OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 6 February 1997 *

I — Introduction

1. The issue presented by the present case comes to the Court from the Lombardy Region of Italy. The Region pays for social welfare services of a health-care character provided by non-profit-making operators of residential homes for the elderly. Does the exclusion of commercially operated homes, combined with the fact that the non-profit-making homes are necessarily almost exclusively Italian, bring the system into conflict in particular with Article 52 of the Treaty? That is the principal question raised by a reference for a preliminary ruling in the context of an action brought by a Luxembourg company and by its Italian subsidiaries.

II — Legal and factual context

2. Italian law draws a distinction between general social welfare activities and social welfare activities with a health-care character. According to a Decree of 8 August 1985, the latter activities are directly and primarily oriented towards protecting citizens' health through prevention, care or physical or psychological therapy. [1] This can include hospitalization in sheltered accommodation for the care of elderly infirm persons who cannot be cared for at home. Where the necessary health-care services cannot be dissociated from general social welfare services, the regional authorities may conclude contracts, within the limits of the funds available from the *Fondo Sanitario Nazionale* (National Health Fund, hereinafter 'the FSN'), with public bodies and, in their absence, with private bodies, which have appropriate staff and facilities to provide such care. The costs are divided between the FSN and the social welfare authorities in accordance with the proportion of health-care and of other social welfare elements of the service provided. [2]

3. Article 5(1) of the *Legge Regionale Lombardia* (Lombardy Regional Law) No 1 of 7 January 1986 on the reorganization and

* Original language: English.

1 — Article 1, *Decreto del Presidente del Consiglio dei Ministri* (Decree of the President of the Council of Ministers) of 8 August 1985, adopted pursuant to Law No 833 of 23 December 1978, GURI No 191, 14 August 1985, p. 5727 (hereinafter 'the Decree').

2 — Article 6 of the Decree. Local communes are the responsible social welfare authorities regarding the payment of the ordinary residential costs of such homes — see paragraph 8 below.

planning of social welfare services (hereinafter 'the 1986 Law') [3] guarantees, in conformity with Article 38 of the Italian Constitution, the liberty of all persons, associations and other bodies to engage in social welfare activities, subject to rules laid down by law. Pursuant to Article 50(1), (2) and (5) of the 1986 Law, establishment of a residential home — whether a retirement home or sheltered accommodation — for elderly persons or for persons who are partially or totally unable to live independently is subject to an authorization from the relevant province. The criteria for authorization regarding, for example, the numbers and qualifications of personnel, the facilities available and the functioning of the home, are fixed by the *Piano Regionale Socio Assistenziale* (Regional Social Welfare Plan, hereinafter 'PSA'). [4] The PSA also fixes the conditions for entitlement to conclude a contract pursuant to Article 18(3) of the *Legge Regionale Lombardia* (Lombardy Regional Law) No 39 of 11 April 1980 on the organization and functioning of local health and welfare centres (hereinafter 'the 1980 Law'). [5] In answer to a question posed by the Court, Italy indicated that the PSA currently in force [6] prescribes the same structural norms (regarding hygiene, fire prevention, heating, maximum number of guests per room, etc.) for all residential homes for the elderly, but imposes higher staffing ratios of nurses, doctors and physiotherapists, to residents, on sheltered accommodation, which caters for those totally incapable of leading an independent life, than on retirement homes, which cater for partially incapacitated persons. However, the prescribed staff ratios are also greater, within each of these two categories of residential home, for those which conclude contracts pursuant to the 1980 Law than for those which are excluded from the contractual regime.

4. Article 12(1) and (2) of the 1986 Law provides for the PSA to fix the criteria for entitlement to social welfare services, while establishing the principle of priority for persons in need and requiring that the costs of services provided to other persons be supported in whole or in part by themselves or by their local commune. [7] Article 59 deals with the conditions for access to social welfare services. Article 9 permits Italian citizens and foreigners resident in Lombardy, and citizens and foreigners staying only temporarily in Lombardy, who are in need and require assistance for which they cannot be directed to their own Region or State of origin, to benefit from social welfare services.

3 — *Bollettino Ufficiale della Regione Lombardia* No 2 of 8 January 1986, 1st Supplement.

4 — Article 50(3) of the 1986 Law.

5 — *Bollettino Ufficiale della Regione Lombardia* No 15 of 11 April 1980, 3rd Supplement. This requirement is set out in Article 50(4) of the 1986 Law, as well as in Article 18(1) and (7) of the 1980 Law.

6 — PSA for 1988-1990, approved by the *Consiglio Regionale della Lombardia* (Regional Council of Lombardy) by Decree No 871 of 23 December 1987, as modified and extended by Decree No V/122 of 12 February 1991 and by Decree No V/1425 of 7 March 1995.

7 — Article 12(3) of the 1986 Law defines persons in need by reference to a variety of factors — family income, partial or total incapacity to live an independent life, risk of marginalization.

5. The 1980 Law governs the making of contracts by public and private bodies for provision of social welfare services, including those with a health-care character. [8] These contracts are concluded with local health and welfare centres (*Unità Socio-Sanitarie Locali*, hereinafter 'USSLs').

6. Article 18 of the 1980 Law sets out the conditions for USSL contracts with private bodies. Article 18(2), read with Article 18(5) states that private associations, foundations and institutions which intend participating in the planning and organization of USSL services shall be granted on request, by the Region, entitlement to enter into contracts with the USSLs. Article 18(3) of the 1980 Law makes acquisition of such entitlement conditional (a) on the bodies concerned being non-profit-making, [9] and (b) on proper levels of service, staff qualifications and organizational and operational arrangements, as provided for in the PSA [10] Contracts are, pursuant to Article 18(10), for a term not exceeding three years, but renewable. They govern the financial relationship with the public contracting authority, providing for payment by reimbursement for individual services, on the basis of predetermined tariffs within the limits laid down by the PSA, which shall in any event cover the costs actually incurred. Furthermore, Article 18(11) states that the contracts must make it possible for the contracting authority to monitor the cost components and the quality of the services provided under the contracts.

7. 425 from a total of 430 residential homes for the elderly have concluded contracts with the various USSLs in the Lombardy Region. [11] Of the residential places available, approximately 95% are provided by contracting homes (14.5% in the public sector, the remainder in private contracting homes). [12]

8. The Region funds the costs arising from social welfare services with a health-care character (viz. staff costs for the personnel mentioned above) in contracting homes, up to a maximum rate of reimbursement of LIT 50 000 per day in respect of each resident who is incapable of living independently, irrespective of financial need. On the other hand, as part of a separate social welfare regime, where elderly residents are

8 — Contracts regarding pure health care are provided for by *Legge Regionale Lombardia* No 833 of 3 December 1978.

9 — The PSA currently in force defines as non-profit-making bodies those which, according to their statutes, do not have objectives of an economic character or do not distribute their profits among their shareholders or members.

10 — Pursuant to Article 18(9) of the 1980 Law, the contract sets out the obligation for the contracting bodies to provide their services for the population groups indicated therein, and to bring the procedures for entitlement for individual recipients of services into line with those laid down for similar public services and facilities.

11 — Figures cited by the applicants in the main proceedings from *Bollettino Ufficiale della Regione Lombardia* of 12 January 1995, 3rd Extraordinary Supplement.

12 — Figures quoted by the applicants in the main proceedings from *Progetto Obbiettivo Anziani Regione Lombardia*, approved by Decree No 48808 of 1 March 1994 of the Regional Council.

deemed to be in need, their residential costs in homes are reimbursed in whole or in part by their communes, depending on the resources available, irrespective of whether or not the homes in question have concluded contracts with the relevant USSLs. [13] The applicants in the main proceedings claim that the health-related costs of residential homes for elderly persons incapable of leading an independent life, which are underwritten by the Region in the case of contracting homes, amount to approximately one-third of total costs. [14]

9. Sodemare SA, a Luxembourg company, owns in its entirety an Italian company, Anni Azzurri Holding S. p. A., which in turn fully owns a number of companies which operate residential homes for elderly persons, including Residenze Anni Azzurri Rezzato S. r. l. The last-named company is authorized by a Decree of the President of the province of Brescia to run sheltered accommodation for persons who are incapable of living independently. [15] It applied to the Regional Council of Lombardy on 29 April 1993 for the grant of entitlement to conclude a contract with the relevant USSL This request was refused by order of the Regional Council on 3 December 1993, pursuant to the negative opinion of the USSL, on the grounds that the company was not non-profit-making, as required by Article 18(3)(a) of the 1980 Law. [16] The level of occupancy of the three residential homes in Lombardy run by Sodemare SA and its subsidiaries is 45% (in the case of Residenze Anni Azzurri Rezzato S. r. l.), 60% and 80%. The level of occupancy of their home in the neighbouring *Regione Piemonte* (Piedmont Region), where public subventions for social welfare services with a health-care character are available, is 90%, while that of contracting homes in the Lombardy Region was 97.4% in 1995. Waiting lists also exist in Lombardy for places in contracting homes. The applicants indicated, in response to a question posed by the Court, that 2% of their residents were non-Italians, who tended to stay for periods of between one and three years. Some 10% of the much greater number of enquiries received every year come from persons in other Member States. At the oral hearing, counsel for the applicants indicated that one non-Italian Community national had stayed in one of their residential homes in the past for a short period of post-operative convalescence, and that a number of queries had been received regarding such short stays.

10. The three abovementioned companies commenced an action against the Lombardy

13 — This information was provided by Italy in response to a question from the Court.

14 — This calculation is based on extrapolations from the average daily cost of residential care calculated by ISTAT and the annual national expenditure by the FSN on health-care subventions to residential homes. The proportion of total costs represented by health-related expenditure, calculated on this basis, appears in the case of Lombardy to be greater than one-third.

15 — Decree No 728/20/92 of 3 December 1992, adopted pursuant to Article 50 of the 1986 Law.

16 — Order No 2157 of the Regional Council of Lombardy; Negative Opinion No 41 of the USSL, by Resolution No 1976 of 7 September 1993.

Region before the Tribunale Regionale per la Lombardia (hereinafter 'the national court'), seeking the annulment of the order and of the negative opinion, as well as the disapplication of Article 18(3)(a) of the 1980 Law. The Fédération des Maisons de Repos Privées de Belgique ASBL (Femarbel) intervened in support of the applicant companies.

11. By order of 2 March 1995, the national court suspended the proceedings in order to make a reference to the Court for a preliminary ruling pursuant to Article 177 of the Treaty establishing the European Community (hereinafter 'the Treaty'). In its order, the national court observed that the applicant companies, while economically active, operate below their potential. The level of occupancy of their residential homes is low. Thus, their turnover, which is composed largely of the residential fees paid by residents, is very far from the optimal possible level. The national court remarked, furthermore, that the effect of Article 18 of the 1980 Law was that the provision of the social welfare services at issue (those with a health-care character) is substantially reserved to non-profit-making companies. [17] Finally, 'the reservation of financing to non-profit-making companies entails the consequence that those who seek the service from a profit-making company must bear a financial burden to which they are not subject if they seek the same service from a non-profit-making company'.

12. The national court referred the following questions to the Court:

'(1) Under Article 190 of the EEC Treaty, must a national provision which, although dealing with a matter falling "within the field of application" of the Community Treaties, nevertheless contains no statement whatsoever of the reasons on which it is based, be regarded as contrary to Community law with the result that that provision, lacking a statement of reasons, cannot be applied by the national court: that result being limited to those cases — of which the present case appears to be one — where the national provision creates an ambiguous state of affairs, in that it keeps the persons concerned in a state of uncertainty regarding the possibilities available to them of relying on Community law?

[Such cases being those in which the Member State has an "obligation" (which, for the Italian Constitutional Court, is a "precise obligation": see judgment of the Constitutional Court (4 July), 11 July 1989, No 389, last subparagraph of paragraph 4 of the grounds of the judgment) to remove from its legal order those provisions which are incompatible with Community law: judgment of the Court of Justice in Case 104/86 [1988] ECR 1799.]

17 — This point of view is put more strongly in the second question, which speaks of an entire category of services being reserved for non-profit-making companies.

(2) Is a national provision which (without stating reasons) reserves to non-profit-making "companies and firms" the provision of an entire category of services, which are important *inter alia* from the financial point of view, contrary to Article 58 of the EEC Treaty, in so far as that article makes a clear distinction between "profit-making companies and firms" and "non-profit-making companies and firms"?

(3) Do Articles 52, 58 and 59 of the Treaty prohibit national legislation which hampers the pursuit of a business activity by imposing on an undertaking established in a particular Member State, which wishes to establish itself in another Member State within the meaning of the Treaty, the alternative of either carrying on that activity on a non-economic basis — in that case adopting one of the legal forms which are listed exhaustively but do not coincide with those that facilitate establishment — or — if it intends carrying on the activity on an economic basis — accepting the burden of services which should be provided at the expense of the public health service?

(4) Does Article 59 of the Treaty prohibit national legislation which, by virtue of the procedures laid down by domestic law, directs the users of welfare services — who are allowed by the said domestic law to choose who is to provide them — solely towards undertakings to which, exclusively by reference to their legal structure, the State reimburses the costs of the health services which all the authorized undertakings are required to provide, thereby, first, channelling the demand for services towards certain providers and, secondly, depriving the user of real freedom of choice?

(5) Do Articles 3(f), [18] 5, 85 and 86, possibly in conjunction with Article 90 of the Treaty, prohibit the legislation at issue which, under the machinery provided by national law,

(a) allows only companies with a particular legal structure to provide, without charges to be borne by the undertaking, services which are ancillary to the services provided by it against payment;

(b) allows them to present themselves on the market as a category of undertakings which, having similar qualitative and quantitative characteristics, are described to users as a largely unitary organization;

18 — Article 3(f) of the EEC Treaty is now Article 3(g) of the EC Treaty.

(c) makes it possible to channel towards the undertakings referred to in paragraph (b) the demand for welfare services provided to old people;

(d) allows imposition on undertakings of the obligation to provide, at their own expense, services ancillary to those provided by them in return for payment;

(e) gives rise to arrangements whose effect is to impose on non-participating undertakings the obligation to provide at their own expense services ancillary to the service offered, passing the cost thereof on to users;

(f) thus creates the necessity of transferring to users the economic burden of such services, which are otherwise, where users avail themselves of the services of the undertakings participating in the arrangement, free of charge?'

III — Observations

13. Written observations were received from the applicants in the main proceedings, Femarbel, the Italian Republic, the Kingdom of the Netherlands and the Commission. Oral observations were submitted by the applicants, Italy and the Commission.

IV — Analysis

14. I will first address the issue of admissibility raised by Italy. I will then examine the questions referred by the national court in the order given above. However, for reasons stated below, the second and third questions will be examined together.

A — *Admissibility*

15. Italy argues that the third, fourth and fifth questions should be held to be inadmissible because the national court gave either cursory reasons (in the case of the third and fourth questions) or no reasons at all (in the case of the fifth) for seeking a preliminary ruling, referring instead to submissions of the parties in the main proceedings which were not reproduced in the order for reference. It submits that this hinders interested

Member States from making observations. [19] I do not accept this argument. The national court's reason for referring the third question is similar to that underlying the second, viz. whether the grant of advantages to non-profit-making firms constitutes a restriction on the establishment of commercial firms. The national court explains in the order for reference that the fourth question relates to potential residents who are established in other Member States, whose choice of home may be channelled towards certain providers by the greater financial burden borne by those who choose commercial companies. While the national court did not provide any express additional reason for referring the fifth question, the series of conditions outlined in the question itself, read in the light of the facts of the case, makes clear the national court's concern regarding the potential application of Community competition rules to the situation described.

B — *The first question*

16. It is evident from the order for reference that this question relates to national legislative measures and, in particular, to the provisions of the 1980 Law. [20] The applicants in the main proceedings, Italy, and the Commission, all submit that Member States are obliged to give reasons for acts which affect the exercise of Community-law rights only in the case of decisions of individual application. However, the applicants argue that the provisions of the 1980 Law constitute such a decision, because they are addressed, in reality, not to society in general but to a limited number of persons who run residential homes for the elderly. They support this contention on the basis of an analogy with Article 173, fourth indent, of the Treaty.

17. The obligation to give reasons for national decisions affecting the exercise of Community-law rights does not arise from any extension of Article 190 of the Treaty, but from the general principle of Community law, flowing from the constitutional traditions of the Member States, that judicial remedies should be available to individuals in such cases. [21]

18. It is important to draw a distinction between legislative measures of general application and executive decisions affecting individuals. A requirement that reasons be given, at the time of enactment, for any

19 — See Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, paragraph 6 of the judgment.

20 — National measures are understood throughout this Opinion to include measures adopted by competent public authorities at levels below that of the State itself, such as regional, provincial or local authorities.

21 — Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, paragraphs 14 and 15 of the judgment. See also Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 25; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 22; Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 40.

national legislation even potentially capable of affecting the exercise of Community-law rights would, in my view, constitute an unwarranted and unnecessary intrusion into Member State competence. The breach of Community law by national legislative measures is determined in accordance with objective criteria. There is no evidence that the effectiveness of judicial protection is undermined by this approach.

19. The 1980 Law does not constitute a decision of individual application. The class of persons operating residential homes for the elderly in the Lombardy Region is open. [22] Indeed, the instant case is concerned, in large part, with the conditions of access to that class of potential members already established in other Member States.

20. I conclude that Member States are not obliged to state the reasons for enactment of legislative acts of general application, even where these potentially affect the exercise of Community-law rights.

22 — See Article 5(1) of the 1986 Law, which is based on Article 38 of the Italian Constitution. On the distinction between open and closed classes in the context of Article 173 of the Treaty, see e. g. Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; Case C-6/92 *Federmineraria and Others* v *Commission* [1993] ECR I-6357.

C — *The second and third questions*

The relevance of Article 58 of the Treaty

21. In deciding how to approach these questions, it is necessary to clarify the meaning of Article 58 of the Treaty, which alone is invoked in the second question and which is also mentioned in the third. In my view, Article 58 relates only to the personal scope of Chapter 2 of Title III of the Treaty. It has the function of assimilating companies, firms and other legal persons, other than those which are non-profit-making, (hereinafter normally referred to as 'commercial companies') to natural persons who are nationals of Member States, for the purposes of freedom of establishment. [23] Thus, non-profit-making companies, firms and other legal persons do not benefit from freedom of establishment. Article 58 does not affect the material scope of that freedom. To take the circumstances of the present case as an example, national rules which treat non-profit-making companies differently from natural persons or commercial companies are not excluded, simply by virtue of Article 58, from the scope of application of Chapter 2 of Title III of the Treaty if their effect is to restrict the freedom of establishment of the latter. Otherwise, the simple exclusion of one category of legal persons from the benefit of Treaty rights would affect the extent of the rights actually enjoyed by other categories. For the purposes of this case, Article 58 does not give rise to substantive rights different from those secured by the other provisions of Chapter 2, and in particular by Article 52. There-

23 — Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677, paragraph 8 of the judgment.

fore, I will concentrate exclusively, in this part of my analysis, on answering the third question.

The relevance of Article 59 of the Treaty

22. The third question refers to Articles 52, 58 and 59 of the Treaty. The establishment of an undertaking or self-employed person in a Member State is assessed by reference to the permanence of its activities relative to those of a provider of services who moves to another Member State to pursue his activity there only on a temporary basis. Establishment is marked by participation by an undertaking or self-employed person on a stable and continuous basis in the economic life of a Member State other than that of origin. [24] It is clear, therefore, that Sodemare and its subsidiaries, in so far as they engage in economic activity through their permanent, continuously operating residential homes for the elderly in Lombardy, must be deemed to have exercised their right of establishment there, rather than to be temporary providers of services in Lombardy from another Member State, such as Luxembourg. I shall therefore consider only Articles 52 to 58 of the Treaty in answering this question. The possible application of Article 59 of the Treaty to Sodemare's relations with its residents and potential residents from Member States other than Italy will be examined under the rubric of the fourth question. [25]

Social welfare systems and the Treaty

23. It is necessary, before proceeding further, to examine whether the contracting regime in force in Lombardy, because it forms part of a social welfare system, escapes the reach of the cited Treaty provisions. Both Italy and the Netherlands rely upon the decision of the Court in *Poucet and Pistre* v *AGF and Cancava*. [26] The latter, in particular, points out that the Court's decision in *Duphar* v *Netherlands* [27] confirms the principle that Community law does not impinge upon the competence of Member States to establish their own social security systems.

24. In *Höfner and Elser*, [28] the Court stated that, in the context of competition law, the

24 — See Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraphs 25 to 27 of the judgment.

25 — See paragraph 43 below.

26 — Joined Cases C-159/91 and C-160/91 [1993] ECR I-637.

27 — Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523.

28 — Case C-41/90 [1991] ECR I-1979, paragraph 21 of the judgment.

concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. In *Poucet and Pistre,* two State-controlled non-profit-making bodies demanded payment of compulsory contributions to the respective social welfare schemes which they managed. These demands were resisted on the ground that the system infringed Community competition law; the two individuals in question claimed the right to take out equivalent private insurance. The Court, however, reiterated the principle laid down in *Duphar* and held that the bodies were not engaged in an economic activity. The system of compulsory contributions was indispensable to the principle of solidarity and the exclusively social function fulfilled by the schemes. That entailed, for one scheme, redistribution of income and, for the other, financing of retired workers by active workers, as well as solidarity between schemes, whereby surpluses would be transferred between schemes as the need arose. The practical management of the schemes, regarding levels of contribution and benefit, was governed in detail by law. [29]

25. While *Poucet and Pistre* was explicitly concerned with competition rules, it is clear that its analysis applies more broadly. In *García* [30] the Court followed the Opinion of Advocate General Tesauro to the effect that the Third Non-life Insurance Directive [31] could not regulate the field of social security because it 'was adopted on the basis of Treaty provisions pursuing freedom of establishment and freedom to provide services (namely Articles 57(2) and 66)', whereas 'social security matters are governed by different, specific provisions'. [32]

26. The principle of solidarity was an essential element in the two cases just cited. By way of contrast with *Poucet and Pistre,* the Court has held a non-profit-making body entrusted with the management of an optional supplementary, though statutory, old-age pension scheme for self-employed farmers, where there were extremely limited elements of solidarity, to be carrying on an economic activity in competition with life-assurance companies. [33]

27. Accordingly, Member States are free to organize their social security systems, and 'the fact that social security institutions are

29 — Advocate General Jacobs applied the *Poucet and Pistre* approach to quite a different scheme in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705, paragraphs 62 to 64 of his Opinion. The Court did not address this issue.

30 — Case C-238/94 *García and Others* v *Mutuelle de Prévoyance Sociale d'Aquitaine and Others* [1996] ECR I-1673, paragraph 13 of the judgment.

31 — Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive), OJ 1992 L 228, p. 1.

32 — Paragraph 9 of the Opinion.

33 — Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013.

substituted for consumers as regards responsibility for the payment of medical expenses', so that such institutions largely determine the marketing possibilities for medicinal preparations, 'cannot *in itself* be regarded as constituting a restriction on the freedom to import guaranteed by Article 30 of the Treaty *if certain conditions are satisfied*'. [34]

28. It does not follow, however, that Member State social welfare systems, organized on the basis of solidarity, are, none the less, free from compliance with Treaty rules. Member States may not discriminate against imports in the choice of medicines whose costs are reimbursed. [35] By the same token, rules which specify laboratories which qualify for reimbursement of the cost of clinical analyses [36] or companies which may tender to provide data-processing systems for public authorities, including the public health system, must exclude discrimination on grounds of nationality, [37] as must the employment rules of such systems. [38] Rules of application of national social security systems, regarding either contributions or benefits, are not permitted to discriminate on grounds of nationality, in so far as they affect the exercise of Community-law rights, [39] or to impose restrictions on freedom of movement. [40]

29. Some general points can be drawn from this very diverse case-law, for the purpose of applying Article 52 of the Treaty. First, the existence of systems of social provision established by Member States on the basis of the principle of solidarity does not constitute, as such, an economic activity, so that any inherently consequent restriction on the free movement of goods, services or persons

34 — *Duphar*, cited above, paragraphs 16 and 20 of the judgment, emphasis added. For similar reasons, the Court has stated that courses taught as part of the national educational system of a Member State, established and maintained by it in fulfilment of its duties towards its own population in the social, cultural and educational fields rather than for gain, and funded from the public purse rather than by pupils or their parents, cannot be regarded as services for the purposes of Article 59 of the Treaty: Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5365, paragraphs 17 to 20 of the judgment; Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15.

35 — *Duphar*, cited above, paragraphs 16 and 21 of the judgment; Case C-249/88 *Commission* v *Belgium*, cited above, paragraph 31.

36 — Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraphs 9 to 11 of the judgment.

37 — Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraphs 2 and 9 of the judgment.

38 — Case 307/84 *Commission* v *France* [1986] ECR 1725 regarding nurses in the public health system; Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207 regarding posts in the public educational and health systems.

39 — See Case 63/86 *Commission* v *Italy* [1988] ECR 29 and Case C-484/93 *Svensson & Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955 regarding access to social housing assistance; Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195, regarding public criminal injuries compensation. The social objectives or basis on the principle of solidarity of the relevant legislation was pleaded, unsuccessfully, by the public authorities in their defence in all three cases: see paragraphs 11, 13 and 16 of the judgments, respectively.

40 — Specific provision is made for this condition in Article 51 of the Treaty in respect of free movement of workers, but it has also been applied by the Court in relation to freedom of establishment: see Case 79/85 *Segers* v *Bedrijfsvereniging voor Bank- en Verzekeringswezen* [1986] ECR 2375, paragraph 17 of the judgment; Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877 and Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897, in which the Court, in paragraph 10 of both judgments, states that, while the Member States have retained legislative competence in the field of social security for self-employed persons, in the absence of Community legislation, they are, none the less, under an obligation to observe the requirement of Article 52 of the Treaty that restrictions on freedom of establishment be abolished.

does not attract the application of Treaty provisions. Social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group by another. Rules closely connected with financing such schemes are more likely to escape the reach of the Treaty provisions on establishment and services. Thus, pursuit of social objectives on the basis of solidarity may lead Member States to withdraw all or part of the operations of social security schemes from access by private economic operators.

30. Secondly, the relations of other persons, as providers of goods or services, with such systems of social provision can, none the less, be economic in character. Community law requires that such systems comply with Treaty rules in so far as they affect the economic activities of others in ways which are not essential to the achievement of their social objectives. In the cases discussed in paragraph 28, the particular implementing provisions at issue were ones which could be made subject to Treaty rules on freedom of movement without undermining the operation of the system. Thus, to the extent that Member States co-opt private economic operators into their social security systems, or contract out the provision of certain benefits to such operators, or subsidize the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, *inter alia*, freedom of establishment.

31. I consider the instant case to be one to which the Treaty rules apply. The costs incurred by contracting homes in providing social welfare services of a health-care character are reimbursed from public funds, on the basis of solidarity between the general population and elderly members of society. However, in contrast with the circumstances of *Poucet and Pistre*, neither the financing of this element of the social welfare system, nor the formal standard of provision required of contracting homes, would be affected if the rules on eligibility to conclude contracts with the USSLs were subject to the Treaty provisions on establishment. Authorization to operate a residential home is contingent on compliance with standards of care and facilities and personnel levels specified by public authorities, irrespective of the character, profit-making or otherwise, of the proprietor. The higher standards applied to contracting homes cannot affect this. Beyond having to observe these basic regulatory requirements, contracting homes outside the public sector *sensu stricto* are independently managed. In addition, it should be observed that health care constitutes only a part of the activity of such homes. The residential aspects of their activities are, as has been outlined, subject to a different social welfare regime, based on means, with the result that

residents in contracting homes who are not in need have to pay the full cost of those residential facilities.

The existence of discrimination

32. I will now examine whether the confinement to non-profit-making private bodies of status to conclude contracts with USSLs for provision of social welfare services with a health-care character, pursuant to Article 18(3) of the 1980 Law, constitutes discrimination on grounds of nationality, incompatible with freedom of establishment. The provision is neutral on its face, in that it makes no reference to the nationality or (in the case of companies) place of registration [41] of the proprietors of contracting homes. However, the principle of equal treatment, of which Article 52 embodies a specific instance, prohibits not only overt discrimination by reason of nationality but also covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [42] The Court has observed on numerous occasions that Articles 48, 52 and 59 of the Treaty are based on the same principles as regards the prohibition of all discrimination on grounds of nationality, and I will have recourse to the case-law in all these fields in order to identify what is meant by covert or indirect discrimination. [43]

33. The Court had occasion in *O'Flynn* v *Adjudication Officer* [44] to analyse the various types of factual circumstances which have arisen in the Court's case-law in which indirect discrimination against workers on grounds of nationality was deemed to exist:

'18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers [45] or the great majority of those affected are migrant workers, [46] where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers [47] or where there is a risk that they may operate to the particular detriment of migrant workers. [48]

41 — The place of registration of a company, while indicating its 'nationality' in most contexts, may in some circumstances be more readily assimilable to the place of residence of natural persons, which can be a justifiable ground of distinction, for example, in the field of taxation. See Case 270/83 *Commission* v *France* [1986] ECR 273, paragraphs 18 and 19 of the judgment.

42 — Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427, paragraph 9 of the judgment; Case C-3/88 *Commission* v *Italy*, cited above, paragraph 8; Case C-1/93 *Halliburton Services* v *Staatssecretaris van Financiën* [1994] ECR I-1137, paragraph 15.

43 — Case 48/75 *Royer* [1976] ECR 497, paragraph 23 of the judgment; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraph 17; Case C-107/94 *P. H. Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 29.

44 — Case C-237/94 [1996] ECR I-2617. The footnotes to the quotation which follows are the references to case-law in the original text.

45 — See Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 24 of the judgment; Case 33/88 *Allué and Another* v *Università degli Studi di Venezia* [1989] ECR 1591, paragraph 12; and Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 11.

46 — See Case C-279/89 *Commission* v *United Kingdom* [1992] ECR I-5785, paragraph 42 of the judgment, and Case C-272/92 *Spotti* v *Freistaat Bayern* [1993] ECR I-5185, paragraph 18.

47 — See Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 10 of the judgment, and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 23.

48 — See Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 14 of the judgment, and Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraph 9.

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law. [49]

20. It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.'

34. In the field of establishment, the Court has identified as being potentially discriminatory legislation which is 'liable to act mainly to the detriment of nationals of other Member States' [50] and rules which 'essentially favour [national] companies'. [51] The Court held that the latter test was satisfied where a national rule favoured a type of company which was predominantly domestic in origin, even though not all domestic companies operating in the sector in question derived an advantage from the measure in question. [52] In a variation on this point, this is also the case where the favoured domestic companies are concentrated in one part of the Member State in question. [53] Criteria which have been identified as potential sources of indirect discrimination include the place of residence of self-employed persons or the principal place of establishment of companies, [54] State ownership of undertakings [55] and possession of qualifications awarded in a particular Member State, to which those awarded in some other Member

49 — See, to that effect, *Bachmann*, cited above, paragraph 27 of the judgment; Case C-111/91 *Commission* v *Luxembourg*, cited above, paragraph 12; and Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* v *Università degli Studi di Venezia* [1993] ECR I-4309, paragraph 15.

50 — *Asscher*, cited above, paragraph 38 of the judgment.

51 — Case C-3/88 *Commission* v *Italy*, cited above, paragraph 9 of the judgment.

52 — See Case C-3/88 *Commission* v *Italy*, cited above, where non-publicly owned Italian data-processing companies were excluded from contracts with the State as well as non-Italian companies; see also Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25 of the judgment.

53 — Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraphs 8 and 9 of the judgment.

54 — *Halliburton*, cited above; Case C-330/91 *The Queen* v *Inland Revenue Commissioners*, ex parte *Commerzbank* [1993] ECR I-4017; Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493; *Asscher*, cited above.

55 — Case C-3/88 *Commission* v *Italy*, cited above.

States are equivalent. [56] It is not the distinction between commercial and non-profit-making bodies as such which is of interest in the present case, but rather, the question whether the favoured type of body is predominantly domestic relative to other types. If a Member State were to single out for favour or disadvantage any one or more of the multitude of legal forms of business enterprise among the broad categories of corporate or unincorporated bodies, partnerships, companies, public and private, limited and unlimited, it would equally be called upon to provide objective justification if the result were to favour in fact its own nationals.

'charity begins at home' and most charitable endeavour in this field takes place at national, regional or local level. This is certainly the case in Lombardy, as all of the private contracting homes are run by bodies based in the Region. Thus, we are permitted to presume that non-Italian companies would be unwilling to assume a non-profit-making legal form in order to operate in Lombardy. [57] As in *O'Flynn*, the merits of the motives of commercial companies relative to those of non-profit-making companies are not relevant. [58] As we have seen, it is also irrelevant that Italian commercial companies are prevented from concluding contracts with USSLs in Lombardy, or that non-profit-making companies from other regions of Italy may be no more attracted to establish in Lombardy than companies from other Member States. [59]

35. The national court observes, in its order for reference, that the effect of Article 18 of the 1980 Law is substantially to reserve the provision of the health-care services at issue to non-profit-making companies, and that the applicants' homes operate well below their capacity. This effect corresponds with the very small number of non-contracting commercial residential homes for the elderly. This legislation, in my view, thus necessarily favours domestic bodies. It is true that international charities exist, and some may operate in the sector of care for the elderly, but

Objective differences and justification

36. 'It is settled law that discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations.' [60] A difference in treatment as

56 — Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765. This is implicit in the judgment of the Court, which condemned the rule in question as a restriction on freedom of establishment after citing, in paragraph 13 of the judgment, Title III (B) of the General Programme for the abolition on restrictions on freedom of establishment, adopted by the Council on 18 December 1961 pursuant to Article 54 of the Treaty (OJ, English Special Edition, Second Series, IX, p. 8), which relates to indirect discrimination. Advocate General Mayras expressly described it as 'disguised discrimination', at p. 790.

57 — This is quite distinct from the argument submitted by the applicants in the main proceedings, that the fact that non-profit-making companies do not benefit from freedom of establishment meant that any non-Italian companies which wished to choose this legal form could be excluded from Italy. It appears, in fact, that Italian law poses no obstacles to the establishment of foreign non-profit-making companies.

58 — See paragraph 21 of the judgment, quoted above.

59 — See Case C-3/88 *Commission* v *Italy*, cited above, and Case C-360/89 *Commission* v *Italy*, cited above, discussed at paragraph 34 above.

60 — *Wielockx*, cited above, paragraph 17 of the judgment; *Asscher*, paragraph 40.

between two categories of taxpayer 'may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situations of the two such as to justify different treatment *in that regard*'. [61] Therefore, while there are evident differences between non-profit-making and commercial companies, it is necessary to establish whether objective differences exist which justify the difference in treatment at issue in the present case. [62]

37. As regards the provision of publicly funded social welfare services of a health-care character, non-profit-making and commercial companies, in my view, can perform the same function. They are both subject to authorization to operate residential homes for the elderly, pursuant to Article 50 of the 1986 Law and to the more detailed terms of the PSA. These provisions define the standard of care and facilities required of homes, irrespective of ownership. Contrary to Italy's submission, it is irrelevant that contracting homes are required to observe higher standards as regards levels of health-care personnel. Even if a commercial company were willing to comply with these requirements, it would be excluded from entitlement to conclude a contract. This is not a case of objective differences between the parties involved. Rather, the difference in the standard of care required to be provided by contracting and non-contracting homes arises from the same legal regime which gives rise to the discrimination. Furthermore, the health-care costs of contracting homes are fully reimbursed, subject to specified ceilings. It has not been suggested that there is any relationship between the additional costs imposed by higher personnel levels and the reimbursement. There is no material difference between the non-health-care (i. e. residential) services provided by commercial and non-profit-making bodies, as they are required to perform the same tasks and to observe the same standards, and are subject to the same reimbursement regime regarding needy residents.

61 — *Asscher*, cited above, paragraph 42, emphasis added. Similarly, a tax advantage reserved to companies resident for tax purposes in one Member State may be discriminatory *vis-à-vis* companies established in other Member States because the latter usually also have a tax residence outside the first State, unless a relevant objective difference can be established between the two categories: *Commerzbank*, cited above, paragraphs 15 and 16 of the judgment.

62 — In Case C-353/89 *Commission* v *Netherlands*, cited above, the Court condemned as a restriction on freedom to provide services a Dutch rule that third parties not be permitted to draw a profit from advertising on broadcasts from other Member States to the Netherlands, as it forced foreign operators to conform to the Dutch model. It then observed that '[i]n order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies in an appropriate manner' (paragraph 42 of the judgment). While this statement reflects the principle that Member States have greater freedom to regulate the activity of undertakings established in their territory than that of undertakings providing services from abroad, whose regulation in the general interest may be secured by the home State, it does not imply that a national rule favouring the non-profit-making sector cannot constitute a restriction on freedom of establishment.

38. Italy sought to justify the difference in treatment on the basis of social solidarity by reference, *inter alia*, to Article 38 of the Italian Constitution, and to a discretion left to

the Regions to limit participation in the contractual regime to those bodies for whom the pursuit of social objectives is the first priority. Thus, public monies were expended exclusively on the basic cost of providing health care to the homes' elderly residents, without resources being diverted to provide a profit to the proprietors. Italy referred at the oral hearing to the traditional social role of religious charitable institutions, which were seen as being more committed than commercial companies to the assistance of the poor. As they were non-profit-making, the subventions provided by the Region were an important source of funds. Furthermore, health-care services could not, in their case, be financed by profits from other aspects of their activities.

39. In my view, Italy has not succeeded in demonstrating that the decision of the Lombardy Region to exclude commercially run homes from the reimbursement of health-care costs is justified. First, it is important to recall that commercial homes are authorized to provide residential care for the elderly, including the health care in question, and that this, as emphasized by Italy, is guaranteed by the Italian Constitution. Secondly, the higher standards said to be required of contracting homes would also apply to commercial homes if admitted to the regime. Thirdly, there is nothing to prevent the Region from reimbursing commercial homes so as to exclude any element of profit from their provision of health-care services and thus put them on the same footing, in that regard, as existing non-profit-making homes. Indeed, this requirement already seems to be implicit in Article 18(10) and (11) of the 1980 Law. Such an approach would be more transparent and less restrictive of the exercise of Community-law rights than outright exclusion from the regime. Commercial homes could continue to seek profit from the purely residential aspect of their activities or from additional health-care services provided at residents' own expense. Fourthly, the admission of commercial companies to the contractual regime would not entail the exclusion of traditional charitable institutions from the system.

The relevance of Article 90(2) of the Treaty

40. It is necessary to consider briefly the possible application of Article 90(2) of the Treaty in the context of a restriction on freedom of establishment. Even if it were accepted that Article 90(2) permits derogations from all Treaty rules, [63] and even if

63 — See Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12 of the judgment; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14; cf. Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727, paragraph 19. This case-law is discussed in the Opinion of Advocate General Cosmas of 26 November 1996 in Joined Cases C-157/94 to C-160/94 *Commission* v *Netherlands, Italy, France and Spain*, paragraphs 86 to 90, in which he concludes that Article 90(2) should be applicable in respect of Treaty rules on free movement of goods.

contracting homes were deemed to be undertakings entrusted with the operation of services of general economic interest, I do not think that this would change the outcome of the above analysis. Article 90(2) permits a derogation only in so far as the application of Treaty rules would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertakings in question. I observed at paragraph 31 above that neither the financing of social welfare services of a health-care character in residential homes for the elderly nor the formal standard of provision would be undermined by the application to the Lombardy Region of the Treaty rules on freedom of establishment. In paragraph 37, I have indicated that no objective difference exists between non-profit-making and commercial homes as regards the performance of the tasks required of them by law which would justify the exclusion of the former from the contractual regime. In these circumstances, the condition for application of Article 90(2) of the Treaty is not satisfied.

Conclusion regarding the second and third questions

41. I conclude, from the foregoing analysis, that the confinement to non-profit-making private bodies of status to conclude contracts with USSLs for provision of social welfare services of a health-care character constitutes indirect discrimination on grounds of nationality, and is, thus, a prohibited restriction on freedom of establishment.

D — *The fourth question*

42. In order to answer the fourth question, it is necessary to establish whether the applicants in the main proceedings are in a position to rely upon the Treaty provisions on services. In my view, they are not.

43. It is clear from, *inter alia*, the decision of the Court in *Alpine Investments* that 'the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State'. [64] This view is in no sense inconsistent with the statement in *Gebhard* that 'the provisions relating to services apply only if those relating to the right of estab-

64 — Case C-384/93 [1995] ECR I-1141, paragraph 30 of the judgment; see also Case C-49/89 *Corsica Ferries France* v *Direction Générale des Douanes Françaises* [1989] ECR 4441, paragraphs 10 and 11, Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 30, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 40, and Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 14.

lishment do not apply'. [65] The latter proposition, which is reflected in the view I have expressed in paragraph 22 of this Opinion, indicates that an undertaking deemed to have become established in a Member State other than that of its origin cannot simultaneously be deemed to provide services in that State. It may, however, from that State, engage in the provision of services in, or to residents of, a third Member State (or even its State of origin) and Articles 59 and 60 will apply.

44. None the less, I do not think that the applicants' activities constitute the provision of services for persons established in Member States other than Italy. The applicants in the main proceedings stated that 2% of their residents are non-Italians, who tend to stay for periods of between one and three years, while some 10% of enquiries received every year come from persons resident in other Member States. They argue that they provide services equivalent to those of a hotel and that persons resident in other Member States have a Community-law right to travel to Italy to avail of these services. [66] I do not find this analogy convincing, because the duration of residents' stay in the applicants' homes is typically much longer than in the case of hotels.

45. The Court observed in *Procureur du Roi* v *Debauve* [67] that 'the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State'. [68] The Court stated in *Steymann* v *Staatssecretaris van Justitie* [69] that '[i]t is clear from the actual wording of Article 60 that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services. On the other hand, such activities may fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case'. It concluded that 'Articles 59 and 60 of the Treaty do not cover the situation where a national of a Member State goes to reside in the territory of another Member State and establishes his principal residence there in order to provide *or receive* services there for an indefinite period'. [70]

46. I see no reason to depart from this case-law. First, it reflects the text of Article 59 of the Treaty, which refers to providers of services who are 'established in a State of the Community other than that of the person for whom the services are intended'. Exceptions are permitted to this literal requirement only in so far as all the relevant elements of

65 — Cited above, paragraph 22 of the judgment.

66 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 10 of the judgment.

67 — Case 52/79 [1980] ECR 833.

68 — Paragraph 9 of the judgment; see also Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 9. In Case 186/87 *Cowan* v *Trésor Public*, cited above, Advocate General Lenz stated, at paragraph 14 of his Opinion, that '[a]ll that is necessary is that the person providing the services and their recipient should not be resident in the same place'.

69 — Case 196/87 [1988] ECR 6159, paragraph 16 of the judgment.

70 — Paragraph 17 of the judgment, repeated in the operative part, emphasis added.

the activity in question are not confined within a single Member State, such as where a person provides services of limited duration in a Member State other than that in which he is established to a recipient established in the same State as the provider. [71] The element of 'transnational "trade" in products which are not "goods"' is thereby preserved. [72]

47. Secondly, it would be inconsistent with the subordinate character of the Treaty chapter on services to those on workers and establishment, set out in Article 60, if persons who had exercised their freedom of movement pursuant to the latter provisions could continue to be treated as recipients of services in the Member State to which they had moved. It is true that nationals of a Member State who move permanently or indefinitely to another Member State, but who are not economically active (as is very likely in the case of residents in the applicants' homes), will not fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty. However, while Advocate General Lenz referred in *Commission* v *France* [73] to the need to avoid lacunae, it would be anomalous if such persons were treated as recipients of services while workers and self-employed persons whose residence in the Member State in question was equally permanent or indefinite were not. [74] The entitlement of permanent residents to rely upon the services provisions of the Treaty *qua* recipients would otherwise vary according to whether the person in question was engaged in economic activity, and could therefore vary over time, even in the case of any given individual.

48. Thus, it is inherent in the concept of services in the Treaty that the period of residence of recipients in another Member State should be temporary or pre-determined rather than permanent or indefinite. [75] For

71 — Case C-154/89 *Commission* v *France*, cited above, paragraphs 7 and 10 of the judgment.

72 — This broad definition of services was suggested by Advocate General Lenz in *Cowan* v *Trésor Public*, cited above, paragraph 13 of his Opinion, and in Case C-154/89 *Commission* v *France*, paragraph 17 of his Opinion.

73 — Case C-154/89, cited above, paragraph 19 of the Opinion.

74 — A person who is not economically active may, none the less, take up long-term residence in a Member State other than his own in compliance with the conditions set out in Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26, or in Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28. A right of residence for citizens of the Union has since been established by Article 8a of the Treaty, inserted by the Treaty on European Union.

75 — The requirement in Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 1973 L 172, p. 14, that Member States issue a right of abode as proof of the right of residence of persons providing or receiving services for periods exceeding three months shows that the period spent in a Member State by a recipient of services need not be negligible, but does not detract from the conclusion set out in the text of this Opinion that residence should still be temporary in nature, or subject to a definite term, if it is to come within the scope of the Treaty provisions on services. See also Article 1 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ, English Special Edition 1963-64 (I), p. 117.

practical purposes, this can only be assessed, at any rate in the circumstances of the present case, from the nature of the 'product' offered. In the present case, all the relevant elements of the applicants' activities are confined within Italy. The only transnational element is the non-Italian nationality of certain of their residents and potential residents. However, a person who moves from one Member State to another in order to retire to a residential home for the elderly can be presumed, from the outset, to do so on a permanent or indefinite basis, even if he later changes his mind and moves back to his State of origin. [76] This approach is particularly persuasive when the Treaty provisions on services are invoked by the provider of the putative service, who offers it to the world at large and does not establish the prior existence of an identifiable recipient, [77] rather than by a particular recipient, who might be able to point to evidence, in his own case, of plans for a merely temporary stay. At the oral hearing, the applicants in the main proceedings mentioned one non-Italian Community national who had stayed on an avowedly temporary basis in one of their homes in Lombardy in order to convalesce after a surgical operation. However, the evidence indicates that the applicants essentially offer residential accommodation for elderly persons on an indefinite or permanent basis. I do not think it appropriate to extend the scope of the present inquiry by reference to isolated cases, such as that just mentioned, not dealt with by the national court in its order for reference.

49. I conclude that the applicants in the main proceedings are not entitled to rely upon the Treaty provisions on the freedom to provide services.

E — *The fifth question*

50. Read in conjunction with Article 5 of the Treaty, Articles 85 and 86 require Member States to refrain from introducing or maintaining in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. [78] There is nothing in the order for reference or otherwise before the Court to show that the public and non-profit-making companies which have contracted with USSLs to operate residential homes for the

76 — This is consistent with the position taken by Advocate General Lenz at paragraphs 28 and 29 of his Opinion in *Cowan*, cited above, who favoured reasoning *ex ante*, by which the status of a recipient of services is determined at the beginning of the journey, over an *ex post* approach focusing on the services actually received.

77 — See *Alpine Investments*, cited above, paragraph 19 of the judgment.

78 — Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257, paragraph 14 of the judgment. As regards Article 85 of the Treaty, see also Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 16, Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14 and Case C-153/93 *Delta Schiffahrts-und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; as regards Article 86, see Case 13/77 *INNO* v *ATAB* [1977] ECR 2115, paragraph 31.

elderly in the Lombardy Region have engaged in anti-competitive agreements or concerted practices contrary to Article 85 of the Treaty, or that permits the existence of such agreements or practices to be inferred from the rules at issue in the instant case. [79] Thus, there can be no question of the Lombardy Region having required or favoured the adoption of such agreements or practices or having reinforced their effects. Furthermore, there is nothing to suggest that the Region has deprived its own rules of the character of legislation by delegating public decision-making power to private economic operators. [80] As regards Article 86 of the Treaty, there is no suggestion that any undertaking enjoys a dominant position within a substantial part of the common market. [81]

51. The Court has indicated that the simple fact of creating a dominant position by granting special or exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86 of the Treaty. [82] None the less, the mere existence of a monopoly may constitute an abuse of a dominant position where the undertaking to which this exclusive right is granted is manifestly not in a position to satisfy the demand prevailing on the relevant market, to the prejudice of those seeking to avail of the service in question. [83] However, even if the conclusion of contracts with USSLs in the Lombardy Region were deemed to constitute a grant of special rights within the meaning of Article 90(1) of the Treaty, it has not been established in the present case that any such circumstantial abuse exists. In the context of a social welfare scheme, the utilization to the full of all available residential capacity in contracting homes, combined with waiting lists in certain areas, may simply indicate the inherent limits on public expenditure rather than failure to serve market demand (in so far as that term is meaningful at all in relation to the provision of publicly funded services). Free competition appears to prevail on that small part of the market for residential care of the elderly in which social welfare services of a health-care character are not publicly funded, which permits any additional, privately funded demand to be satisfied.

52. I conclude that the circumstances described in the fifth question do not amount to a breach of Articles 3(g), 5, 85, 86 or 90 of the Treaty.

79 — *Reiff*, cited above, paragraph 15 of the judgment; *Delta Schiffahrts-und Speditionsgesellschaft*, cited above, paragraph 15.

80 — *Van Eycke*, cited above, paragraph 16 of the judgment; *Reiff*, cited above, paragraph 14; *Delta Schiffahrts-und Speditionsgesellschaft*, cited above, paragraph 14.

81 — For a collective dominant position to exist, according to the judgments of the Court in Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 42, and in *DIP*, cited above, paragraph 26, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market, which has not been established. The Court stated, at paragraph 27 of its judgment in *DIP*, that a salient feature of a collective dominant position would be that traders did not compete against one another, which has not been shown to be the case in respect of contracting homes in the Lombardy Region.

82 — Case 311/84 *CBEM* [1985] ECR 3261, paragraph 17 of the judgment; *Höfner and Elser*, cited above, paragraph 29.

83 — *Höfner and Elser*, cited above, paragraphs 30 and 31 of the judgment.

V — Conclusion

53. On the basis of the foregoing analysis, I recommend that the Court rule as follows:

(1) Member States are not obliged to state the reasons for enactment of legislative acts of general application, even where these potentially affect the exercise of Community-law rights;

(2) A national provision which reserves to non-profit-making private bodies the status to conclude contracts with local social security authorities for provision of publicly funded social welfare services of a health-care character constitutes indirect discrimination on grounds of nationality, and is, thus, a restriction on freedom of establishment, where these non-profit-making bodies are very likely to be established in the Member State in question;

(3) The applicants in the main proceedings are not entitled to rely upon the Treaty provisions on the freedom to provide services;

(4) The national legislation at issue in the main proceedings does not amount to a breach of Articles 3(g), 5, 85, 86 or 90 of the Treaty.