CHAPTER FIVE

ARTICLE 102 TFEU AND SELF-REGULATORY PROFESSIONS

This chapter will investigate more closely whether and to what extent Article 102 TFEU may prove a useful tool to control collective regulation in the professional services sector. This provision not only covers unilateral behaviour of a single dominant firm, but also abusive behaviour by more than one undertaking. A market jointly dominated by a number of economic operators is traditionally called an oligopolistic market. Different from oligopolistic markets, however, professional services markets are usually heterogenous and often marked by little concentration. Not least in light of continuously growing absolute numbers of the members of the professions it seems, at first sight, hardly conceivable that collective professional regulation be the expression of the economic will of a dominant few in professional services markets and no systematic scrutiny has been done before.

This perception can, however, not be taken for granted, especially since the judgment in Piau. This case concerned collective regulation adopted by FIFA (Fédération internationale de football association) on the matter of services provided by football players’ agents. The GC recognised that for the purpose of Article 102 TFEU the national football associations and their member sport clubs, as organised within the FIFA, occupied a collective dominant position on the purchase market of services provided by football players’ agents. The GC furthermore considered that the members’ affiliation makes the FIFA the emanation of its members and, therefore, the FIFA itself was considered to be covered by Article 102 TFEU. This finding is remarkable taking account of the conflicting fact that, first, Article 102 TFEU only applies to undertakings but, second, FIFA does not itself engage in an economic activity on the particular

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1107 Different terms are used to describe the same phenomenon of dominance by two or more undertakings. Collective, joint and oligopolistic dominance are usually used interchangeably. The term of collective dominance is employed most, and in particular by the Court as has been observed by Joined Cases C-395/96 P and C-396/96 P, CMB (Cewal) II, [2000], para. 15. See also Monti G., (2001), 131; Whish R., (2000), 583. In the case of liberal professions it is not very appropriate to use the term ‘oligopolistic’ dominance as they are too numerous to speak of oligopoly, ‘oligo’ meaning a few.

1108 For an occasional reference to the applicability of Article 102 TFEU to the professions see for instance Vickers J. / (Chairman of the Office of Fair Trading), (2003), 6 f. The Commission so far has not considered the discussion of Article 102 TFEU in the field of the professions, see European Commission, Report on Competition in Professional Services, of 09.02.04, para. 7.

1109 Case T-193/02, Piau I, [2005]. The case is summarised in Chapter 2.E.
market of the case. The analogy for present purposes imposes itself by considering the idea that the members of the professions are affiliated with their professional bodies. After Plan, but also since the opinion of Advocate General Léger in Wouters1110, it is inescapable to test whether and to what extent the liberal professions have to be perceived in their collectivity rather than their numerousness. For this operation it is necessary to carve out the particular legal issues that the jurisdictional and substantive requirements specific to Article 102 TFEU provoke when applied to professional self-regulation. The chapter is divided into two parts. First, the concept of collective dominance will be fathomed and applied on the case of professional self-regulation. The second part will turn to scrutinise the meaning of the competition related concept of abuse in respect of professional self-regulation. More specifically, since collective regulation does not represent a ‘classical’ unilateral behaviour of a single firm, the question arises of how a collectivity of professionals can exercise its economic strength leading to a possible abuse thereof: through their professional association, their members individually, or both taken together.

A. THE CONCEPT OF COLLECTIVE DOMINANCE AND COLLECTIVELY ORGANISED PROFESSIONS

The objective of Article 102 TFEU to not only cover single-firm behaviour stems from the consideration that competitive market mechanisms may equally fail where a number of economic operators jointly exercise market power to reap the benefits of restricting output and charging prices above the competitive level. The notion of collective dominance rests on the theoretical concepts of tacit coordination1111, interdependence, output restrictions and joint profit maximisation.1112 These are more likely to occur in oligopolistic markets. The problem of oligopolistic markets is that their members often manage to adjust their

1110 AG Léger in Case C-309/99, Wouters et al. v NOvA, [2002], paras. 147-154, had no principled difficulties to picture a collective dominance of the legal profession and developed a reasoning that lays the foundation for the application of Article 102 TFEU to the liberal professions.
1111 The thrust of economic literature speaks of ‘tacit collusion’, an expression which jars with lawyers. They associate the term of collusion with active conspiracy of the kind captured by Article 101 TFEU. Whish R., (2003), 505, therefore suggests that the notions ‘conscious parallelism’, ‘tacit coordination’ and ‘coordinated effects’ may be preferable to ‘tacit collusion’, in that they express the idea of parallel conduct “without attaching the opprobrious term ‘collusion’”.