr/reports/professional_bodies/oft328.pdf. Accessed on 12 March 2008.

²³ Irish Competition Authority, “Competition in the liberal professions: solicitors and barristers”, 11 December 2006, available at: http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=181. Accessed on 12 March 2008.

²⁴ See e.g. case C-250/03, *Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'Appello di Milano*, [2005] ECR I-1627, para. 44-45.

²⁵ European Parliament, Resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006, P6_TA(2006)0108, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0108&language=EN>, point B. Accessed on 12 March 2008.

²⁶ *Id.*, point J; para. 5.

of legal professionals, such as those concerning the determination of fees and fee scales, which, by their nature, are inextricably linked to the right of each individual to seek access to justice.²⁷

The implementation of the Modernisation reforms has also had wider implications for the provision of legal advice in individual cases. Regulation No 1/2003 strengthened the investigative powers enjoyed by the Commission and has laid down cooperation measures aimed at boosting the bringing of private antitrust claims before the national courts.²⁸ In addition, as the litigation in the *AKZO Nobel* case shows, the abolition of the notification system and the direct applicability of the exception enshrined in Article 81(3) of the Treaty resulted in the increasing importance of self-assessment of prima facie anti-competitive practices which can only be possible through legal advice.²⁹

In the light of these considerations, it is argued that the “consumer-friendly” provision of good quality legal services in conditions of efficiency should be inspired by principles of genuine competition and by canons of ethical integrity, confidentiality and avoidance of conflicts of interest.³⁰ Accordingly, national legislatures and regulators together with the EU institutions should seek to establish a “level playing field” across the Common Market to achieve the goals of “better regulation” as far as possible uniformly, albeit in the respect of their reciprocal spheres of jurisdiction.³¹

3. Articles 81 and 82 EC Treaty and the legal profession: streams of debate

This Special Issue of the *European Business Law Review* seeks to examine some of the aspects characterising the debate on the impact of the competition rules on the regulation of the legal profession and on the path toward the progressive “liberalisation” of the market for the supply of legal services, albeit in the light of the need to uphold the public interest to the sound administration of justice and to the unhindered access to the courts.

²⁷ *Id.*, para. 11-13.

²⁸ Council Regulation No 1/2003 on the implementation of the rules on competition laid down by Articles 81 and 82 of the Treaty, [2003] OJ L1/1, Preamble, Recitals 6-7, 23-26.

²⁹ See Joined cases T-125/03 and 253/03, *AKZO Nobel and Ackros Chemicals v Commission*, judgment of 17 September 2007, not yet reported, para. 13-14.

³⁰ European Parliament, Resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006, P6_TA(2006)0108, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0108&language=EN>, para. 9. Accessed on 12 March 2008.

³¹ *Id.*, para. 12-13.

The contribution by Prof Alison Jones addresses the general issue of whether public interest considerations linked to the existence and functioning of regulatory regimes should play a part in the “competition scrutiny” of restriction on the economic freedom of undertakings and, if that is the case, how this assessment should be conducted. Prof Jones examines the implications of judgments such as *Wouters*³² and *Meca Medina*³³ for the manner in which this appraisal should be carried out and compares it with other decisions³⁴ and with the Commission Guidelines on the interpretation of Article 81 (3) of the EC Treaty.³⁵ She argues that the current position adopted by the ECJ, which is becoming increasingly similar to the ‘rule of reason’ approach adopted by the US Courts in the application of Section 1 of the Sherman Act³⁶ which, if on the one hand is likely to ensure that “public interest considerations” are taken into proper account in the competition scrutiny of regulatory restrictions, on the other hand makes the position adopted by the Commission difficult to reconcile with the views adopted by the ECJ.³⁷

The paper provided by Prof Frank Stephen considers the possible justifications for the regulation of the provision of legal services and analyses the main reasons for the failure of the market in this area, namely the asymmetry of information between suppliers and consumers and the concept of negative externalities. The contribution then moves on to assess the implications in England and Wales of the 2007 Legal Services Act and argues that as a result of its enactment, the structure of the market for the supply of legal services may already be evolving towards a degree of regulatory competition. Prof Stephen suggests that overall, the outcome of the 2007 reforms is likely to be the emergence of “competitive regulation based on legal service market rather than the individual professional and subject to a minimum standard” established by the oversight regulating authority.³⁸

Prof John Peysner’s essay provides the reader with an assessment of the impact of past and present regulatory approaches on the right of individuals to

³² Case C-309/99, *Wouters and others v Algemene Raad de Nederlandse Orde van Advocaaten*, [2002] ECR I-1577.

³³ Case C-519/04 P, *Meca Medina and Majcen v Commission*, [2006] ECR I-6991.

³⁴ Case T-112/99, *Metropole SA and others v Commission*, [2001] ECR II-2459.

³⁵ Commission Guidelines on the application of Article 81(3) EC Treaty, [2004] OJ C101/97. For commentary, see JONES, “Analysis of agreements under US and EC antitrust law: convergence or divergence?”, (2006) 51(4) *Antitrust Bulletin* 691.

³⁶ See e.g. *Board of Trade of the City of Chicago v US*, 221 US 1 (1911).

³⁷ *Inter alia*, JONES, cit. (footnote 35), at p. 805-806.

³⁸ STEPHEN, “Regulation of the legal professions or regulation of markets for legal services: potential implications of the *Legal Services Act 2007*”, (2008) *EBLRev*, this issue, *infra*, p. **.

seek access to a court in a specific area of litigation, namely personal injury work. It examines the implications of the UK Government decision no longer to finance these claims by means of legal aid funds and to move to a system based on contingency fee agreements for the quality and accessibility of legal services.³⁹

Thereafter, the paper analyses the disciplinary issues and the questions for access to justice arising from the practice of charging “referral fees”. It argues that the current position, according to which charging these fees is prohibited, may not be consistent with the needs of the provision of legal services in an area where legal aid is no longer available and, ultimately, may not ensure that individual litigants obtain redress of their rights away from conflicts of interest with their legal advisers.

The previous section illustrated how the agenda for the reform of regulation of the market for the provision of legal service is now being shaped not only at EU but also at national level. The contribution provided by Prof Dermot Cahill represents a critical account of the debate taking place in Ireland on the issue partly as a result of the publication by the Irish Competition Authority of the 2006 Report into the Legal Profession.⁴⁰

The paper describes the current state of affairs concerning the regulation of barristers and solicitor in this jurisdiction and analyses the proposals made by the Irish competition agency for future reform. Prof Cahill argues, on the one hand, that some of the Recommendations should be welcomed as capable of increasing openness and transparency in the structure of the legal profession as well as improving the efficiency in the provision of legal services.

On the other hand, however, he points to major flaws in the approach adopted by the NCA in its assessment of both the current state and the future perspectives characterising the Irish Legal Profession, such as the lack of an underlying economic analysis of the issues arising from the impact of the rules on competition on the regulation of the legal profession. Overall, the essay highlights the partial inability of the Report to tackle the principal question raised by the inquiry, i.e. whether more liberalisation in the supply of legal services can actually benefit the consumer by means of better quality and more widely available legal advice.

³⁹ See Schedule 2, Legal Services Act 1999.

⁴⁰ Irish Competition Authority, Final Report: Competition in Professional Services—Solicitors and Barristers, 11 December 2006, available at: http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=181. Accessed 12 March 2008.

Finally, the case note on the recent *AKZO Nobel and Ackros Chemicals v Commission* judgment,⁴¹ provides an analysis of the current state of affairs as regards the scope and the conditions governing legal professional privilege in EC law. It is argued that, although the CFI disappointed the expectation that the existing test governing privilege would be reformulated with a view to covering also communications emanating from employed legal advisers,⁴² its judgment is nonetheless significant since it subjects the Commission to a number of “checks and balances” in the exercise of its powers to grant or withhold confidential treatment to evidence containing legal advice.⁴³

Accordingly, the case note suggests that by forcefully restating the concept of “professional autonomy” of lawyers for the purpose of privilege primarily as “economic independence” of the client and by laying down an ad hoc procedure for dealing with these claims, the CFI reiterated the central status of lawyers for the sound administration of justice through the provision of independent and reliable legal advice to those in need of it.⁴⁴

4. “Between the public interest and the free market”: where now for the liberalisation of the market for legal services?

The debate taking place at European and at national level, which has been reflected by the contributions to this issue highlights an underlying topic, namely the interplay between two competing, yet not irreconcilable, interests. On the one hand, there are the needs of the market: legal services should be provided in an efficient, consumer friendly manner and constitute “value for money”, in harmony with the principles at the basis of the “better regulation” agenda. On the other hand, there is the public interest, namely the protection of the sound administration of justice and the full availability of sound and affordable legal advice.

Therefore, it is the task of regulation to strike a fair balance between these competing interests, in the light of clearly spelled goals. In this respect, the 2004 Clementi Report called for the creation of a framework aimed at the objectives of enhancing confidence in the judicial system, upholding the rule of

⁴¹ Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported.

⁴² See Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575, para. 20-21.

⁴³ Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, paras. 45-48.

⁴⁴ *Id.*, para. 167-168.

law, ensuring full access to justice and protecting the interest of the client/consumer.⁴⁵ At the same time, the Commission Report, inspired by the Lisbon Agenda, argued that any limitation on the economic freedom of legal professionals should be outweighed by its benefits.⁴⁶

It is therefore necessary to ensure that any restriction on the economic freedom of legal professionals is strictly proportionate to the legitimate aims it pursues. And this is the function of competition scrutiny, as an essential part of the regulatory process seeking to reconcile the competing requirements of confidence in the legal system and those of the efficient delivery of legal services.⁴⁷ In this context, the call for more competition in the market for the provision of legal services, especially through the introduction of “alternative business structures” and the liberalisation of the determination of fees and fees’ scales emerges clearly from the Commission’s statements⁴⁸ and is also reflected in the reforms taking place in some of the Member States.⁴⁹

However, the impact of the application of the competition rules on the regulation of legal profession has raised a number of general problems: as the *Wouters* judgment⁵⁰ has amply demonstrated, the consideration of “non-economic”, “public interest” concerns in the context of the competition scrutiny may have wider implications for the structure of Article 81 of the EC Treaty and has raised questions on the suitability of this rule, in the way in which it is currently interpreted by the Commission, to fulfil this task.⁵¹ Also, the circumstance that, as the European Parliament forcefully indicated, any reform to the regulatory structures governing the legal profession should take place first and foremost at national level could create potential problems for the uniform application of the Community competition rules and overall for the realisation of a “level playing field” in this area.⁵²

It is therefore clear that paramount to the complex balancing exercise characterising the competition scrutiny should be the protection of the

⁴⁵ Clementi Report, cit. (footnote 6), para. 7.

⁴⁶ Communication from the European Commission, “Report on competition in professional services”, COM/2004/0083/final, executive summary, section 6.3.

⁴⁷ *Ibid.*

⁴⁸ See e.g. *id.*, para. 22-23, 31-34.

⁴⁹ See Clementi Report, cit. (footnote 6), para. 103-104.

⁵⁰ Case C-309/99, *Wouters and others v Algemene Raad de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

⁵¹ See, e.g., JONES, cit. (footnote 35), p. 805-806.

⁵² European Parliament, Resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006, P6_TA(2006)0108, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0108&language=EN>, paras. 9, 12-13. Accessed on 12 March 2008.

client/consumer. It is acknowledged that the interests of the client are best served by the absence of unjustified restrictions on competition as well as by the application of appropriate education and ethical integrity standards. However, it is also important not to lose sight of the special role that lawyers play in a democratic society, for the purpose of providing sound and widely available legal advice.

On this point, the European Court of Human Rights stated in its *Casado Coca* judgment that the primary function of the legal profession is to serve “the public interest through the furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics.”⁵³ Furtherance of these objectives is regarded by the Court as inextricably linked to the “central position” of the legal profession “in the administration of justice as intermediaries between the public and the courts.”⁵⁴ Accordingly, it is argued that this “special status” not only constitutes a fundamental justification for regulation as a legitimate means to safeguard these objectives. It also provides perhaps the ultimate benchmark against which the efforts for increased competition in this market, which is so specific, should be assessed.⁵⁵

Against this background, it is clear that the “consumer”, namely the client, seeking legal advice and assistance should constitute the focus of any regulatory effort, as a result of which his or her welfare should be maximised through the supply of effective, prompt and well qualified legal advice. In this context, preserving the economic freedom of legal services providers is fundamental as it benefits efficiency and innovation. Nonetheless, its protection and promotion must at all times be reconciled with essential principles such as the sound administration of justice and the right to access to a court.⁵⁶

A democratic society clearly requires the provision of good quality, good value for money legal services in conditions of competition—and these are the needs of the market being met. However, and perhaps most importantly, it demands that the “best interest of the client” be kept at the forefront of any effort to improve the provision of legal advice—and this requirement stems directly from that public interest which justifies regulation. It is therefore the

⁵³ Appl. No 15450/89, *Casado Coca v Spain*, judgment of 24 February 1994, Ser. A-285A, para. 54.

⁵⁴ *Id.*, para. 54-55.

⁵⁵ See also See Clementi Report, cit. (footnote 6), para. 11.

⁵⁶ See e.g., *mutatis mutandis*, Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45.

task of judges, regulators and of the legislature to ensure that the objectives of these two competing agendas are constantly kept in reciprocal check.

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