OPINION OF ADVOCATE GENERAL TESAURO

delivered on 14 July 1993 *

Mr President,
Members of the Court,

1. Having been the subject of several judgments in recent years, all in preliminary-ruling proceedings, the question of the compatibility with Article 3(f), the second paragraph of Article 5 and Article 85(1) of the EEC Treaty of State rules affecting the economic activity of private undertakings continues, in view of the principles involved, to arouse enormous interest.

The questions submitted by the Kammergericht Berlin (Case C-2/91), and the Arrondissementsrechtbank Arnhem (Case C-245/91), which again raise that issue in relation to two pieces of national legislation, one German and the other Dutch, prohibiting insurance undertakings and intermediaries from granting their clients special advantages of any kind, provide the Court with an opportunity to give further clarification in this matter, in particular regarding the link which must exist (and, possibly, the very need for such a link) between State measures of the kind in question and the conduct of private persons if those measures are to be regarded as being in breach of the Community competition rules.

2. I shall first recall the national legislation involved in Case C-2/91, drawing attention to the fact that, although the prohibition of transferring commission at present applies to all branches of insurance, [1] the question referred by the national Court relates only to *health* insurance and *legal expenses* insurance.

As far as *health* insurance is concerned, the prohibition was imposed by the order of 5 June 1934 of the Reichsaufsichtsamt für Privatversicherung (German Private Insurance Supervision Office); in the case of *legal expenses* insurance, the prohibition, initially introduced by order of 24 January 1967, was confirmed by an order of 17 August 1982 of the Bundesaufsichtsamt für das Versicherungswesen (Federal Insurance Supervision Office), which applies to the whole indemnity insurance sector. It should also be noted that, whilst the 1934 order merely prohibits the 'grant of special reductions of any kind', the 1982 order specifically prohibits 'any financial advantage, direct or indirect, in addition to the services provided for in the contract of insurance, in particular any transfer of commission'.

* Original language: Italian.

1 — Three measures are in force: the order of 8 March 1934, concerning life assurance, which repealed and replaced an order of 10 August 1923; the order of 5 June 1934 on health insurance; and finally the regulation of 17 August 1982 which concerns all indemnity insurance and therefore repealed and replaced all the previous orders covering specific branches of insurance: accident and civil liability (order of 14 May 1924), property insurance (order of 8 March 1934) and legal expenses insurance (order of 24 January 1967).

Those measures are based on the third sentence of Paragraph 81(2) of the Versicherungsaufsichtsgesetz (Insurance Supervision Law, hereinafter 'the VAG') of 6 June 1931, previously Article 64 of the Gesetz über die privaten Versicherungsunternehmen (Law on private insurance undertakings) of 12 May 1901. That provision, on the basis of which the competent authority is 'entitled, in general or for certain branches of insurance, to prohibit insurance undertakings and insurance intermediaries from granting special advantages of any kind', was inserted in the 1901 Law by an amending measure of 19 July 1923 and then incorporated in the VAG in 1931. Moreover, fines may be imposed, under Paragraph 144a(1)(2) of the VAG, for infringement of the measures adopted under the abovementioned provision.

The competent supervisory authority availed itself of the power vested in it by Paragraph 81 on 10 August 1923, that is to say immediately after the introduction of that provision, adopting the prohibition at issue in relation to life assurance.

3. It is noteworthy that agreements with the same subject-matter as the State measures at issue had been concluded, prior to the adoption of those measures, between the insurance undertakings operating in the *life assurance* sector. In particular, there was the Heidelberg agreement of 1900, entered into by the four largest undertakings in the sector; the 'anti-discount' agreement of 1911, to which most insurance undertakings were parties (again in the life assurance sector); and, finally, the so-called 'directives' of 1919, on the basis of which the undertakings in question submitted to the government what constituted a veritable draft law, which then led to the abovementioned amendment of the VAG of July 1923 and the subsequent adoption of the order of 10 August of the same year.

For the sake of completeness, mention should also be made of the 'Wiesbadener Vereinigung' of 1978, concluded between the representatives of associations of undertakings in all branches of insurance. Under that agreement, as is apparent from the judgment of the Amtsgericht Tiergarten, the transfer of any commission in respect of any kind of insurance is prohibited. It is thus an agreement to which all insurance undertakings are parties, which imposes the prohibition at issue on all intermediaries, including those operating independently; however, that agreement post-dates the adoption of the State measures at issue in these proceedings.

4. I now turn to Case C-245/91, which is concerned with Netherlands legislation having substantially the same content as the German measures described above. Article 16(1) of the Wet Assurantiebemiddelingsbedrijf of 7 February 1991 (Law on the activities of insurance agencies, hereinafter 'the WABB'), which essentially reproduced the content of Article 16 of the Wet Assurantiebemiddeling (Law on Insurance Agencies, hereinafter 'the WAB'), provides that 'it shall be prohibited to allow, grant or promise, directly or indirectly, in connection with an insurance policy, a commission, refund of commission or any other financially quantifiable advantage to persons other than the intermediary to whom the insurance portfo-

lio belongs'. Any infringement of that provision is punishable, under the Wet op de Economische Delicten (Law on Economic Offences) by imprisonment and fines.

5. The facts of the main proceedings are straightforward and undisputed. Mr Meng (Case C-2/91), an independent financial adviser, is accused of infringing the legislation in question by paying to his clients the commission received from the insurance companies in respect of six policies, three for health insurance and three for legal expenses insurance. The company Ohra (Case C-245/91) is the subject of criminal proceedings for having promised and/or offered credit cards to clients who had subscribed insurance contracts.

Before the national courts, Mr Meng and Ohra contended that the national measures in question were unlawful by virtue of the Community competition rules. The Kammergericht and the Arrondissementsrechtbank therefore decided that a preliminary ruling should be sought from the Court as to whether, essentially, the measures at issue were compatible with Article 3(f), the second paragraph of Article 5 and Article 85(1) of the EEC Treaty. The Dutch court also asked whether the answer to that question would be different depending on whether the prohibition of granting financial advantages applied only to intermediaries, also to insurance companies working with intermediaries or also to 'direct writers'.

6. The questions submitted thus have a direct bearing on the problem of the relationship between Community competition rules and national legislation governing undertakings' exercise of economic activities, that is to say legislation adopted — in principle — in pursuit of the public interest but nevertheless having an anti-competitive effect: can the former stand in the way of the application of the latter? And if so, under what conditions?

In that regard, the Court has always held that national rules governing the economic activity of undertakings fall outside the scope of Articles 85 and 86. Those articles are addressed (*ratione personae*) to undertakings, not to Member States; and they are intended (*ratione materiae*) to regulate freedom of competition, not to limit the prerogatives of the Member States in matters of economic policy, those prerogatives, in any event, being the subject of other provisions of the Treaty.

The Court has also repeatedly stated that 'Articles 85 and 86 of the Treaty, in conjunction with Article 5, require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings'. [2]

The two statements are perfectly consistent with each other. Whilst it is true that Articles 85 and 86 deal with anti-competitive conduct on the part of undertakings, it is also true that the Member States must not allow such undertakings to evade the prohibitions that they impose by offering them a legislative 'shield'. If that were not the case, Articles

2 — See, most recently, Case C-332/89 *Marchandise* [1991] ECR I-1027, paragraph 22.

85 and 86 would be deprived of their effectiveness: *the Member States are therefore under an obligation not to undermine the effectiveness of the competition rules addressed to undertakings.*

7. Although that principle is, according to its terms, absolutely clear, the same cannot be said of the scope of the obligation or the criteria to be used in deciding in which cases it has been breached. In other words, what are the 'measures' liable to negate the effectiveness of Article 85? What is the precise scope of the criterion of effectiveness?

In order to answer that question, it is, I think, necessary to review first of all the most important decisions on the matter, those relating to the application of the Treaty provisions on competition to those State measures which, although not forming part of the legislation on competition, [3] nevertheless have an impact on competition. [4]

The case-law

8. It will be remembered that the Court's first decision on this matter was in *INNO* v *ATAB*, [5] concerning a Belgian provision which required retailers selling manufactured tobacco to observe the price indicated on the tax seal, which was fixed by the producer or the importer. [6]

Having stated that, by virtue of the second paragraph of Article 5, 'Member States shall abstain from an measure which could jeopardize the attainment of the objectives of the Treaty', the Court continued, 'whilst it is true that Article 86 is directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its

3 — It goes without saying that any conflicts between Community and national competition law will be resolved by applying the principle of the primacy of Community law (see the well-known judgment in Case 14/68 *Wilhelm* [1969] ECR 1 and Joined Cases 253/78 and 1-3/79 *Giry and Guerlain* [1980] ECR 2327, in which the Court re-stated that the 'parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules or the full effects of the measures adopted in implementation of those rules' (paragraph 16).

4 — It is clear that such a wide definition will cover every type of State rule: it will thus extend to all measures, legislative or otherwise, within the sphere of administrative law, which, in the public interest, regulate the activities of undertakings, and in particular measures regulating markets, including rules on prices and tariffs, environmental measures, economic and monetary policy measures and so forth, and those in the fields of taxation, employment, social security and so on.

5 — Case 13/77 [1977] ECR 2115. It should be borne in mind, however, that the Court was confronted with a problem of that kind in Case 78/70 *Deutsche Grammophon* [1971] ECR 487. It was asked to rule on the compatibility of a provision of national copyright law with the second paragraph of Article 5 and Article 85(1). However, on that occasion the Court confined itself to saying that where the exercise of the exclusive right in question 'does not exhibit the elements of contract or concerted practice referred to in Article 85(1) it is necessary ... to consider whether the exercise of the right in question is compatible with other provisions of the Treaty, in particular those relating to the free movement of goods' (paragraph 7).

6 — In that case the company INNO, which claimed that it should not be bound, for the purpose of retail sales, by a price fixed by tobacco manufacturers and importers, contended that the national legislation on prices was only in appearance part of tax law but in reality should be seen as national competition legislation providing legal cover for a restrictive agreement. It claimed, therefore, that it should be held to be unlawful for a Member States to require private undertakings to engage in conduct which, in the absence of a State provision, would be contrary to Article 85 or 86.

effectiveness' (paragraph 31); and it thus came to the conclusion that 'Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty' (paragraph 33).

In that case, the Court did not draw any inferences from that statement of principle, taking the view that 'in any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect' (paragraph 35).

9. In that judgment, the Court thus identified the criterion of effectiveness with the obligation of the Member States not to adopt measures allowing undertakings to escape the constraints of Articles 85 and 86. The statement of that principle cannot disregard the facts of the case to which it relates, in which it is clear that the adoption of the contested measure had been preceded by arrangements contrary to Article 85 and was attributable to an initiative by a member of parliament who at the same time served as secretary of one of the associations which were parties to the agreement. The need not to undermine the effectiveness of the competition provisions by adopting rules which allow undertakings to escape the prohibitions imposed by Articles 85 and 86 must therefore be seen in that context.

The principles laid down in *INNO*, which provoked a heated debate among academic writers, did not dispel certain doubts as to whether (a) effectiveness is undermined only where the undertakings engage in conduct which gives rise to the adoption of the contested State measure or is a consequence thereof (particular importance would therefore attach to the origin of the measure in question or the fact that it encouraged the emergence of an agreement), or whether (b) effectiveness is undermined whenever the State measure could have been the subject of an agreement which would be intrinsically incompatible with Article 85(1) (in other words, where the undertakings ultimately find themselves in a situation which they could not have created for themselves without infringing Article 85).

10. The case-law immediately following the *INNO* v *ATAB* judgment seems to me to favour the first hypothesis. And indeed, having been called on several times to give a ruling on national rules relating, in particular, to prices and tariffs, the Court took the view that they did not raise any problem of compatibility with Articles 5 and 85 of the Treaty [7] but should instead be examined in the light of Article 30.

In that connection, the judgment in *Van de Haar* [8] is relevant: it involved national provisions of the same kind as the Belgian provision that gave rise to *INNO*. However, in *Van de Haar*, the Court held that 'Whilst it is true that Member States may not enact measures enabling private undertakings to

7 — See in that connection Case 82/77 *Van Tiggele* [1978] ECR 25 (minimum price rules); Case 5/79 *Buys* [1979] ECR 3203 (rules freezing prices); Case 181/82 *Roussel* [1983] ECR 3849 (system of imposed prices); Case 238/82 *Duphar* [1984] ECR 523 (scheme for reimbursements in respect of medicinal preparations by social security bodies).

8 — Joined Cases 177 and 178/82 [1984] ECR 1797. To the same effect, see Case 188/86 *Lefèvre* [1987] ECR 2963 (system of controlled prices for wholesale trade in beef and veal)

escape the constraints imposed by Article 85 of the Treaty, the provisions of that article belong to the rules on competition "applying to undertakings" and are thus intended to govern the conduct of private undertakings in the common market. They are not therefore relevant to the question whether legislation such as that involved in the cases before the national court is compatible with Community law' (paragraph 24).

It thus follows from *Van de Haar*, having regard to the principle enunciated in *INNO* v *ATAB*, that the appraisal of State measures in the light of Articles 5, 3(f) and 85(1) depends on the relationship between those measures and the anti-competitive conduct attributable to the undertakings.

11. The decisions which followed appear, at least at first sight, to go in two different directions.

A first line of development, which confirms the need for the existence of a link — and indicates the nature of that link — between the State measure and the anti-competitive conduct of the undertakings, includes the judgments in *BNIC* v *Clair*, [9] *BNIC* v *Aubert*, [10] *'Nouvelles Frontières'* [11] and *Ahmed Saeed*, [12] and also *Vlaamse Reisbureaus*. [13] They are also the only judgments in which the Court, referring to the second paragraph of Article 5 in conjunction with Articles 3(f) and 85(1), concluded that the measures at issue were illegal.

12. In *BNIC* v *Clair*, in relation to national legislation which extended an agreement concluded within an inter-professional organization to the other economic agents in the sector, the Court took the view that the agreement constituted an agreement between undertakings or associations of undertakings and that the adoption of a measure by the public authorities, intended to make that agreement binding on third parties, 'cannot remove the agreement from the scope of Article 85(1)' (paragraph 23).

Thus, without specifically giving its views on the State measure at issue, the Court merely held that the agreement in question remained subject to the prohibitions laid down in Article 85(1).

13. The fate of a State measure which extends the effects of an agreement to third parties was considered in greater detail in *Nouvelles Frontières*, in which the Court stated that the Member States' obligation to refrain from adopting or keeping in force measures which might in practice render the competition provisions ineffective would be infringed, in particular, 'if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof' [14] (paragraph 72).

9 — Case 123/83 [1985] ECR 391.

10 — Case 136/86 [1987] ECR 4789.

11 — Joined Cases 209-213/84 *Asjes and Others* [1986] ECR 1425.

12 — Case 66/86 [1989] ECR 803.

13 — Case 311/85 [1987] ECR 3801.

14 — In the later judgment of 3 December 1987 in *BNIC* v *Aubert* — concerning circumstances wholly analogous to those in *BNIC* v *Clair* — the Court, having reaffirmed that the agreement between undertakings was still subject to the prohibitions laid down by Article 85(1), made it clear that a State measure which makes the agreement binding on third parties as well is in turn incompatible with Articles 5 and 85.

The Court thus reached the conclusion that 'it is contrary to the obligations of the Member States under Article 5 of the EEC Treaty, read in conjunction with Article 3(f) and Article 85, in particular paragraph (1), of that Treaty, to approve air tariffs and thus to reinforce the effects thereof, where ... it has been found ... that those tariffs are the result of an agreement, a decision by an association of undertakings or a concerted practice contrary to Article 85' [15] (paragraph 77).

14. *Vlaamse Reisbureaus*, which concerned national provisions prohibiting travel agents from transferring to their customers any of the commission due to them, is of particular interest. The Court, having ascertained the existence of a system of agreements whose provisions had been incorporated in the contested legislation, held that the conversion of a purely contractual obligation into a statutory obligation constituted reinforcement of the existing agreements.

The novelty of that judgment lies in the fact that the Court no longer requires that the agreement and the State measure both exist when the dispute arises: in that case, it was not proved that the agreement, concluded in 1963, was still in force when the dispute arose. However, the Court considered it sufficient that the agreement was at the origin of the measure in question, a fact which was apparent from the actual *arrêté royal* of 1966, where it provided that the travel agent was required to 'respecter l'interdiction *convenue* de partager avec les clients les commissions perçues'.

Although formally referring to the case of a measure which reinforces the effects of an agreement, the Court seems in fact to have recognized that the effectiveness of Article 85 is also undermined where the State measure, by incorporating the content of the agreement, takes the latter's place, codifying it. The same could be said of a measure which, by the very fact of taking the place of the earlier agreements, made it unnecessary for the undertakings concerned to engage in anti-competitive conduct independently.

15. The last statement leads on to the second, divergent, line of development in the Court's case-law, which refers back to *INNO* v *ATAB* and, according to some commentators, disregards any anti-competitive conduct on the part of undertakings.

I refer to the *Leclerc* 'books judgment' of 10 January 1985, [16] concerning a national law which made book publishers or importers responsible for fixing binding retail prices at their own discretion.

Considering that the contested measure was not intended to require agreements to be concluded between publishers and retailers or other conduct prohibited by Article 85(1), the Court wondered whether 'national legislation which renders corporate behaviour of the sort contemplated by Article 85(1) of the

15 — The Court gave judgment on the same subject in *Ahmed Saeed*, cited above, in which it confirmed that 'the approval by the aeronautical authorities of tariff agreements contrary to Article 85(1) is not compatible with Community law and in particular with Article 5 of the Treaty. It also follows that the aeronautical authorities must refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements contrary to the Treaty.' (paragraph 49).

16 — Case 229/83 [1985] ECR 1.

Treaty superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty' (paragraph 15).

The Court therefore raised — but did not answer — the question whether the effectiveness of the competition rules is also undermined by a national measure — in that case the measure brought about effects similar to those previously deriving from a set of agreements between traders in the sector — which entrusts to the actual traders involved the task of fixing binding prices for retail sales, thereby rendering unnecessary anti-competitive conduct of the kind prohibited by Article 85(1).

16. A first answer to that question is already to be found in the *Leclerc* 'petrol' judgment of 29 January 1985. [17] In that judgment, the Court stated that the rules in question were 'not intended to compel suppliers and retailers to conclude agreements or take any other action of the kind referred to in Article 85(1) of the Treaty' and then emphasized that 'on the contrary, they entrust responsibility for fixing prices to the public authorities, which for that purpose consider various factors of a different kind'; and finally it added that the fact that the factors taken into account included 'the ex-refinery price fixed by the supplier ... does not prevent rules such as those provided for here from being State rules and is not capable of depriving the rules on competition applicable to undertakings of their effectiveness' (paragraph 17).

Those *dicta* make it clear, *a contrario*, that the effectiveness of the competition rules is liable to be undermined where the legislation in question, by entrusting to the traders concerned the task of regulating the market, ceases to be State legislation, but not where that responsibility remains with the public authorities. [18]

17. The case-law so far outlined is completed by the *Van Eycke* [19] judgment, in which the Court 'codified' the two lines of development discussed above, stating that the effectiveness of the competition rules is undermined, in particular, if a Member State 'were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions

17 — Case 231/83 [1985] ECR 305.

18 — The same view underlies the case-law of the Supreme Court of the United States, which raises no objections to measures which provide for active control by the State (see for example *Bates* v *State Bar of Arizona* 97 US 2691, 1977), whilst it regards as unconstitutional those measures which entrust entirely to economic agents the responsibility of regulating the market (see for example *Goldfarb* v *Virginia State Bar* 421 U. S., 1975, in which legislation allowing a bar association to fix minimum fees was held to be unlawful).

19 — Case 267/86 [1988] ECR 4769. That case concerned a State measure on tax exemption for income from savings deposits adopted in a sector in which inter-bank agreements existed for the specific purpose of limiting income from savings deposits. The Court nevertheless considered that it had not been proved that the contested legislation was intended to require or facilitate the conclusion of new agreements or the implementation of new practices or that it had incorporated wholly or in part the elements of agreements entered into between economic agents requiring or encouraging compliance on the part of those undertakings (paragraph 18); it also held that the fact that the legislation had been adopted after consultation with representatives from the sector in question did not deprive it of its official character.

affecting the economic sphere' [20] (paragraph 16).

General observations on the case-law

18. Although from the examination of the case-law so far carried out the possibility cannot be excluded that the theory of effectiveness may apply in cases falling outside the circumstances described in *Van Eycke*, it is nevertheless clear — in my opinion extremely clear — that State measures producing an objective anti-competitive effect cannot, for that reason alone, be appraised in relation to Articles 3(f), 5 and 85. [21]

For practical purposes, [22] the Court has so far made the illegality of the contested national rules conditional upon the existence of a significant link between the measure concerned and anti-competitive conduct attributable to undertakings, which implies that the effectiveness of Article 85 is undermined where two conditions are fulfilled:

— there is an agreement contrary to Article 85(1);

— a State measure imposes, favours or reinforces the effects of that agreement.

Admittedly, the fulfilment of those conditions is not necessary in the case — so far dealt with only by a statement of principle — where a Member State delegates to private traders the responsibility for adopting decisions affecting the economic sphere — but that is so precisely because, and to the extent to which, the Member State, by means of such delegation, *deprives its own legislation of its official character.*

In that connection, an important question was raised by Advocate General Capotorti in his Opinion in *Van Tiggele*, [23] namely 'whether ... it is not inadequate to proceed only as far as formal consideration of the mandatory nature which the State can confer (and in the present case has conferred) on decisions of agencies charged with the exercise of tasks involving the public interest in regulating the economy.' An affirmative answer to that question, which I think is the right answer, stems from the fact that such decisions may be analysed in relation to Articles 3(f), 5 and 85 where the composition of the agencies to which responsibility for making them is delegated is found to be such as to bring into being, *de facto*, a 'decision of an association of undertakings' or even a

20 — The same *dictum* was repeated in later judgments in which the examination undertaken by the Court showed that none of those conditions was satisfied and that the legislation in question was therefore not open to criticism from that standpoint (see Case C-339/89 *Alsthom Atlantique* [1991] ECR I 107, paragraph 11 and Case C-332/89 *Marchandise* [1991] ECR I-1027, paragraph 22). See also Case C-60/91 *Morais* [1992] ECR I 2085, paragraphs 11 and 12, in which the Court did not even enquire whether the contested measure came within the scope of either of the cases mentioned because it was not liable to undermine trade between Member States and therefore was not, in any event, likely to produce effects comparable to those of an agreement incompatible with Article 85(1).

21 — Of particular importance in that connection are the *de Haar* and *Leclerc 'petrol'* judgments.

22 — I refer to the *'Nouvelles Frontières'*, *BNIC* v *Aubert*, *Ahmed Saeed* and *Vlaamse Reisbureaus* judgments, in which the Court concluded that the contested national measures were illegal.

23 — Opinion of 13 December 1977 in Case 82/77 [1978] ECR 42, in particular at p. 48.

concerted practice. However, it should be emphasized that the hypothesis examined here has been put forward by the parties or by the Court, or by both, in cases where *the system resulting from the contested measure produced effects similar to those previously stemming from a set of arrangements between the traders in the sector.* [24]

In fact, it seems to me that the abovementioned case-law may be summarized as follows: the effectiveness of the competition rules is liable to be undermined only where State measures allow private undertakings to *escape* the constraints of Article 85, such measures thus being manifestly circumventive, either because (a) they offer legal cover for conduct that would otherwise be prohibited, or (b) they make such conduct unnecessary because the traders concerned are themselves given the task of ... regulating the market, with the result that the action of such traders may be seen, essentially, as conduct by undertakings within the meaning of Article 85.

The contested measures viewed against the background of the case-law

19. Since the circumstances codified in the abovementioned case-law, although helping to provide a fairly clear frame of reference, cannot be regarded as exhaustive, I think it is appropriate to verify first of all whether the measures challenged by Mr Meng and Ohra fall within any of them.

(a) *Case C-2/91*

Let me say straight away that, in the *Meng* case, there is no question of any circumstances such as to deprive the measures concerned of their status as State rules. Indeed, the prohibition of transferring commission was adopted by the Bundesaufsichtsamt, an administrative authority operating under the auspices of the Ministry of Finance which is empowered to adopt measures intended, in particular, to prohibit conduct liable to prejudice the interests of consumers. Furthermore, it should be emphasized here that the representatives of the insurance companies are merely invited to take part in the preparation of that body's decisions, but they do not actually determine the content thereof. [25]

20. Let us now examine the present case in relation to the other hypothesis found in the case-law, which presupposes the existence of a significant link between the contested measure and anti-competitive conduct on the part of private undertakings.

In the first place, it can be stated categorically that the measures in question are not intended to *require or favour the conclusion*

24 — This applies not only to the *Van Tiggele* judgment but also to those in *Leclerc 'books'* and *Van Eycke*. The facts were similar in *INNO* v *ATAB*.

25 — It will be remembered that in *Van Eycke*, cited above, the Court stated that the official character of legislation cannot be put in doubt by the mere fact that it was adopted after consultation with representatives of the associations in the sector concerned (paragraph 19).

of new agreements. Furthermore, I have little hesitation in endorsing the Commission's view that the measures in question *reinforced the effects of pre-existing agreements* in the manner described by the Court in *Vlaamse Reisbureaus*, [26] which was concerned with national rules prohibiting travel agents from transferring to their clients all or part of the commission due to them. In that case the Court made clear that the conversion of a purely contractual obligation into a statutory obligation reinforces the effects of existing agreements, but that — of course — is so only where it has been established that there was a system of agreements whose content has been embodied in the contested legislation.

In the present case, the situation is different for the simple reason that in the branches of insurance involved (health and legal expenses) there have never, as is apparent from the documents before the Court, been any agreements between undertakings; as we have seen, they exist only in the branch of life assurance.

The Commission considers, however, that the measures in question reinforced the agreements concluded in the life assurance sector because, by extending the prohibition of transferring commission to other branches of insurance, they broadened its field of application. In my opinion, that interpretation could be applied to the present case only if the prohibition of transferring commission had been adopted at the same time for all branches of insurance. Let me explain: at most, it could be concluded that the effects of existing agreements had been reinforced if the national measures which incorporated the content of the agreement concluded between the insurance companies in the life sector, and therefore took its place, were not limited to making the prohibition in question binding on all those operating in that sector but had at the same time extended it to those in the neighbouring sectors.

Since, however, the alleged 'extension' to the neighbouring sectors took place, in the case of health insurance, 11 years after the date on which the prohibition in question was made binding for the life sector and a full 44 years later in the case of legal expenses insurance, that argument is not very persuasive. Those time lapses make it clear that the 1934 measures (health insurance) and the 1967 measures (legal expenses insurance) cannot have reinforced an agreement which, applying as it did only to the life assurance sector, ceased to exist — by definition — as soon as it was 'replaced' by the State measures which incorporated its content, that is to say on 10 August 1923. It would be to say the least odd to consider that the measures in question had reinforced the effects of an agreement which had long ceased to be valid when they were adopted.

21. In short, it must be recognized that there is no substantial link between the measures in question and the agreements concluded between the life assurance companies. What can be stated, on the other hand, is that those agreements are at the root of the prohibition of transferring commission which, although

26 — Cited above.

initially adopted only in respect of life assurance, ultimately came to affect, albeit in successive stages, all branches of insurance.

That fact may of course support the view that the undertakings in the other insurance sectors had 'pushed' for the adoption of the prohibition already in place for the life sector, but that certainly does not prove that the contested measures are linked with anti-competitive conduct prohibited by Article 85 of the Treaty. Moreover, the insurance industry does not as such constitute a homogeneous market; in particular, the life assurance branch displays such specific and peculiar characteristics, by comparison with the other branches, that the existence of anti-competitive behaviour on the part of undertakings operating in that sector does not in itself provide conclusive — or indeed any — guidance as to the attitudes and interests of the undertakings operating in the other sectors.

(b) *Case C-245/91*

22. As regards the Ohra case, let me say immediately that neither the order for reference nor the observations of Ohra itself mention the existence of any agreement of the kind required by the case-law.

The agreements between the insurance companies themselves and between them and the intermediaries, the existence of which was emphasized by Ohra in its replies to the questions put by the Court, prove, even on superficial examination, either absolutely unrelated to the State measure in question [27] or, in any event, entirely unconnected with it in the sense that a rule of professional ethics which merely refers 'so far as may be relevant' to Article 16 of the WABB certainly cannot be regarded as anti-competitive conduct prohibited by Article 85.

The illegality of State measures in the absence of any link with anti-competitive conduct on the part of undertakings

23. That said, the fact that the measures in question do not fall within either of the hypotheses expounded by the Court and, more generally, do not display any link with anti-competitive conduct by the undertakings in the sector, clearly does not provide a basis for a conclusive answer to the problem at issue.

It remains to be established whether, in circumstances falling outside those hypotheses, the obligation imposed on Member States not to undermine the effectiveness of the competition rules addressed to private undertakings may be infringed — and if so within what limits — by State legislation which has no link with anti-competitive conduct prohibited by Community law. And it was precisely on that aspect that the discussions focused after the oral procedure was re-opened, a step which enabled the parties and all the Member States to submit their observations on that specific point.

The essence of the problem consists of course in *determining whether a State measure deprives Article 85 of its effectiveness* —

27 — That applies to agreements which, as pointed out by the Commission, fall within the scope of block exemption regulations.

and is therefore unlawful — *merely because it has an effect equivalent to that of an agreement prohibited by that article.*

24. Let me say immediately that a close examination, as required in the present case, discloses no legal basis for that view.

The obligation of Member States not to deprive the competition rules addressed to private undertakings of their practical effect is based on the second paragraph of Article 5 of the Treaty, an article which imposes 'a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty' [28] and therefore, in the present case, on Article 85. It is therefore impossible to rely on that provision to declare State measures unlawful, even if they have an effect equivalent to that of an agreement between undertakings prohibited by Article 85(1), in the absence of any — even indirect — link with anti-competitive conduct attributable to undertakings.

Nor do I consider that the problem can be redefined by referring to Article 3(f), to which some writers accord a fundamental role. That provision merely sets out a Community objective which is 'made specific in several Treaty provisions concerning the rules on competition'. [29] And it is certainly no accident that Article 3 states that that objective is to be pursued 'as provided in this Treaty and in accordance with the timetable set out therein'. That means that the system of free competition, although mentioned in Article 3 as an objective, is regulated, and therefore also restricted, *in the manner laid down in the Treaty*. To conclude otherwise would be tantamount to treating the substantive provisions on competition as superfluous: Article 3 would be sufficient to deal with any case in that field.

On the other hand, it is beyond doubt that, just as the aim pursued by Article 3(a) must be achieved under the conditions laid down in the later substantive provisions (Articles 9 to 12, 30 to 37 and 95), the objective laid down in Article 3(f) can only be pursued under the conditions laid down in the substantive provisions of Articles 85 to 94 and, as regards more particularly the conduct of the Member States, Article 90 (public undertakings and those enjoying exclusive or special rights) and Articles 92 and 93 (rules on State aid).

25. In short, having regard to the fact that, in the absence of a specific provision, 'the Member States' general obligation ... laid down in Article 5 of the EEC Treaty cannot be relied on' [30] and Article 3(f) merely sets out an objective and a principle which are then expounded in Articles 85 to 94, any anti-competitive effects of State measures addressed to private undertakings can be criticized as undermining the effectiveness of Article 85 only if they breach the prohibitions imposed on undertakings by Article 85(1) itself.

28 — *Deutsche Grammophon*, cited above, paragraph 5.

29 — See, *inter alia*, *INNO* v *ATAB*, cited above, paragraph 29.

30 — Order in Case 229/86 *Brother* [1987] ECR 3757, in particular at p. 3763.

Moreover, as was repeated yet again in the *Woodpulp* judgment, [31] it is not sufficient to prove the anti-competitive effect of the conduct of the undertakings, which may simply be the result of parallel behaviour: it must be proved that such conduct stems from concertation. And that definitively confirms the fact that Article 85, far from prohibiting mere anti-competitive effects, is directed against the means used to achieve them, that is to say agreements and concerted practices. *A fortiori*, therefore, I do not consider it permissible to criticize the possible and indirect anti-competitive effect of State measures when that effect has no link with the conduct of undertakings or in fact with Article 85, that is to say when it does not in any way cloak, directly or indirectly, conduct — actual, not merely ostensible conduct, let it be repeated — on the part of undertakings.

Otherwise, the alleged illegality of the State measure would have to be based solely on the combined provisions of Article 3(f) and the second paragraph of Article 5: the first of course no longer being seen as an objective to be attained under the conditions laid down in the Treaty but rather as a fundamental and independent principle to which the competition provisions are merely ancillary. Moreover, that interpretation, although, on a systematic reading of the Treaty, appearing somewhat improbable, would of course raise the not inconsiderable problem of the effect of such a principle on the legal position of individuals: it should not be forgotten that in this case it is an individual who has claimed before the national court a subjective legal position accorded to him, in his view, by Community law and denied him by national law. However, it seems to me that there can be no question of attributing direct effect to Article 3(f), even when read in conjunction with Article 5.

26. On the basis of the case-law on Article 90 and in particular the *dictum* in the *RTT* judgment [32] to the effect that a national measure cannot place a public undertaking, or one enjoying exclusive or special rights, in a position which, if achieved by the undertaking's own efforts, would constitute an infringement of Article 86 of the Treaty, it has also been contended in the course of these proceedings, by the Spanish Government for example, that the same should apply to private undertakings as well: there is no justification for them to be subject to different conditions from those applied to the undertakings referred to in Article 90(1).

It is therefore necessary to establish whether the obligations contained in the second paragraph of Article 5 and in Article 90(1) are the same.

I would point out that the very existence of a provision — Article 90(1) — which expressly requires the Member States not to enact or maintain in force in respect of public undertakings and those enjoying exclusive or special rights provisions contrary to the competition rules, whilst the only obligation to be

31 — See the judgment in Joined Cases C-89, 104, 114, 116, 117 and 125-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307.

32 — Case C-18/88 [1991] ECR I-5941, paragraph 20.

inferred from Article 5 is the obligation not to undermine the effectiveness of those provisions, justifies the different conditions applied to the undertakings in question.

That choice on the part of the authors of the Treaty — which may in fact be justified by the nature of the measures granting exclusive rights (in that they have an impact on the very structure of markets) and of the particular interests which the States retain in the public sector (and thus in their capacity as economic agents) — may be discussed at a theoretical level: the fact remains, however, that it is embodied in the Treaty and is in any case a choice typical of a legislator, not of a judge. That is even more so in a system which, like the Community system, is based on a division of powers between the Member States and the Community. It is relevant to bear in mind, in that regard, the provisions of Articles 101 and 102 of the Treaty, which clearly presuppose the existence and the legality of anti-competitive State measures, subject to the possibility of activating machinery, which involves both the Commission and the Member States, in order to remedy the situation.

27. That said in regard to matters of principle, I cannot but emphasize that the opposite solution advocated in the course of the proceedings, although attractive, remains, in the absence of any legal basis, purely academic.

Moreover, a solution based solely on the anti-competitive effect of national legislation displays numerous disadvantages, in so far as the Court might be called on to examine every national measure affecting the business activity of undertakings, [33] and, most importantly, because of the legal uncertainty that would arise regarding the type of State measures that are incompatible with the competition rules.

Even if the review of measures of that kind were merely marginal and limited to the appropriateness of the measure, examining the extent to which the means adopted were consonant with the aims pursued in the public interest, the fact remains that the very possibility of verifying whether the choice made by the legislator is justified by reasons relating to the public interest, and above all the question whether or not such an interest takes precedence over the anti-competitive effect of the legislation in question, might lead to arbitrary solutions in the absence of any yardstick for the appraisal of legality.

28. Admittedly, a solution based exclusively on the existence of a link between the State legislation and anti-competitive conduct on the part of individuals may appear unsatisfactory, since it is quite possible that in certain cases an agreement between undertakings may prove to be of only formal significance.

33 — Since the very fact of regulating the market involves, by definition, a limitation of competition, it is rare for State measures on the exercise of economic activities not to have anti competitive effects.

That situation might arise (and indeed this is the only possibility) in cases where a State measure has affected competition in the market in a manner substantially in harmony with the wishes expressed by the economic agents concerned. However, it must be borne in mind, first, that the influence of private individuals in the process of drafting legal provisions is an established fact in modern legal systems; and, secondly, that in practice it is not easy to determine whether the State measure concerned actually (and to what extent) reflects courses of action advocated by private individuals, which may well coincide with the public interest pursued by the legislature.

29. Conversely, there may be cases in which it would be more correct to decide that the State measure was not unlawful notwithstanding the existence of a link with the conduct of undertakings, since, as emphasized by the French Government, that link is necessary in order to conclude that the measure is in breach of Article 85, but is not always sufficient.

It is true that the link with an agreement between undertakings may prove to be merely a matter of form. But that does not mean, strictly speaking, anything more than that the only State measures that must be considered incompatible with Community law are those which the authors of the Treaty themselves specifically identified in Articles 90, 92 and 93, and no others. I consider, however, that the effort made in the case-law to treat as being similarly unlawful those measures which facilitate, encourage or render inevitable the infringement of the provisions addressed to undertakings must be correctly appraised and that the seemingly less rigorous approach adopted merely reflects recourse to systematic interpretation, by virtue of which provisions are construed in conjunction with and by reference to each other — although, needless to say, the process should not be taken too far and the progressive development of the case-law should not lose sight of the ever necessary normative aspect, which underlies and shapes the strict interpretative approach which must be adopted in reading the Treaty.

30. In any event, it does not seem to me that the approach so far taken by the Court is such as to afford immunity for measures whose sole aim is to evade the competition rules.

I would point out that the cases in which it seems necessary to have recourse to Articles 3(f), 5 and 85 in order to declare unlawful national legislation having the same effects as an agreement prohibited by Article 85 are purely residual. Most 'anti-competitive' economic measures in fact affect the Community rules on the common market in the areas covered by Article 30 or Article 59, in that a State measure 'capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34'. [34]

And in fact, as indicated earlier, when examining national rules governing prices and tariffs which have been challenged as being in breach of the competition rules, the Court has held, on the other hand, that such rules should be viewed in the light of Article 30. [35]

34 — *INNO* v *ATAB*, cited above, paragraph 35.

35 — See for example the judgments, cited above, in *Van Tiggele*, *Buys*, *Roussel* and *Duphar*, as well as in *INNO* itself and, to some extent, the *Leclerc 'books'* judgment.

And it is true, as academic authors have made clear, [36] that Article 30 allows the same result to be achieved in a manner consonant with the provisions of the Treaty.

The application of Article 30 or Article 59 does not call for an artificial interpretation: they are provisions addressed to the Member States, which must be strictly interpreted and facilitate review of the State measure in question on the basis of clear and precise criteria.

31. The measures contested by Mr Meng and Ohra, for example, could well be referred to the Court under Article 59 where the requisite conditions are fulfilled: that is to say, where there is a cross-frontier element — which is lacking in the case before us. The possibility cannot be excluded that the contested national rules may so affect the structure of the German and Netherlands markets that it will be more difficult for intermediaries and insurance companies established in other Member States to gain access to them.

The Netherlands legislation challenged in the Ohra case was examined by the Commission, which concluded, however, that it was justified on grounds of consumer protection in connection with the freedom to provide services. Nevertheless, the Commission observed, in particular at the hearing, that it is clear from the documents before the Court that the Ohra case concerns a purely internal situation, in so far as it involves a Netherlands insurance company which advertises, in the Dutch press, certain advantages offered to Dutch consumers who take out an insurance policy in respect of risks within national territory.

32. It has nevertheless been emphasized that State measures which do not create an obstacle to trade within the meaning of Article 30 (or Article 59) but are liable to affect trade between the Member States fall outside the scope of the Treaty. Such a case might arise above all where tariff and price rules which merely freeze the retail sale price nevertheless place no restriction on determination of the import price.

In view of the fact that Article 30 will be applicable in any event where it is found that the retail price is fixed at such a level as to make imported products more difficult to dispose of than domestic products, the purely internal situations in question will, as such, only in very rare cases be liable to have an *appreciable* adverse effect on trade between Member States, as required by Article 85(1).

Since such circumstances rarely arise, I consider to be excessive, having regard to the result sought, the negative consequences which, as has become apparent in the course of the proceedings, might follow from an approach whereby — subject of course to consideration of grounds of public interest — all State measures having effects similar to those of an agreement prohibited by Article

36 — See for example Ulrich, 'State intervention and EEC competition law', *World Competition*, 1990, p. 79 et seq

85 were regarded, in principle, as incompatible with the Treaty competition rules.

33. In conclusion, I am of the opinion that the second paragraph of Article 5, in conjunction with Articles 3(f) and 85(1), may not be used as a basis for reviewing the legality of a State measure in the absence of any link with anti-competitive conduct by individuals, even though, objectively, that measure has an effect equivalent to that of an agreement prohibited by Article 85.

34. In view of the foregoing considerations, I suggest that the Court give the following answers to the questions referred to it by the Kammergericht Berlin, and the Arrondissementsrechtbank Arnhem:

(a) *In Case C-2/91:*

Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty must be interpreted as not precluding, in the absence of any link with conduct by undertakings prohibited by Article 85(1), the application of State legislation which, as in the present case, prohibits insurance intermediaries in the health and legal expenses sectors from transferring all or part of the commission payable to them.

(b) *In Case C-245/91:*

Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty must be interpreted as not precluding, in the absence of any link with conduct by undertakings prohibited by Article 85(1), the application of State legislation which prohibits the grant or promise, in respect of an insurance contract, of any commission, rebate or any other financial advantage to persons other than the intermediary to whom the insurance portfolio belongs.