OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 July 2001 [1]

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1. This reference for a preliminary ruling raises the difficult question of the application of Community competition law to the professions. [2]

2. A dispute has been brought before the Nederlandse Raad van State (Netherlands Council of State) concerning the legality of a regulation adopted by the Netherlands Bar Association. The regulation in issue prohibits lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with members of the professional category of accountants. It is for the Court to decide whether the Treaty provisions on competition are applicable and, if necessary, whether they preclude such a prohibition of cooperation.

3. This case has much in common with two other references for a preliminary ruling referred by the Pretore di Pinerolo (Magistrate, Pinero) (Italy) in Case C-35/99 *Arduino* and by the Giudice di Pace di Genova (Italy) in Case C-221/99 *Conte*. Those Italian courts are called upon to determine whether the professional tariff scales for services provided by lawyers and architects in their country are compatible with the Community rules on competition.

4. Although the three cases raise the same issues, the differences distinguishing their legal and factual backgrounds lead me to present a different Opinion. [3] This Opinion relates to the request from the Nederlandse Raad van State in Case C-309/99 *Wouters and Others*.

2 — This topic is the subject of learned debate. See, in particular, C. Ehlermann, 'Concurrence et professions libérales: antagonisme ou compatibilité?' in *Revue du marché commun et de l'Union européenne*, 1993, p. 136; L. Misson and F. Baert, 'Les barèmes d'honoraires des avocats sont-ils illégaux?' in *Journal des tribunaux*, 1995, p. 485; L. Idot, 'Quelques réflexions sur l'application du droit communautaire de la concurrence aux ordres professionnels', in *Journal des tribunaux de droit européen*, April 1997, p. 73; H. Nyssens, 'Concurrence et ordres professionnels: les trompettes de Jéricho sonnent-elles?' in *Revue de droit commercial belge*, 1999, p. 475; and A.-M. Van den Bossche, 'Voor economische vrijheid en mededingingsrecht: hoe vrij is de plichtenleer in het beperken van de economische keuzevrijheid van vrije beroepers?' in *Tijdschrift voor Privaatrecht*, 2000, p. 13.

3 — See my Opinion presented today in Case C-35/99 *Arduino* [2002] ECR I-1529, I-1522 and my Opinion presented on 12 July 2001 in Case C-221/99 *Conte* [2001] ECR I-9359, I-9361.

I — The national legal background

A — *The Netherlands Constitution*

5. Article 134 of the Constitution of the Kingdom of the Netherlands deals with the establishment of, and legal rules governing, public bodies. It provides that:

'(1) Public professional bodies and other public bodies may be established and dissolved by or under statute.

(2) The duties and organisation of such public bodies, the composition and powers of the governing bodies and public access to their meetings shall be governed by statute. Powers to adopt regulations may be granted to the governing bodies by or under statute.

(3) Supervision of the governing bodies shall be governed by statute. Their decisions may be annulled only where they are contrary to law or to public interest.'

B — *The Nederlandse Orde van Advocaten*

6. Pursuant to that provision, the Netherlands authorities adopted the Law of 23 June 1952 establishing the Nederlandse Orde van Advocaten (Netherlands Bar Association, 'the Association') and laying down the internal operating regulations and the disciplinary rules applicable to 'advocaten' and 'procureurs' ('the Advocatenwet', the law on the legal profession).

7. In accordance with the Advocatenwet, the Association is composed of all lawyers registered in the Netherlands. In addition, all lawyers registered with the same court form the Bar association for the district concerned.

8. The governing bodies of the Association and the district associations are the Algemene Raad (General Council) and the Raden van Toezicht (Supervisory Boards) respectively. The members of the General Council are elected by the committee of representatives, who are themselves elected at meetings of the various district associations.

9. According to Article 26 of the Advocatenwet,

'the General Council and the Supervisory Boards shall ensure the proper practice of

the profession and have the power to adopt any measures which may contribute to that end. They shall defend the rights and interests of lawyers as such, ensure that the obligations of the latter are fulfilled and discharge the duties imposed on them by regulation.'

10. Article 28(1) of the Advocatenwet provides:

'The Committee of Representatives may adopt regulations in the interests of the proper practice of the profession, including regulations concerning provision for lawyers on account of old age or total or partial incapacity for work, and provision for the next-of-kin of deceased lawyers. Furthermore, the Committee shall adopt the necessary regulations concerning the administration and organisation of the Association.'

11. In accordance with Article 29 of the Advocatenwet, the regulations are binding on the members of the Association and on 'visiting lawyers', that is to say persons who are not registered as lawyers in the Netherlands but who are authorised to carry on professional activity in another Member State under the title of lawyer or an equivalent title.

12. Article 30 of the Advocatenwet provides for scrutiny of the regulatory power of the governing bodies. It provides that 'decisions of the Committee of Representatives, the General Council or other bodies of the Association may be suspended or annulled by royal decree in so far as they are contrary to law or the public interest.'

C — *The Samenwerkingsverordening of 1993*

13. In 1993 the Committee of Representatives of the Bar Association adopted, on the basis of Article 28 of the Advocatenwet, a regulation entitled 'Samenwerkingsverordening' (regulation on joint professional activity, 'the Regulation').

14. Article 1 of the Regulation defines 'professional partnership' (samenwerkingsverband) as being 'any joint activity in which the participants practise their profession for their joint account and at their joint risk or by sharing control or final responsibility for that purpose'. [4]

15. Article 4 of the Regulation permits lawyers to enter into partnership with other lawyers registered in the Netherlands and,

4 — I shall refer in the remainder of my Opinion to this kind of joint professional activity as a '[multi-disciplinary] partnership'. This form of joint activity entails sharing profits, losses, decision-making power and final responsibilities.

on certain conditions, with lawyers registered in other States.

16. By contrast, where lawyers wish to enter into partnership with members of a *different professional category*, that other category must form the subject of authorisation by the General Council of the Bar Association.

17. Moreover, Article 8 of the Regulation provides that '[e]very professional partnership must mandatorily have a collective name for all external contacts' and that '[t]he collective name must not be such as to give rise to error'.

18. It is clear from the statement of reasons given for the Regulation that in the past lawyers have been authorised to enter into partnership with notaries, tax consultants and patent agents. Authorisation for those three professional categories remains valid. On the other hand, accountants are mentioned as a professional category with which lawyers are not authorised to enter into multi-disciplinary partnership.

II — Facts and procedure

19. The actions in the main proceedings were brought by five persons, namely, Mr Wouters, Mr Savelbergh, the partnership Arthur Andersen & Co. Belastingadviseurs (tax consultants), the partnership Arthur Andersen & Co. Accountants and the private company Price Waterhouse Belastingadviseurs BV (tax consultants).

20. Mr Wouters was registered as a lawyer at the Amsterdam Bar. He became a partner in Arthur Andersen & Co. Belastingadviseurs on 1 January 1991.

21. In November 1994 Mr Wouters informed the Rotterdam Supervisory Board of his intention to establish himself as a lawyer in that district and to practise there under the name of 'Arthur Andersen & Co., advocaten en belastingadviseurs'.

22. The Rotterdam Supervisory Board rejected his application by decision of 27 July 1995.

It took the view that, on account of the links between them, the partnership Arthur Andersen & Co. Belastingadviseurs and the partnership Arthur Andersen & Co. Accountants formed a multi-disciplinary partnership within the meaning of Article 4 of the Regulation. The Supervisory Board considered that, by entering into association with the first partnership, Mr

Wouters had also entered into a multi-disciplinary partnership with the second, that is to say with members of the professional category of accountants. Since that professional category has not been given authorisation by the Bar Association, Mr Wouters' partnership with Arthur Andersen & Co. Belastingadviseurs was held to be contrary to Article 4 of the Regulation.

Furthermore, the Supervisory Board considered that Mr Wouters could not, without contravening Article 8 of the Regulation, enter into a partnership the collective name of which included the name of the natural person Arthur Andersen.

23. Mr Savelbergh is registered at the Amsterdam Bar.

24. In spring 1995 he informed the Supervisory Board for that district that he intended to enter into a multi-disciplinary partnership with the company Price Waterhouse Belastingadviseurs BV, a branch of the international body Price Waterhouse, which includes not only tax consultants, but also accountants.

25. On 5 July 1995 the Amsterdam Supervisory Board declared the partnership contemplated by Mr Savelbergh to be contrary to Article 4 of the Regulation.

26. By two decisions of 21 and 29 November 1995, the General Council of the Association dismissed the administrative appeals brought by Mr Wouters, Mr Savelbergh and Price Waterhouse Belastingadviseurs BV against the abovementioned decisions.

27. The five applicants then appealed to the Arrondissementsrechtbank (District Court, 'the Rechtbank'), Amsterdam. They claimed, *inter alia*, that the decisions of the General Council of the Association were incompatible with the Treaty provisions on competition, right of establishment and freedom to provide services.

28. On 7 February 1997 the Rechtbank declared inadmissible the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants. Moreover, it dismissed as unfounded the arguments put forward by Mr Wouters, Mr Savelbergh and Price Waterhouse Belastingadviseurs BV.

29. The Rechtbank considered that the Treaty provisions on competition did not apply to the circumstances of the case.

It held that the Association was a body governed by public law, established by statute in order to further a public interest.

For that purpose it makes use of the regulatory power conferred on it by Article 28 of the Advocatenwet. The Association is required to guarantee, in the public interest, the independence and 'partiality' [5] of lawyers providing legal assistance. In the Rechtbank's view, the Association is not, therefore, an association of undertakings within the meaning of Article 85 of the EC Treaty (now Article 81 EC).

With regard to the plea based on Article 86 of the EC Treaty (now Article 82 EC), the Rechtbank considered that the Association could be regarded neither as an undertaking nor as an association of undertakings. Furthermore, Article 28 of the Advocatenwet does not transfer any powers to private operators in such a manner as to undermine the effectiveness of Articles 85 and 86 of the Treaty. In consequence, that provision is not incompatible with the second paragraph of Article 5 of the EC Treaty (now the second paragraph of Article 10 EC), read in conjunction with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) and Articles 85 and 86 of the Treaty.

30. Nor did the Rechtbank follow the appellants' argument that the Regulation is incompatible with the right of establishment (Article 52 of the EC Treaty (now, after amendment, Article 43 EC)) and the freedom to provide services (Article 59 of the EC Treaty (now, after amendment, Article 49 EC)).

According to the Rechtbank, there is no cross-border factor in the case in point, so that those provisions are not applicable. In any event, the prohibition on partnerships is justified by overriding reasons relating to the public interest and is not disproportionately restrictive. Furthermore, it considered that the Regulation is not incompatible with the right of establishment. In the absence of Community provisions in that field, the Member States remain free to make the exercise of the legal profession on their territory subject to rules intended to guarantee the independence and partiality of lawyers providing legal assistance.

31. The appellants in the main proceedings appealed against the decision of the Rechtbank to the Raad van State.

32. The respondent in the proceedings is the General Council of the Association. It is supported in its pleadings by the Raad van de Balies van de Europese Gemeenschap (the Council of the Bars and Law Societies of the European Community, 'the CCBE'), an association established under Belgian law which has been granted leave to intervene in the main proceedings.

33. By judgment given on 10 August 1999, the Raad van State confirmed that the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants were inadmissible. As regards the other appeals, it considered

5 — 'Partijdigheid': this term, which is apparently peculiar to the Netherlands legal system, seems to refer to partisan defence of the client's interests.

that the outcome of the dispute in the main proceedings depended on the interpretation of several provisions of Community law.

III — The questions referred

34. Consequently, it decided to stay proceedings and to refer the following questions to the Court:

'1 (a) Is the term "association of undertakings" in Article 85(1) of the EC Treaty (now Article 81(1) EC) to be interpreted as meaning that there is such an association only if and in so far as it acts in the undertakings' interest, so that in applying that provision a distinction must be made between activities of the association carried out in the public interest and other activities, or is the mere fact that an association can also act in the undertakings' interest sufficient for it to be regarded as an association of undertakings within the meaning of the provision in respect of all its actions?

Is the fact that the universally binding rules adopted by the relevant institution are adopted under a statutory power and in its capacity as a special legislature relevant as regards the application of Community competition law?

(b) If the answer to Question 1(a) is that there is an association of undertakings only if and in so far as it acts in the undertakings' interest, is the question of when the public interest is being pursued also governed by Community law?

(c) If the answer to Question 1(b) is that Community law is relevant, can the adoption under a statutory power by an institution such as the [Netherlands] Bar Association of universally binding rules, designed to safeguard the independence and loyalty to the client of lawyers providing legal assistance, on the formation of multi-disciplinary partnerships between lawyers and members of other professions be regarded for the purposes of Community law as pursuing the public interest?

2. If the answers to the first question indicate that a rule such as the Regulation ... is to be regarded as a decision of an association of undertakings

within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) is such a decision, in so far as it adopts universally binding rules, designed to safeguard the independence and loyalty to the client of lawyers providing legal assistance, on the formation of multidisciplinary partnerships such as the one in question to be regarded as having as its object or effect the restriction of competition within the common market and in that respect affecting trade between the Member States?

What criteria of Community law are relevant to the determination of that issue?

3. Is the term "undertaking" in Article 86 of the EC Treaty (now Article 82 EC) to be interpreted as meaning that where an institution such as the Bar Association must be regarded as an association of undertakings, that institution must also be considered to be an undertaking or group of undertakings for the purposes of that provision, even though it pursues no economic activity itself?

4. If the previous question is answered in the affirmative and it must be held that an institution such as the Bar Association enjoys a dominant position, does such an institution abuse that position if it regulates the relationships of the lawyers affiliated to it with others on the market in legal services in a manner which restricts competition?

5. If an institution such as the Bar Association is to be regarded as a whole as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) to be interpreted as extending to an institution such as the Bar Association which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of lawyers providing legal assistance, on cooperation between lawyers and members of other professions?

6. If an institution such as the Bar Association is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 3(g), 10, 81 and 82 EC) preclude a Member State from providing that (an agency of) that institution may adopt rules concerning *inter alia* cooperation between lawyers and

members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

7. Are both the Treaty provisions on the right of establishment and those on the freedom to provide services applicable to a prohibition on cooperation between lawyers and accountants such as that in question, or is the EC Treaty to be interpreted as meaning that such a prohibition must comply, depending for example on the way in which those concerned actually wish to model their cooperation, with either the provisions on the right of establishment or with those relating to the freedom to provide services?

8. Does a prohibition on multi-disciplinary partnerships including lawyers and accountants such as the one in question constitute a restriction of the right of establishment or the freedom to provide services, or both?

9. If it follows from the answer to the previous question that one or both of the abovementioned restrictions exists, is the restriction in question justified on the ground that it constitutes merely a "selling arrangement" within the meaning of *Keck and Mithouard* and therefore there is no discrimination, or on the ground that it satisfies the criteria that have been developed in that respect by the Court of Justice in other judgments, in particular *Gebhard*?'

IV — The subject-matter of the questions

35. The order for reference made by the Raad van State raises five groups of questions.

36. The first group of questions concerns the interpretation of Article 85(1) of the Treaty. These questions seek to determine whether a professional association of lawyers, such as the Association, infringes that provision where it adopts a binding provision prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnerships with members of the professional category of accountants. [6]

37. The second group of questions essentially seeks to ascertain whether a professional association of lawyers, when adopting a provision entailing such a prohibition on partnership, abuses its dominant position within the common market or in a

6 — Question 1(a), (b) and (c), and Question 2.

substantial part of it within the meaning of Article 86 of the Treaty. [7]

38. The third group of questions arises if the contested provision is to be regarded as a restriction on competition or an abuse of a dominant position. In that case, it is a matter of ascertaining whether, on a proper construction of Article 90(2) of the Treaty, application of the Community rules on competition to a professional association of lawyers which adopts such a measure is liable to frustrate the performance of the particular task assigned to it by the public authorities. [8]

39. The fourth group of questions concerns Article 5 in conjunction with Articles 85 and 86 of the Treaty. It seeks to ascertain whether a Member State infringes those provisions where it confers on a professional association of lawyers the power to adopt binding measures which determine whether it is possible for lawyers practising in its territory to enter into multi-disciplinary partnership with accountants, when the Member State concerned does not reserve the right to substitute its own decisions for the measures adopted by the association. [9]

40. Last, the fifth group of questions relates to the issue of whether it is contrary to the Treaty provisions concerning the right of establishment (Article 52) and the freedom to provide services (Article 59) for a professional association of lawyers to adopt a provision such as that in issue in the main proceedings. [10]

V — Article 85(1) of the Treaty

41. Article 85(1) of the Treaty prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

42. The appellants in the main proceedings consider that, in the circumstances of this case, the conditions for application of that provision have been satisfied. The arguments they put forward are as follows.

First, they argue that the Association is an 'association of undertakings'. Like any other professional body, it ensures the defence of the collective and individual interests of its members. The fact that it may act in the public interest or be granted regulatory powers is immaterial in this connection.

7 — Questions 3 and 4.
8 — Question 5.
9 — Question 6.
10 — Questions 7, 8 and 9.

Second, it is an object of the Regulation to 'restrict competition'. It was adopted specifically for the purpose of preserving an absolute prohibition of all forms of association between lawyers and accountants in the Netherlands. In any event, the contested regulation has the effect of preventing lawyers and accountants from creating forms of association capable of offering better services to clients operating in a complex economic and legal environment.

Third, the Regulation is capable of affecting 'trade between Member States'. The appellant partnerships, like firms of lawyers, carry on international activities. They frequently take part in cross-border transactions involving the legal systems of several Member States.

43. The Association, the CCBE, the Commission and most of the Member State Governments which have intervened [11] take up the opposite position. In their view, there is no breach of Article 85(1) of the Treaty. The purpose of the prohibition on partnership laid down in the Regulation is to guarantee the independence and loyalty to the client of the lawyer. It cannot, therefore, be in one way or another taken account of or prohibited by Article 85(1) of the Treaty.

11 — Pursuant to the Protocol on the EC Statute of the Court of Justice, written observations were submitted by the Danish, German, French, Dutch, Portuguese and Swedish Governments and the Government of Liechtenstein. The Luxembourg Government submitted oral observations.

44. I must consider in turn the scope *ratione personæ* and the scope *ratione materiæ* of Article 85(1). The first will make it possible to determine whether the Association can be called an association of undertakings. The second will seek to establish whether the contested prohibition on partnership is such as to restrict competition and to affect trade between Member States. A preliminary observation is called for on the very concept of an undertaking.

A — *The definition of an undertaking*

45. In its order for reference, [12] the Raad van State expressly stated that lawyers registered in the Netherlands were 'undertakings' within the meaning of Article 85(1) of the Treaty.

46. The national court pointed out that, under Community competition law, the definition of an undertaking includes 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'. [13] It considered that Netherlands lawyers fell within that definition since they offered, in return for remuneration, services on a particular market, namely the market in the provision of legal services.

12 — English translation, p. 10.

13 — Judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

47. The Raad van State's assessment on this point has not been challenged by the interveners. Inasmuch as the national court has not referred to the Court any question on the interpretation of the definition of an undertaking, I shall start from the principle that Article 85(1) of the Treaty applies *ratione personæ* to lawyers registered in the Netherlands.

48. None the less, for the sake of completeness, I shall say that the situation of Netherlands lawyers might prove more complicated in the light of the Treaty provisions.

49. It is clear from the documents in the file forwarded to the Court [14] that lawyers registered in the Netherlands are authorised to carry on their activities under two distinct bodies of legal rules. They may act as independent agents or as employees. The Treaty rules applicable to the profession may vary, depending on whether the lawyer is to be found in the former or latter situation.

50. The activities carried out by lawyers are traditionally centred on two essential roles: the first, that of legal adviser (including consultation, negotiation and drawing up certain documents), and the second, that of assisting and representing the client before the judicial and extra-judicial authorities.

51. Where lawyers practise as independent agents, they offer services on a particular market, namely the market for legal services. They demand and receive from their clients remuneration in return for the services performed. In addition, they carry the financial risks attaching to the performance of their activity since, if there should be an imbalance between their expenses and their receipts, they must bear the losses themselves. In accordance with the criteria laid down in the Court's case-law, [15] lawyers must in that case be classified as 'undertakings' for the purposes of Community competition law.

52. On the other hand, lawyers carrying out their activities as employees are in a different situation. Two hypotheses are possible in this connection.

First, lawyers may perform their services for, and under the direction of, another person who pays them remuneration in return. In that case, lawyers are employed 'workers' and, as such, do not fall within

14 — See the order for reference (English translation, pp. 6 and 10), the Association's observations (paragraph 27) and the written observations of the Netherlands Government (paragraph 19).

15 — Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraphs 36 to 38 ('*CNSD*'); and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 73 to 77.

the scope of Community competition law. [16] Second, it may happen that lawyers do not really work under their employer's direction and that their remuneration is directly linked to the latter's profits and losses. In that case, lawyers belong to the 'borderline categories' mentioned by Advocate General Jacobs in his Opinion in *Pavlov*. [17]

53. In addition, the existence of two distinct bodies of legal rules in the Netherlands is likely to have some effect on the interpretation of the definition of 'association of undertakings'. It is, in reality, trickier to ascertain whether a professional organisation including both undertakings and employees constitutes an association of undertakings within the meaning of Article 85(1) of the Treaty. [18]

54. However, inasmuch as the Court has not been called upon to give an interpretation to that effect, it is not for me to take up a position on those different questions. In any event, it would be impossible to consider that point since there is nothing in the file which might enable me to ascertain with any certainty the status of salaried lawyers in the Netherlands.

16 — Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraphs 24 to 26.

17 — Paragraph 112.

18 — The question arose in *Pavlov*. It was not, however, necessary to answer it in order to reply to the questions referred (see Advocate General Jacobs' Opinion in that case, paragraph 125).

55. I shall therefore start from the principle that lawyers registered in the Netherlands do constitute undertakings for the purposes of Community competition law.

B — *The definition of association of undertakings*

56. The first question concerns the definition of 'association of undertakings'.

57. The Raad van State asks whether, on a proper construction of Article 85(1) of the Treaty, the definition of an association of undertakings applies to a professional association of lawyers, such as the Association, when it adopts, pursuant to regulatory powers conferred by statute, binding measures which forbid lawyers to enter into multi-disciplinary partnerships with accountants in order to protect the independence of lawyers and their loyalty to their clients.

58. The national court faces the following problem. [19]

19 — Order for reference, pp. 5 and 11, English translation.

59. It explains that, according to the statement of reasons for the Advocatenwet, the Association is required to exercise its regulatory power in the public interest. It must ensure that individuals have access to the law and to justice. Nevertheless, pursuant to Article 26 of the Advocatenwet, the Association is expressly charged with the defence of the rights and interests of lawyers. The Association therefore exercises its regulatory power with a view to furthering the collective and individual interests of its members.

60. Having regard to those factors, the national court identifies several questions. It asks the Court:

(1) Whether Article 85(1) of the Treaty requires the Association's activities to be considered separately, so that the Association is classified as an association of undertakings only where it acts in the interest of its members, or whether, on the contrary, the mere fact that the Association may exercise its regulatory power in the interest of its members is sufficient for it to be classified as an association of undertakings in respect of all its activities (Question 1(a));

(2) Whether the fact that the Association possesses regulatory power conferred by statute has an effect on whether or not it is classified as an association of undertakings (Question 1(a));

(3) Whether, if the Association's activities are to be considered separately, Community law establishes those cases in which a professional organisation acts in the public interest and those in which it acts in its members' interest (Question 1(b));

(4) Whether, if Community law does establish the cases in which a professional organisation acts in the public interest, the adoption by the Association of binding measures forbidding its members to enter into multi-disciplinary partnership with accountants in order to protect lawyers' independence and loyalty to clients is covered by 'the public interest' for the purposes of Community law (Question 1(c)).

61. The concept of association of undertakings is not defined by the Treaty. As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests *vis-à-vis* other economic operators, government bodies and the public in general. [20]

20 — M. Waelbroek and A. Frignani, 'Commentaire J. Megret, Le Droit de la CE, Vol 4, Concurrence', *Éditions de l'Université de Bruxelles*, Bruxelles, 1997, 2nd ed., para. 128.

62. The concept of an association of undertakings does, however, play a particular role in Article 85(1) of the Treaty.

It seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article 85(1) covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.

63. The Court has frequently been called upon to give a ruling in cases concerning associations of a purely commercial nature. *CNSD* is the first case in which the Court applied the concept of an association of undertakings to a professional association. [21]

21 — The Commission has adopted three decisions concerning the professions: Decision 93/438/EEC of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407 — CNSD) (OJ 1993 L 203, p. 27); Decision 95/188/EC of 30 January 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.686 — COAPI) (OJ 1995 L 122, p. 37); and Decision 1999/267/EC of 7 April 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/36.147 — EPI Code of Conduct) (OJ 1999 L 106, p. 14). That last decision was in part annulled by judgment of the Court of First Instance of 28 March 2001 in Case T-144/99 *Institute of Professional Representatives before the European Patent Office* v *Commission* [2001] ECR II-1087, 'IPR'.

64. In the light of the importance of that case to the present dispute, its principal elements should be brought to mind.

65. In Italy the activity of customs agent is a profession. [22] The practice of that profession is dependent on possession of approval and entry in a national register. At departmental level, the activities of customs agents are supervised by departmental councils under the guidance of the National Council of Customs Agents (CNSD). Pursuant to the Italian legislation, the CNSD was responsible *inter alia* for setting the tariffs for the professional services provided by customs agents.

The Commission had decided to initiate proceedings against the Italian Republic for failure to fulfil obligations. It alleged that Italy had infringed Articles 5 and 85 of the Treaty by forcing the CNSD to set a compulsory tariff for all customs agents.

66. One of the questions raised in that dispute was whether the CNSD was an association of undertakings within the meaning of Article 85(1) of the Treaty. In

22 — *CNSD*, paragraph 34.

that regard, the Court identified from its previous case-law [23] two defining criteria linked to the *composition* and the *legal framework* of the organisation's activities.

67. As regards the first criterion, the Court considered that the members of the CNSD were the 'representatives of professional customs agents'. [24]

The Court pointed out that 'members of the CNSD can only be registered customs agents, since they are elected from among the members of the Departmental Councils on which only customs agents sit'. [25] It also remarked that, following a legislative amendment introduced in 1992, 'the Director-General of Customs no longer acts as chairman of the CNSD'. [26] Last, it appeared that 'the Italian Minister for Finance, who is responsible for the supervision of the professional organisation in question, cannot intervene in the appointment of the members of the Departmental Councils and the CNSD'. [27]

68. As regards the second criterion, the Court found that 'nothing in the national legislation concerned prevents [the members of] the CNSD from acting in the exclusive interest of the profession'. [28]

The Court noted that when the CNSD was setting the tariff for services on the basis of proposals from the Departmental Councils, there was 'no rule in the national legislation obliging, or even encouraging, the members of either the CNSD or the Departmental Councils to take into account public-interest criteria'. [29]

69. In consequence, the CNSD was regarded as an association of undertakings on the ground that:

'the members of the CNSD cannot be characterised as independent experts... and... they are not required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the general interest and the interests of undertakings in other sectors or users of the services in question'. [30]

70. It follows from that judgment that a body will not be classified as an association

23 — In particular, Case C-185/91 *Reiff* [1993] ECR I-5801; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883; and Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* [1995] ECR I-3257.

24 — *CNSD*, paragraph 41.

25 — Ibid., paragraph 42.

26 — Ibid., paragraph 42.

27 — Ibid., paragraph 42.

28 — Ibid., paragraph 41.

29 — Ibid., paragraph 43.

30 — Ibid., paragraph 44.

of undertakings within the meaning of Article 85(1) of the Treaty where, on the one hand, it is composed of a majority of representatives of the public authorities and, on the other, it is required by national legislation to observe various public-interest criteria when taking its decisions. [31]

71. Those two criteria must be applied to the Association.

72. As regards composition, the Advocatenwet provides that the Association and the district associations are to be governed by the General Council and the Supervisory Boards respectively. [32] The members of the Supervisory Boards are to be elected from among the members of the district association concerned. [33] The members of the General Council are elected by a committee of representatives, [34] who are themselves elected at meetings of the various district associations. [35] The wording of Article 24(1) of the Advocatenwet confirms that only lawyers may be elected as members of the General Council, the committee of representatives and the supervisory boards.

It follows that the governing bodies of the Association are composed exclusively of lawyers elected by members of the profession. In addition, the file submitted to the Court [36] shows that the Crown and the Minister for Justice may not intervene in the appointment of the members of the supervisory boards, committee of representatives or the General Council.

73. With regard to the second criterion, the observations presented by the parties during the written stage of the proceedings contained little information. At the hearing, I invited the representatives of the Association and of the Netherlands Government to explain their arguments in greater detail. I asked them whether, in Netherlands law, there existed provisions, binding in nature, which might require the Association to take into consideration public-interest criteria in the exercise of its regulatory powers.

On this point, the Netherlands Government noted that, pursuant to Article 30 of the Advocatenwet, the Crown has the power to annul regulations adopted by the Association where they are contrary to the public interest. The Association, for its part, observed that Articles 26 and 28 of the Advocatenwet require its governing bodies to exercise their powers 'in the interests of the proper practice of the profession'.

74. Those two parts of an answer do not in the end persuade me.

31 — See also *Pavlov*, paragraph 87.

32 — Articles 18(1) and 22(1) of the Advocatenwet.

33 — Article 22(2) of the Advocatenwet.

34 — Article 19(1) of the Advocatenwet.

35 — Article 20(1) of the Advocatenwet.

36 — See the order for reference (English translation, p. 5) and the written observations of the appellants in the main proceedings (paragraph 43).

First, the Crown's power of annulment, however real it may be, is completely a matter of chance. As the appellants in the main proceedings have stated, the fact that review of this kind exists does not mean that the Association is legally required to give positive expression to the public interest when exercising its regulatory powers. Second, the term 'the interests of the proper practice of the profession' is vague and does not, of itself, lay down any criteria. The information supplied by the national court [37] demonstrates, furthermore, that that term may be used as a basis by the Association in the defence of the common interests of lawyers registered in the Netherlands.

It must therefore be held that, when exercising its regulatory powers, the Association is not *bound*, pursuant to provisions of Netherlands law, to take into account 'the general interest and the interests of undertakings in other sectors or users of the services in question'. [38]

75. In accordance with the Court's case-law, the Association must therefore be classified as an association of undertakings within the meaning of Article 85(1) of the Treaty.

76. Most of the interveners have, however, disputed the possibility of reaching such a conclusion. They have put forward three sets of considerations, reflecting the concerns expressed by the national court in its questions. Their arguments are as follows.

First, the Association carries on no economic activity. It is a body governed by public law responsible for laying down rules of an ethical nature.

Second, the Association constitutes a 'subdivision' of the State and is thus possessed of public authority rights and powers. It has the power to adopt legal rules (regulatory power), the power to judge (disciplinary power) and, generally, the power to supervise the conduct of its members.

Third, the Association has a public-interest role linked to the administration of justice. That role is essential in a State governed by the rule of law. The Association, like the professional associations of lawyers in other Member States, is responsible for ensuring that individuals have access to the law and to justice, guaranteeing the integrity of lawyers, watching over the proper practice of the profession and maintaining public confidence in the profession.

The CCBE and the French Government take up an intermediate position. They argue that the Association's activities have

37 — Order for reference, English translation, pp. 5 and 9.
38 — *CNSD*, paragraph 44.

to be looked at separately, so that the rules on competition are applied to the Association only when it is acting *exclusively* in the interests of its members, which is not the case in the present circumstances, since the contested ban on partnership is intended to guarantee, in the public interest, lawyers' independence and loyalty to clients.

77. The first argument of those parties, based on the constitution of the Association, cannot be accepted.

Since judgment was given in *BNIC*, it has been settled case-law that 'the legal framework within which such agreements [between undertakings] are made and such decisions [of associations of undertakings] are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned'. [39]

Moreover, for an entity to be classified as an association of undertakings it is not necessary that it should itself carry on any economic activity. [40] Article 85(1) of the Treaty applies to associations in so far as their own activities *or* those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. [41]

78. With regard to the second argument, I have already stated that the Association's governing bodies are composed exclusively of representatives of private economic operators and that the public authorities have not reserved the right to intervene in their decision-making process. In those circumstances, the Association cannot be regarded as an organ of the State for the purposes of Community law.

Moreover, the fact that it possesses regulatory and disciplinary powers is immaterial. That conclusion follows from *CNSD* and *Pavlov*.

In *Pavlov* the Court classified as an association of undertakings a professional association of specialist doctors in the Netherlands when that body, like the Association, possessed regulatory powers conferred on it by statute. [42] Similarly, the CNSD was considered to be an association of undertakings when it possessed disciplinary powers pursuant to Italian legislation. That

39 — Case 123/83 *BNIC* [1985] ECR 391, paragraph 17. See also *CNSD*, paragraph 40, and *Pavlov*, paragraph 85.

40 — Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 87 and 88; and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 19 and 20.

41 — Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraph 30; *Van Landewyck*, paragraph 88, and *IAZ*, paragraph 20.

42 — *Pavlov*, paragraphs 84 and 87. The Court has relied on the same approach with regard to the definition of an undertaking. It considered that Article 86 of the Treaty applied to the regulatory activity of a public telecommunications undertaking (Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraphs 16 to 20).

body had the power to impose disciplinary sanctions on its members, ranging from a reprimand to removal from the national register of customs agents. [43]

79. The parties' third argument is also without foundation. It is based on the premiss that a body charged with tasks in the public interest *automatically* falls outside the scope of competition law on account of the special tasks entrusted to it.

80. That premiss is incorrect.

In competition law, the concept of an undertaking encompasses 'every entity engaged in an economic activity'. [44] According to that definition, an entity will not fall outside the scope of the rules on competition unless the activity in question has no economic nature. [45] On the other hand, once an entity carries on an activity which can, at least in principle, be carried on by a private operator in order to make a profit, [46] it must be regarded as an undertaking. In that case, it is of small importance that its tasks are in the public interest or the public service. [47] The restrictions imposed by the State do not lead to the entity's being placed outside the field of competition law, but may, where appropriate, justify the granting of special or exclusive rights within the meaning of Article 90 of the Treaty. [48]

The same finding is unavoidable as regards associations of undertakings. In *BNIC* the Court refused to consider that the fact that a professional organisation was entrusted with a public-service mission by the State could prevent the application of Article 85(1) of the Treaty. [49]

81. Finally, the last argument put forward by some of the interveners asks the Court to adopt a sort of functional interpretation of the concept of association of undertakings. Those interveners propose that the Court distinguish between the various activities carried on by the Association according to

43 — *CNSD*, paragraph 7, and the Opinion of Advocate General Cosmas in that case (point 71).

44 — *Höfner and Elser*, paragraph 21.

45 — That is so in the case of bodies entrusted with the management of certain compulsory social security schemes based on the principle of national solidarity (Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 18), and bodies the activities of which constitute a task in the public interest which forms part of the essential functions of the State and which is connected by its nature, its aims and the rules to which it is subject with the exercise of powers which are typically those of a public authority (Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30; and Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraphs 22 and 23).

46 — See Advocate General Tesauro's Opinion in *Poucet and Pistre*, point 8.

47 — See Mr Jacobs' Opinion in Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 312.

48 — See, *inter alia*, Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* [1995] ECR I-4013, paragraph 20; *Albany* (paragraph 86); and *Pavlov* (paragraph 118).

49 — See the Report for the Hearing in *BNIC*, paragraph 1.1, the judgment (paragraph 16), and Commission Decision 82/896/EEC of 15 December 1982 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/29.883 — UGAL/BNIC) (OJ 1982 L 379, p. 1), recitals 2 and 3 of the reasoning.

the *nature of the interest* pursued by the measure and consider that the entity constitutes an association of undertakings only where it is acting in the exclusive interest of its members.

82. I do not agree with that point of view.

83. On the one hand, at this stage of argument, the Court is called upon only to define the scope *ratione personæ* of the law on competition. It is simply a matter of identifying the persons to whom Articles 85 to 90 of the Treaty apply.

Now, at this stage of the analysis, the Court cannot adopt a restrictive approach. *CNSD* and *Pavlov* have clearly established the circumstances in which an entity may avoid Article 85 of the Treaty. Those are cases where, because of the composition and legal framework of its activities, the entity is to be regarded as an organ of the State. By contrast, if a body is composed, as it is in this case, exclusively of private economic operators, the competition authorities must necessarily be allowed to scrutinise all its actions in the light of the Treaty.

The reasons which must underpin a broad interpretation of the field of competition law have been clearly set forth by Advocate General Jacobs in his Opinion in *Albany*. According to Mr Jacobs: [50]

'It can be presumed that private economic actors normally act in their own and not in the public interest when they conclude agreements between themselves. Thus, the consequences of their agreements are not necessarily in the public interest. Competition authorities should therefore be able to scrutinise private actors' agreements even in special areas of the economy such as banking, insurance or even the social field.' [51]

84. On the other hand, the interveners' argument arises, to my mind, from the confusion of two different matters: one, defining the scope *ratione personæ* of competition law, and the other, identifying a restriction of competition or a possible justification for the measure.

50 — Paragraph 184. Those considerations concerning the scope *ratione materiæ* of the rules on competition may be transposed to their scope *ratione personæ*.

51 — See also A. Bach, note on *Reiff*; Case C-2/91 *Meng* [1993] ECR I-5751; and Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, in *Common Market Law Review*, 1994, p. 1357, footnote 14. The author states that, 'Instead of presuming corporate rule-making to be in the public interest, however, it seems much more justified to presume that this kind of rule follows the economic interests of those participating in the rule-making and creates restrictive conditions for newcomers and outsiders'.

It is clear that, when it exercises its regulatory powers, the Association, like the professional associations of lawyers in other Member States, may act in the public interest. That consideration is not, however, relevant in determining whether or not it is to be regarded as an association of undertakings. [52] The fact that the Association may adopt a measure in the public interest comes in at a later stage in the analysis, in ascertaining whether the measure is liable to restrict competition within the common market and, if so, whether it can be justified in the light of the derogating provisions of the Treaty.

85. In any event, I think that the criterion proposed by the interveners is unworkable with regard to the professions.

Most of the rules adopted by the association authorities in this field involve public and private interests *simultaneously*. Even where a professional association of lawyers sets a mandatory tariff for services performed by its members, it may be argued that the tariff is intended to ensure that fees are transparent and to guarantee individuals access to the law and to justice. Following the interpretation proposed by the interveners would amount to placing all the questions of law in the sphere solely of the scope *ratione personæ* of Community competition law. Such an interpretation cannot be accepted.

86. In consequence, I believe that Article 85(1) of the Treaty does not require the different activities carried on by the Association to be looked at separately. If, as in the present case, a professional association of lawyers is composed exclusively of representatives of the profession and is not required by law to take its decisions in compliance with various public-interest criteria, it must be considered to be an association of undertakings in respect of all its activities, irrespective of the subject-matter and purpose of the measure adopted. The fact that statute confers on the Association regulatory and disciplinary powers is without relevance to this assessment.

87. It follows that the Regulation constitutes a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty.

C — *Restriction of competition*

88. The second question seeks to ascertain whether, in forbidding lawyers to enter into

52 — See, in particular, *IAZ*. In that case, the Anseau had concluded, with various manufacturers and importers of washing-machines, an agreement to monitor the conformity of the machines with the requirements laid down by Belgian law with a view to preserving the quality of drinking water. The agreement was, however, implemented in such a way as to hinder parallel imports into Belgium. The Court ruled that 'the purpose of the agreement ... is appreciably to restrict competition within the common market, *notwithstanding the fact that it also pursues the objective of protecting public health*' (paragraph 25, emphasis added). The public-interest objective pursued by the agreement did not, therefore, prevent the Court from finding that the Anseau was an association of undertakings within the meaning of Article 85(1) of the Treaty (paragraphs 19 to 21).

multi-disciplinary partnership with accountants, the Regulation has as its 'object or effect the prevention, restriction or distortion of competition'.

89. In general, the Court passes through two successive stages in determining whether or not an agreement is compatible with Article 85(1) of the Treaty. [53]

90. First, the Court ascertains whether the agreement has as its *object* the restriction of competition. To that end, it undertakes an objective examination of the aims pursued by the agreement in the light of the economic context in which it is to be applied. [54] If an agreement has an anti-competitive object it is prohibited under Article 85(1) and there is no need to take account of its concrete effects. [55] The same considerations apply to decisions of associations of undertakings. [56]

The Court thus declares agreements or decisions of associations of undertakings the sole purpose of which is to restrict or distort competition between the parties or between the parties and third persons to be contrary to Article 85(1) of the Treaty.

Such is the case as regards horizontal agreements for fixing the sale price of goods [57] or services, [58] horizontal agreements intended to partition national markets, [59] vertical agreements including a clause prohibiting export [60] and, in general, any agreement the object of which is to bring about an artificial partitioning of the market. [61]

91. Where it is not the specific object of an agreement to restrict competition, the Court establishes whether its *effect* is the prevention, restriction or distortion of competition. [62] In that respect, Article 85(1) of the Treaty prohibits both actual anti-competitive effects and purely potential effects, provided that those are sufficiently appreciable. [63]

92. In either case, the criterion used to determine whether an agreement is liable to restrict competition consists of considering competition within the actual context in

53 — Case 56/65 *Société Technique Minière* [1966] ECR 235, p. 359.

54 — Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 26.

55 — Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342.

56 — Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39.

57 — Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 10; and *BNIC*, paragraph 22.

58 — *Verband der Sachversicherer* v *Commission*, paragraphs 39 to 43.

59 — Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 128.

60 — Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 7.

61 — *Consten and Grundig*, pp. 342 and 343.

62 — *Société Technique Minière*, pp. 249 to 250; and Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 13.

63 — Case T-35/92 *Deere* v *Commission* [1994] ECR II-957, paragraph 61.

which it would occur *in the absence* of the agreement. [64]

93. Furthermore, whether conduct is compatible with Article 85(1) must be assessed in the economic and legal context of the case, [65] taking into account the nature of the product [66] or service [67] and the structure and actual conditions in which the market functions. [68]

(a) The object of the Regulation

94. In the present case, the appellants in the main proceedings submit that the object of the Regulation is to restrict competition on the market for legal services in the Netherlands. They have put forward many facts, [69] seeking to demonstrate that the Association adopted the contested Regulation for the *sole* purpose of thwarting the endeavours of firms of accountants to penetrate the relevant market.

95. On that point, I would note that proceedings under Article 234 EC are based on a clear separation of functions between the national courts and the Court of Justice, and that any assessment of the facts in the case is a matter for the national court. [70] The Court of Justice is empowered only to give rulings on the interpretation or validity of a Community provision on the basis of the facts which the national court puts before it. [71]

In its order for reference the Raad van State found that: 'the aim of the Regulation is to safeguard the independence and duty of loyalty of lawyers providing legal assistance'. [72]

In those circumstances, it is not open to the Court to examine the facts submitted by the appellants. The argument that the Regulation has an anti-competitive object must therefore be rejected.

64 — *Société Technique Minière*, p. 250; Case 22/71 *Béguelin* [1971] ECR 949, paragraph 17; Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 19; Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 18; and Case 31/85 *ETA* [1985] ECR 3933, paragraph 11.

65 — *Société Technique Minière*, pp. 249 to 250, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 134.

66 — *Société Technique Minière*, p. 250.

67 — *Pavlov*, paragraph 91.

68 — Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10; and *Pavlov*, paragraph 91.

69 — Written observations of the appellants in the main proceedings (paragraphs 81 to 93).

70 — See, *inter alia*, Case 13/68 *Salgoil* [1968] ECR 453, p. 459; Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4; Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25; and Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 37.

71 — See, *inter alia*, *Oehlschläger*, paragraph 4; Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16; and Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 11.

72 — Order for reference (English translation, p. 12).

(b) The effects of the Regulation

96. On the other hand, the Raad van State asks the Court to consider whether the effects produced by the Regulation are restrictive of competition on the Netherlands market for legal services.

97. The Association, the CCBE and some of the Governments which have intervened consider that this question calls for a negative answer. In support of their position, they in essence rely on Decision 1999/267 adopted by the Commission in the IPR case.

In that case, the Commission was called upon to decide on the legality of the rules in the code of conduct of the Institute of Professional Representatives before the European Patent Office (the IPR). The Commission took the view that most of the rules considered fell outside the prohibition laid down by Article 85(1) of the Treaty on the ground that:

'They are necessary, in view of the specific context of this profession, in order to ensure impartiality, competence, integrity and responsibility on the part of representatives, to prevent conflicts of interest and misleading advertising, to protect professional secrecy or to guarantee the proper functioning of the [Office]'. [73]

According to the Commission, the provisions of the code of conduct laying down such rules 'are not liable to restrict competition if they are applied objectively and without discrimination'. [74]

98. The interveners submit that the Commission's reasoning, although it related to patent agents, applies to all professions. [75] Inasmuch as the purpose of the contested prohibition on partnership is to guarantee the independence and loyalty to clients of lawyers, it will therefore fall outside the scope *ratione materiæ* of Article 85(1) of the Treaty.

In its written observations, the Commission did not take up a position on that matter. In answer to a question raised by the Court, it replied briefly that the contested regulation was not liable appreciably to restrict competition in that it seeks to guarantee the independence of lawyers and to avoid conflicts of interests.

73 — 38th recital in the statement of reasons.

74 — Ibid.

75 — That would also seem to be the Commission's official position. See, to that effect, M.-J. Bicho, 'Professions libérales: aspects essentiels de l'action de la Commission en matière d'application des règles de concurrence' in *Competition Policy Newsletter*, No 2 June, p. 24, and the XXIXth Report on Competition Policy 1999, paragraph 138.

99. In essence, the arguments put forward by the parties invite the Court to adopt a form of 'rule of reason'. That 'rule of reason' would enable all professional rules which are intended to ensure observance of the ethical rules particular to the legal profession to evade the prohibition laid down by Article 85(1) of the Treaty.

100. Before I examine that idea, it should be observed that the Treaty provisions on competition are set out according to a precise structure. Article 85(1) lays down the principle that agreements restrictive of competition are prohibited. In their respective spheres of application, Articles 85(3) and 90(2) provide opportunities for derogating from that principle.

101. The rule of reason theory was developed in the American law on agreements. In the United States, section 1 of the Sherman Act prohibits all obstacles to competition without distinction as to degree or motive.[76] Unlike Article 85 of the Treaty, that legislation does not provide for any possibility that the authorities might exempt an agreement.

Faced with the rigidity of that provision, the United States courts swiftly found it necessary to interpret the Sherman Act in a more 'reasonable' way. In the first place, they developed the theory called 'ancillary restrictions': they held that restrictions of competition necessary to the performance of an agreement lawful in itself fell outside the prohibition laid down in section 1 of the Sherman Act.[77] Then, the Supreme Court of the United States of America changed its point of view and adopted what might be called the 'competition balance-sheet method'.[78] That method is defined as being:

'An analytical method intended to draw up, for every agreement in its own context, the balance-sheet of its anti- and pro-competitive effects. If it shows a positive balance, because the agreement stimulates competition more than it restricts it, section 1 of the Sherman Act will not apply.'[79]

102. In Community competition law, the 'rule of reason' may carry several meanings.[80] However, it is not in the circumstances of this case necessary to recall the learned disputes concerning the definition of that concept or the advisability of its introduction into Community law.[81]

76 — D. Fasquelle, *Droit américain et droit communautaire des ententes, Étude de la règle de raison*, Paris, éditions Joly, 1993, p. 25.

77 — R. Kovar, 'Le droit communautaire de la concurrence et la "règle de raison"', in *Revue trimestrielle de droit européen*, 1987, p. 237 (p. 238).

78 — D. Fasquelle, cited above, p. 31.

79 — R. Kovar, cited above, p. 238.

80 — See G. Wils, '"Rule of reason": une règle raisonnable en droit communautaire?' in *Cahiers de droit européen*, 1990, p. 19, and C. Bellamy and G. Child, *Common Market Law of Competition*, London, Sweet & Maxwell, 1993, 4th ed., point 2-062 et seq.

81 — See, in this regard, the references cited by *Commentaire J. Megret*, cited above, paragraph 172.

103. For the needs of this case I shall simply say that the Court has made limited application of the 'rule of reason' in some judgments. Confronted with certain classes of agreement, decision or concerted practice, it has drawn up a competition balance-sheet and, where the balance is positive, has held that the clauses necessary to perform the agreement fell outside the prohibition laid down by Article 85(1) of the Treaty. The Court has thus held that:

— selective distribution systems constitute an aspect of competition which accords with Article 85(1) of the Treaty, provided that resellers are chosen on the basis of objective criteria of a qualitative nature and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion; [82]

— the dissemination of a new agricultural product encourages competition and the grant of an 'open' exclusive licence for its cultivation and marketing in the territory of a Member State may be necessary if that competition-encouraging objective is to be achieved; [83]

— a contract for the transfer of an undertaking contributes to competition and clauses requiring non-competition between the parties to the agreement escape the prohibition laid down in Article 85(1) provided that they are necessary to the transfer of the undertaking and that their duration and scope are strictly limited to that purpose; [84]

— clauses essential to the performance of a franchise agreement do not constitute restrictions of competition within the meaning of Article 85(1) of the Treaty; [85]

— a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organised cooperation which are in direct competition with it, is not caught by the prohibition in Article 85(1), so long as that provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers. [86]

104. It follows from those judgments that, irrespective of any terminological dispute,

82 — Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraphs 20 to 22.

83 — Case 258/78 *Nungesser and Eisele* v *Commission* [1982] ECR 2015, paragraphs 54 to 58.

84 — *Remia and Others* v *Commission*, paragraphs 17 to 20.

85 — Case 161/84 *Pronuptia* [1986] ECR 353, paragraphs 14 to 27.

86 — Case C-250/92 *DLG* [1994] ECR I-5641, paragraphs 28 to 45.

the 'rule of reason' in Community competition law is strictly confined to a *purely competitive* balance-sheet of the effects of the agreement. [87] Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article 85(1) of the Treaty. The only 'legitimate goal' which may be pursued in accordance with that provision is therefore exclusively competitive in nature.

105. In this case, the argument put forward by the interveners and the Commission goes far beyond the scope of the competition balance-sheet allowed by the Court's case-law.

The parties do not maintain that the effect of the Regulation is to encourage competition on the market in legal services. [88] As the observations made in response to the first question indicate, the parties believe that the prohibition of multi-disciplinary partnerships between lawyers and accountants is necessary in order to protect aspects of the profession — independence and loyalty to the client — which are essential in a State governed by the rule of law. Their reasoning therefore amounts to introducing into the provisions of Article 85(1) considerations which are linked to the pursuit of a *public-interest* objective.

106. In that regard, I regret the fact that the Commission has not set out the legal reasoning supporting its position. As academic legal writing has shown, [89] it is possible that Decision 1999/267 in the IPR case is explained more by the concern to avoid notifying the professional rules adopted by the association authorities in the various Member States. We know that as Community law now stands the Commission alone has power to adopt decisions providing for exemption pursuant to Article 85(3) of the Treaty. [90]

However, if we attempt to analyse the Commission's reasoning, it would appear

87 — See, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 33 to 36.

88 — At the hearing, the Luxembourg Government nevertheless argued that the Regulation had positive effects on competition. It explained that, in forbidding lawyers to form partnerships with accountants, the Regulation made it possible to avoid practice being concentrated in the hands of a few large international firms and, thereby, to maintain a sufficient (if not very large) number of practitioners on the market. I fully share the concerns expressed by the Luxembourg Government. The risk of witnessing such acts of concentration is genuine, having regard to the size of certain law firms and certain firms of accountants. However, from a legal point of view, this question must be examined in the light of other provisions of Community law. Structural concentration operations fall within the ambit of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1). The conduct of integrated structures must be examined in the light of the provisions of Article 86 of the Treaty.

89 — H. Nyssens, cited above, paragraph 4.1.2.

90 — Article 9(1) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87). On 27 September 2000 the Commission presented to the Council a proposal for a regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty') COM(2000) 582 final (OJ 2000 C 365 E, p. 284). Article 1 of this proposal declares, *inter alia*, that Article 81(3) EC is to be directly applicable.

to fall into several successive stages. The point is to establish whether: (1) the professional rule in question involves a restriction of competition on the relevant market; (2) the professional rule pursues a legitimate objective, having regard to the characteristics of the profession (the preservation of the independence, loyalty to clients, powers, integrity or responsibility of lawyers, the protection of professional secrecy or the need to avoid conflicts of interest); (3) the professional rule is necessary if the objective it pursues is to be attained; and (4) the professional rule is applied objectively and without discrimination.

107. Having regard to those various components, I think that the interveners' argument misconstrues the *ratio legis* and the structure of the Treaty provisions.

In the first place, it amounts to introducing into the wording of Article 85(1) of the Treaty considerations which are linked to the pursuit of a public-interest objective. In the second, it sets all the questions of fact and of law in the context of that provision. It implies that the Court should consider, in the light of Article 85(1) of the Treaty exclusively, not only the question of determining whether a restriction of competition exists but also whether or not it might be justified. Such an interpretation is liable to negate a great part of the effectiveness of Articles 85(3) and 90(2) of the Treaty.

My evaluation of this point is confirmed by the judgment of the Court of First Instance in *Institute of Professional Representatives* v *Commission*. The Court held that: 'it cannot be accepted that rules which organise the exercise of a profession fall as a matter of principle outside the scope of Article 81(1) EC merely because they are classified as "rules of professional conduct" by the competent bodies'. [91]

108. In consequence, I propose that the Court should dismiss the argument put forward by the interveners.

109. Before I explain my position, it is important to point out that we cannot rely simply on reading the provisions of the Treaty in order to examine the rules adopted by professional associations.

110. In his Opinion in *Pavlov*, Mr Jacobs stated that: 'Owing to the heterogeneity of the professions and the specificities of the markets on which they operate, no general formula can be applied'. [92] I fully concur with that analysis.

91 — Paragraph 64.
92 — Section 89.

It seems to me to be *impossible* to identify a *single formula* which might cover all the professional rules relating to all the professions in the various Member States. Each professional rule must be examined on a case-by-case basis, depending on its subject-matter, context and purpose.

111. One of the challenges raised by the issue of the application of Community competition law to the professions is how to identify solutions which will reflect the structure and broad logic of the Treaty provisions. In this connection, I think it necessary to make a distributive application of the Community competition rules. From that viewpoint, it may be helpful to refer to a reading plan including the following *three guidelines*.

112. First, it is not inconceivable that, having regard to the characteristics of the market for legal services, certain professional rules may be likely to encourage competition within the meaning of the Court's case-law as it now stands.

As Mr Jacobs has observed, the markets for professional services are notable for 'asymmetric information'.[93] In so far as the consumer is rarely in a position to assess the quality of the services provided, certain rules might prove necessary in order to ensure that the market operates in normal competitive conditions. Thus, there are those who claim that rules restricting advertising make it possible to avoid introducing systematic enticement into the market and, in the long term, a falling-off in the general quality of the services.[94]

Following that line of thought, academic writers[95] have put forward the idea that the rules forbidding lawyers to fix their fees on the basis of the result obtained could have pro-competitive effects.

However that may be, professional rules which are in fact capable of encouraging or guaranteeing normal competition on the market for legal services might fall outside the prohibition laid down in Article 85(1) by virtue of the 'rule of reason'.

113. Second, I would point out that in Community competition law there are no

93 — Opinion in *Pavlov*, paragraph 86.

94 — See, however, *IPR*, paragraphs 72 to 79.

95 — H. Nyssens, cited above, paragraph 4.1.1.

infringements which are inherently incapable of qualifying for an exemption under Article 85(3) of the Treaty. [96]

According to the case-law, the wording of Article 85(3) makes it possible to take account of the particular nature of different branches of the economy, [97] social concerns [98] and, to a certain extent, considerations connected with the pursuit of the public interest. [99] Professional rules which, in the light of those criteria, produce economic effects which are positive, taken as a whole, should therefore be eligible for exemption under Article 85(3) of the Treaty.

114. Finally, Article 90(2) of the Treaty applies specifically to undertakings entrusted with the operation of services of *general economic interest*. It is therefore possible that professional rules aimed at the preservation, in the public interest, of certain essential features of the profession of lawyer may fall within the ambit of that provision. That is, in addition, the subject of the fifth question.

96 — Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 85.

97 — *Verband der Sachversicherer* v *Commission*, paragraph 15.

98 — *Metro* v *Commission*, paragraph 43; and *Remia and Others* v *Commission*, paragraph 42.

99 — Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649, paragraph 118. See also on that point *SCK and FNK* v *Commission*, paragraph 194.

115. Inasmuch as I propose that the interveners' argument be rejected, it remains to be considered whether the Regulation produces effects restricting competition on the Netherlands market for legal services.

116. In that regard, the arguments put forward by the appellants in the main proceedings are persuasive. In the *absence* of the contested prohibition on partnership, competition would be likely to develop in various ways.

117. First, by entering into multi-disciplinary partnerships with lawyers, accountants would be in a position to improve their services qualitatively and quantitatively.

In general, lawyers have a monopoly of pre-trial work and representation. In most cases, they alone are able to represent natural and legal persons before the judicial authorities of a State. As a result of their activity, lawyers therefore have solid experience in the field of litigation. In addition, they enjoy prestige which frequently prompts them to uphold their clients' interests before extra-judicial authorities (administrative bodies, supranational bodies, the press, etc.).

By being associated with members of the legal profession, accountants could benefit from their experience. Their opinions, consultations and the documents they draw up in various areas of the law could be more reliable, better informed and, as a result, offer significant gains. Furthermore, accountants would be able to extend the range of services they offer to their clients. As a result of their partnership with lawyers, the common structure could undertake the representation of their clients' interests before the judicial authorities in the event of litigation.

118. Conversely, lawyers in association with accountants could also improve the quality and diversity of their services.

Taking account of their activities, accountants have gained real experience in some legal spheres, such as tax law, the law of accountancy, financial law, legislation on aid to undertakings and the rules relating to the (re)structuring of undertakings. Lawyers could benefit from the experience acquired by accountants in those various fields and, thus, improve the quality of the legal services offered.

Furthermore, accountants operate on markets other than that of the provision of legal services. They also offer services in such areas as the certification of accounts, auditing, book-keeping and management consultancy. [100] Creating an associative structure with accountants would enable lawyers to offer a distinctly more varied range of services to their clients.

119. Second, integrating those various services into a single structure would bring additional advantages both for the professionals concerned and for consumers.

In the first place, lawyers and accountants should be able to achieve economies of scale since the common structure would comprise a greater number of service providers. Those economies of scale ought to be reflected in the cost of providing the services and, eventually, have positive effects for consumers in terms of price.

Next, clients would be able to turn to a single structure for a large part of the services required for the organisation, management and operation of their businesses. They would, as a result, obtain

100 — See Commission Decision 1999/152/EC of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1016 — Price Waterhouse/Coopers & Lybrand) (OJ 1999 L 50, p. 27), recital 20 et seq. in the preamble.

services which were better adapted to their needs since the structure would possess overall and in-depth knowledge of their policies (commercial policy, sales strategy, personnel management, etc.) and the difficulties they encounter. In addition, clients ought to be able to save both time and money. They would not themselves need to coordinate the services offered by the two professional categories (lawyers and accountants), and could simply communicate to just one person all the information necessary for handling their business.

120. In this connection, a study carried out at national level [101] indicates that undertakings are not unanimous in demanding the establishment of such multi-disciplinary structures. In those States in which they are authorised, it seems that each undertaking individually chooses the type of organisation which it finds most suited to its needs (single structure or multiple providers). None the less, the conclusion to be drawn from that study is that there is a genuine demand for that kind of structure, including lawyers and members of the professional category of accountants.

121. In those circumstances, I consider that the effect of the contested regulation is to restrict competition within the common market. It hinders the appearance on the market of associative structures capable of offering 'integrated' services for which there exists potential demand on the part of consumers. The effect of the contested Regulation is therefore to 'limit or control production, markets, technical development or investment' within the meaning of Article 85(1)(b) of the Treaty. [102]

(c) Whether the restriction of competition is appreciable

122. It is clear from established case-law that Article 85(1) of the Treaty prohibits only those restrictions of competition that are appreciable. [103]

123. In this case, several factors make it possible to state that the Regulation appreciably restricts competition on the Netherlands market for legal services.

124. First, the contested Regulation applies to all lawyers registered in the Netherlands.

101 — H. Nallet, *Les réseaux pluridisciplinaires et les professions du droit*, La Documentation française, Paris, 1999, p. 77 et seq.

102 — See, to that effect, in a very different context, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraphs 48 to 58.

103 — See, *inter alia*, Case 5/69 *Völk* [1969] ECR 295, paragraph 7; and *Pavlov*, paragraphs 94 to 97.

In accordance with Article 29 of the Advocatenwet, the Regulation also applies to 'visiting lawyers', that is to say, to persons authorised to practise their professional activity in another Member State under the title of lawyer or an equivalent title. Plainly, competition is less affected where the Association's bodies adopt an individual decision concerning just one member of the profession.

125. Second, the parties concerned by the contested Regulation occupy a major position on the Netherlands market for legal services.

According to information supplied by the parties to the main proceedings, the market share held by the legal profession on the market for legal services in the Netherlands amounts to between 35 and 50%. The market shares held by firms of accountants have not been communicated to the Court. Nevertheless, certain official documents indicate that Arthur Andersen Worldwide and Price Waterhouse achieve 17 to 20% of turnover from the one area of tax advisory services. [104] The turnover of each firm worldwide is between EUR 8 billion and EUR 10 billion. [105]

104 — Decision 1999/152, recital 70 in the statement of reasons.

105 — H. Nallet, cited above, p. 21.

126. Lastly, the restriction imposed by the Regulation affects an essential element of competition, since it has a direct effect on the services which operators are authorised to offer on the market. [106] According to the Court's case-law, the competition on services between operators constitutes an important factor in the context of Article 85(1) of the Treaty. [107]

127. It follows from the above that the Regulation has the effect of restricting competition to an appreciable degree.

D — *Whether trade between Member States is affected*

128. It has been consistently held that 'in order that an agreement, decision or concerted practice may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that the realisation of a single market between Member States might be impeded'. [108]

106 — See, in that regard, *Pavlov*, paragraphs 94 to 97.

107 — *Metro* v *Commission*, paragraphs 20 to 22.

108 — Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 20. See also, *inter alia*, *Société Technique Minière*, p. 235, *Consten and Grundig* v *Commission*, p. 495; *L'Oréal*, paragraph 18; and *DLG*, paragraph 54.

Article 85(1) of the Treaty does not require proof that agreements or decisions of associations of undertakings referred to by that provision have in fact affected intra-Community trade, but requires that they should be capable of having such an effect. [109] In some judgments, the Court has even confined itself to requiring that the agreement should concern, 'even if only partly, a product imported from another Member State'. [110]

129. The condition relating to an effect on intra-Community trade is also satisfied in the circumstances of this case.

130. First, it is not disputed that the contested Regulation covers the whole of the territory of the Netherlands. The Court has repeatedly held that 'an agreement extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'. [111]

131. Second, I would point out that Mr Wouters and Mr Savelbergh wish to enter into multi-disciplinary partnership with firms which, because of their connections with others, are international in nature.

The purpose of this partnership is, in particular, to offer 'integrated' services to clients established in other Member States. Moreover, the national court has found [112] that lawyers and tax advisers established in other Member States and belonging to Arthur Andersen or to Price Waterhouse could also have the intention of offering, in partnership with Mr Wouters and Mr Savelbergh, 'integrated' services in or from the territory of the Netherlands. Finally, as the appellants in the main proceedings have pointed out, firms of lawyers and of accountants often effect cross-border transactions involving simultaneously the legal systems of several Member States.

132. In consequence, the contested regulation is capable of affecting patterns of intra-Community trade in 'integrated' services.

109 — *Miller* v *Commission*, paragraph 15; and *Ferriere Nord* v *Commission*, paragraph 19.

110 — Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 49.

111 — *CNSD*, paragraph 48. See also Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; Case 126/80 *Salonia* [1981] ECR 1563, paragraph 14; *Remia and Others* v *Commission*, paragraph 22; Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 229; and *SCK and FNK* v *Commission*, paragraph 179.

112 — Order for reference, English translation, pp. 19 and 21.

E — *Conclusion*

133. It follows from all those considerations that the conditions for the application of Article 85(1) of the Treaty have been satisfied in this case.

134. At this stage in my reasoning, I must conclude that it is contrary to Article 85(1) of the Treaty for a professional association of lawyers, such as the Association, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnerships with members of the professional category of accountants.

VI — Article 86 of the Treaty

135. The third and fourth questions concern the interpretation of Article 86 of the Treaty. The first paragraph of that provision provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

136. The Raad van State asks whether the term 'undertaking' used in Article 86 of the Treaty applies to a professional association of lawyers, such as the Association, 'even though it pursues no economic activity itself'.[113] If so, the national court wishes to know whether the Association abuses its dominant position within the common market or in a substantial part of it by adopting binding measures prohibiting lawyers in practice in the Netherlands from entering into multi-disciplinary partnership with accountants.[114]

137. It is clear from the case-law that the term 'undertaking' used in Article 86 has the same meaning as that given to it in the context of Article 85 of the Treaty.[115] According to the definition given in *Höfner and Elser*,[116] the 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'.

113 — Question 3.

114 — Question 4.

115 — Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 358.

116 — Paragraph 21.

The Court has also held that any activity consisting in offering goods or services on a given market is an 'economic activity'. [117] As a general rule, an activity is economic in nature if it is capable of being carried on, at least in principle, by a private undertaking with a view to profit. [118]

138. The fact that an entity constitutes an 'association of undertakings' within the meaning of Article 85(1) of the Treaty does not necessarily imply that it is also an 'undertaking' for the purposes of Community competition law. We have seen that it is not necessary for a body to carry on any economic activity in order to be classified as an association of undertakings. [119] On the other hand, if the association of undertakings itself carries on an economic activity, it must also be regarded as an 'undertaking' within the meaning of Articles 85 and 86 of the Treaty. [120]

139. In this instance, the appellants in the main proceedings maintain that, contrary to what is said in the third question, the Association itself does carry on an economic activity. [121] That in essence consists of activities carried on through an association called 'BaliePlus'.

140. That argument is irrelevant.

141. It is not disputed that the notion of 'undertaking' in competition law is relative. [122] It has to be established *in concreto* in every case with regard to the specific activity under scrutiny. So, where an entity simultaneously carries on activities of different kinds, the Court will 'dissociate' [123] those activities: it considers only whether, *in respect of the activity under scrutiny*, the entity is to be classified as an undertaking. [124]

142. It follows that the only question that arises in the present case is that of establishing the nature (economic or otherwise) of the activity carried on by the Association when it adopts binding measures governing the right of lawyers in practice in the Netherlands to enter into multi-disciplinary partnership with accountants.

117 — See, *inter alia*, Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; *CNSD*, paragraph 36; and *Pavlov*, paragraph 75.

118 — See the Opinions of Mr Tesauro in *Poucet and Pistre*, point 8, and in *SAT Fluggesellschaft*, point 9.

119 — *Van Landewyck*, paragraphs 87 and 88, and *IAZ*, paragraphs 19 and 20.

120 — Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 50.

121 — Written observations of the appellants in the main proceedings (paragraph 121).

122 — See Mr Jacobs' Opinion in *Albany*, paragraph 207.

123 — According to the term used by L. Idot, 'Nouvelle invasion ou confirmation du domaine du droit de la concurrence? À propos de quelques développements récents ...', in *Europe*, January 1996, p. 1 (paragraph 24).

124 — See, *inter alia*, *Commission* v *Italy*, paragraph 7, and *Diego Cali & Figli*, paragraphs 16 to 18.

143. As the Raad van State noted in its third question, such activity is not economic in nature. The Association exercises its regulatory power with a view to organising the legal profession in the Netherlands. It does not offer any service for reward on the market. It is, moreover, difficult to imagine that a private operator could, on its own initiative, undertake such regulatory activity for profit.

144. In consequence, the notion of undertaking within the meaning of Article 86 of the Treaty does not apply to a professional body of lawyers, such as the Association, when it adopts binding measures regulating whether it is possible for lawyers in practice in the Netherlands to enter into multidisciplinary partnership with accountants.

145. The appellants in the main proceedings have, however, put forward another possibility. They consider that the Court might find that there existed a *collective dominant position* with respect to lawyers registered in the Netherlands. [125]

146. The Raad van State has not put before the Court any request for interpretation relating to the existence of a collective dominant position with respect to Netherlands lawyers. The subject of the third question is confined to the issue of whether the Association is to be regarded as an undertaking within the meaning of Article 86 of the Treaty. However, inasmuch as the question of a collective dominant position is likely to be of some interest for the remainder of the main proceedings, I shall briefly consider the arguments put forward by the appellants.

147. The concept of a 'collective dominant position' may be described as follows. [126]

It refers to a situation in which two or more undertakings are connected to one another by connecting links or factors such that, from an economic point of view, they present themselves as a collective entity with the power to act, to a considerable extent, independently of their competitors, of their customers and also of consumers. In accordance with that description, a collective dominant position requires the undertakings to be sufficiently linked to each other to adopt the same conduct on the market. [127]

125 — Written observations of the appellants in the main proceedings, paragraphs 121 to 124.

126 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 221 and Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 36, 41 and 42.

127 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 42; *Centro Servizi Spediporto*, paragraph 33; *DIP and Others*, paragraph 26; and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 46.

148. The precise meaning of the concept of the 'links' which must connect undertakings is uncertain. [128] As case-law now stands, it is possible to consider that those links can be structural, [129] legal [130] or economic. [131] In addition, certain judgments [132] give grounds for thinking that the notion of 'economic links' covers mere economic interdependence between the members of an oligopoly. [133]

With regard to links of a legal kind, the Court has noted that an agreement, decision or concerted practice within the meaning of Article 85(1) of the Treaty could lead to the creation of a collective dominant position. Admittedly, the mere fact that several undertakings are linked by an agreement, a decision of an association of undertakings or a concerted practice cannot of itself constitute a sufficient basis for such a finding. [134] None the less, the Court has held that an agreement, decision or concerted practice may 'undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity *vis-à-vis* their competitors, their trading partners and consumers'. [135]

149. Lastly, on several occasions [136] the Court seems to have indicated that one of the features of a collective dominant position is the absence of competitive relations between the various economic operators concerned. [137]

150. Traditionally, a collective dominant position is a situation in which economic operators occupy an oligopolistic position on the market. However, in the light of the principles identified in the case-law, the possibility of applying that concept to the professions cannot be ruled out. [138]

151. It is conceivable that members of a profession are in some way connected by 'structural' or 'legal' links within the meaning of the case-law. Because of their

128 — V. Korah, 'Compagnie Maritime Belge, Collective Dominant Position and Exclusionary Pricing', in *Mélanges en hommage à Michel Waelbroek*, Bruylant, Brussels, 1999, p. 1101, at p. 1110.

129 — Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraphs 50 to 52. That judgment is at present the subject of an appeal in Case C-497/99 P *Irish Sugar* v *Commission*.

130 — *Compagnie Maritime Belge Transports and Others* v *Commission* [appeal], paragraphs 43 to 48.

131 — Ibid., paragraphs 42 and 45.

132 — Ibid., paragraph 45; and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 273 to 276.

133 — See, to that effect, P. Muñiz Fernández, 'Increasing powers and increasing uncertainty: collective dominance and pricing abuses', in *ELRev.*, 2000, p. 645, at pp. 648 and 649.

134 — *Compagnie Maritime Belge Transports and Others* v *Commission*, paragraph 43.

135 — Ibid., paragraph 44.

136 — *Centro Servizi Spediporto*, paragraph 34; and *DIP and Others*, paragraph 27.

137 — See, to that effect, the footnote on p. 81 of Mr Fennelly's Opinion in *Sodemare and Others*.

138 — See, in this connection, *Politique de la concurrence et professions libérales*, OECD, Paris, 1985, paragraph 69.

compulsory membership of the competent association, professionals are part of a collective entity the object of which is to define and apply common conditions for the practice of the profession. [139] Moreover, the rules imposed on the members of the profession may limit, sometimes significantly, the competition which operates between them by means of prices, services and advertising. It is therefore possible that the rules governing the profession may on examination prove to be decisions of associations of undertakings which, when implemented, 'result in the undertakings concerned being so linked as to their conduct on [the] market that they present themselves on that market as a collective entity *vis-à-vis* their competitors, their trading partners and consumers'. [140]

152. In such a situation, it could be necessary to consider whether the conduct of the members of the profession constitutes an 'abuse' of a collective dominant position within the meaning of Article 86 of the Treaty or whether, on the contrary, their conduct is such as to strengthen competition on the market. [141] Then, it might prove useful to establish whether the conduct of the profession may be justified objectively. [142] Lastly, it may be asked whether, in accordance with the provisions of Article 90(2) of the Treaty, the restriction of competition caused by the abusive conduct is necessary in order to ensure the performance of the public-service task which may be entrusted to the members of the profession.

153. In this case it is, however, impossible to take up a position on those various questions. The consideration requested by the appellants in the main proceedings cannot be carried out because the file does not contain the matters of law and fact necessary to that end.

154. In consequence, I suggest that the Court should answer the third question to the effect that the concept of undertaking as it appears in Article 86 of the Treaty does not apply to a professional association of lawyers such as the Association where it adopts, pursuant to regulatory powers conferred by statute, binding measures forbidding lawyers to enter into multidisciplinary partnership with members of the professional category of accountants. In those circumstances, the fourth question, relating to possibly abusive conduct on the part of the Association, becomes nugatory.

139 — See, in this connection, Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, paragraph 65.

140 — *Compagnie Maritime Belge Transports and Others* v *Commission* [appeal], paragraph 44.

141 — *DLG*, paragraphs 49 to 52; and point 112 of this Opinion.

142 — Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 37; and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 102 to 119. See also Commission Decision 2000/12/EC of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 — 1998 Football World Cup) (OJ 2000 L 5, p. 55; paragraphs 105 to 114 in the statement of reasons).

VII — Article 90(2) of the Treaty

155. The fifth question concerns the interpretation of Article 90(2) of the Treaty. That provision is worded as follows:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

156. The Raad van State asks whether the Association is liable to fall within the ambit of Article 90(2). More specifically, the national court wishes to know whether the Association may be regarded as an entity entrusted with the operation of a 'service of general economic interest' in so far as it has adopted the contested Regulation for the specific purpose of preserving the independence and loyalty to clients of lawyers.

157. Article 90(2) of the Treaty lays down six conditions for its application. It provides that: *undertakings* (first condition) *entrusted* (second condition) with the operation of a *service of general economic interest* (third condition) are to be subject to the rules contained in the Treaty *in so far* (fifth condition) as the application of those rules does not *obstruct* (fourth condition) the performance of the particular tasks assigned to them, subject to the reservation that the *development of trade* (sixth condition) must not be affected to such an extent as would be contrary to the interests of the Community.

158. We should bear in mind the principles identified in the case-law relating to each of those conditions. I shall then examine the factual circumstances of the dispute in the main proceedings in the light of those principles.

A — *The conditions for the application of Article 90(2) of the Treaty*

159. The first condition laid down by Article 90(2) does not pose any problems.

The concept of an undertaking referred to in that provision bears the same meaning as

that given to it in the context of Articles 85 and 86 of the Treaty. [143] *Höfner and Elser* gives a uniform definition of the concept of undertaking in Community competition law. Article 90(2) applies thus to all undertakings, whether public or private. [144]

160. The second condition assumes that the undertaking has been 'entrusted' with the operation of a service of general economic interest by an *act of the public authority*. [145]

In principle, the mere fact of performing regulated activity under State supervision is not sufficient to bring an entity within the scope of Article 90(2), even if that State scrutiny is sharper with respect to the entity concerned. [146] However, as its case-law has developed, the Court has greatly mitigated its requirements relating to the existence of a formal act of the public authorities.

Originally, it held that Article 90(2) did not necessarily require a legislative measure or regulation adopted by the State. [147] The act of the public authorities may thus consist of no more than the grant of a concession governed by public law [148] or of 'concessions [which] have been granted in order to give effect to the obligations imposed on undertakings which, by statute, have been entrusted with the operation of a service of general economic interest'. [149] Then, in *Albany*, [150] the Court by implication held that the mere fact, for employers and workers, of creating a sectoral pension fund and of requesting the public authorities to make affiliation to that fund compulsory was enough to support the conclusion that the fund constituted an undertaking *entrusted* with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty. [151]

161. As regards the third condition, the Court's case-law does not define what is meant by 'services of general economic interest'.

There can be no doubt that the undertaking's activities must be of 'general economic interest exhibiting special character-

143 — See, to that effect, *Pavlov*, paragraph 77.

144 — Case 127/73 *BRT II* [1974] ECR 313, paragraph 20.

145 — *BRT II*, paragraph 20; and Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 55.

146 — Case 172/80 *Züchner* [1981] ECR 2021, paragraph 7; and Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraphs 29 to 32.

147 — Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 66.

148 — *Almelo*, paragraph 47.

149 — C-159/94 *Commission* v *France*, paragraph 66.

150 — Paragraphs 98 to 111.

151 — In this connection, see the observations of L. Gyselen, note on *Albany*; Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025; and C-219/97 *Drijvende Bokken* [1999] ECR I-6121, in *Common Market Law Review*, 2000, p. 425, at p. 445.

istics as compared with that of other economic activities'. [152] That being so, the Court describes the services covered by Article 90(2) of the Treaty in terms which are virtually interchangeable: service of general interest, [153] universal service [154] or, quite simply, public service. [155]

162. In point of fact, it falls to the Member States to define the content of their services of general economic interest. In this respect they enjoy considerable leeway since the Court will intervene only in order to penalise any abuse, where the Member States damage the Community's interests. [156] Article 90(2) of the Treaty seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic, fiscal or social policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market. [157]

163. The Court has thus considered that the following fall within the ambit of Article 90(2) of the Treaty: television undertakings entrusted with a public-service task, [158] air carriers obliged to operate routes which are not commercially viable, [159] an undertaking entrusted with the distribution of electricity, [160] a fund entrusted with managing a supplementary pension scheme which fulfilled an essential social function in a State's pensions system, [161] making a public telephone network available to users, [162] the distribution of post throughout the national territory, [163] the management of certain waste with a view to dealing with an environmental problem, [164] and a universal mooring service provided for reasons of public safety. [165]

On the other hand, the Court has refused to recognise certain dock work without any special characteristics [166] and certain services dissociable from the universal postal service [167] as being 'services of general economic interest.'

164. By virtue of the fourth condition set by Article 90(2), undertakings entrusted

152 — Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 53; and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 45.

153 — Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 19.

154 — *Corsica Ferries France*, paragraph 45.

155 — Ibid., paragraph 60.

156 — F. Blum, 'De Sacchi à Franzén en passant par la Crespelle: la jurisprudence récente de l'article 90', in *Gazette du Palais*, 1999, No 20, p. 12, at p. 21.

157 — Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12; and *Albany*, paragraph 103.

158 — Case 155/73 *Sacchi* [1974] ECR 409, paragraphs 13 to 15.

159 — *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, paragraph 55.

160 — *Almelo*, paragraph 48; and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 41.

161 — *Albany*, paragraph 105.

162 — Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 16.

163 — *Corbeau*, paragraph 15.

164 — Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 75.

165 — *Corsica Ferries France*, paragraphs 45 and 60.

166 — *Merci Convenzionali Porto di Genova*, paragraph 27; and *GT-Link*, paragraphs 52 and 53.

167 — *Corbeau*, paragraph 19.

with the operation of services of general economic interest may avoid the application of the competition rules if such application 'obstructs' the performance of the particular tasks assigned to them.

In order to enable the undertaking to deal with the various constraints imposed on it, State authorities generally decide to grant it special or exclusive rights. Accordingly, Article 90(2) of the Treaty may make it possible to justify restrictions of competition, even the exclusion of all competition, arising as the result of the grant or exercise of such rights.

In that regard, the Court considers that it is not necessary, for the conditions for application of Article 90(2) to be fulfilled, that the survival, economic viability or financial balance of the undertaking should be threatened by the application of the competition rules. [168] It is enough that, in the absence of special or exclusive rights conferred by the State, performance of the particular tasks assigned to the undertaking is obstructed or that maintenance of those rights is necessary in order to enable their holder to perform its task in economically acceptable conditions. [169]

165. The fifth condition in Article 90(2) of the Treaty contains a proportionality test.

The provision states that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty 'in so far' as application of such rules does not obstruct the performance of their tasks.

It follows that restrictions on competition from other economic operators are allowed only 'in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it.' [170] The proportionality test thus leads to establishing whether the undertaking's particular task might not be accomplished by measures less restrictive of competition. [171] In other words, it requires the solution

168 — Case C-159/94 *Commission* v *France*, paragraphs 59 and 95, and *Pavlov*, paragraph 107.

169 — *Pavlov*, paragraph 107. The Court has thus considerably relaxed its requirements relating to the fourth condition imposed by Article 90(2) of the Treaty. It had originally required proof that the application of the competition rules was *incompatible* with the performance of the undertaking's particular tasks (see *Sacchi*, paragraph 15; Case 311/84 *CBEM* [1985] ECR 3261, paragraph 17; *Höfner and Elser*, paragraph 24; and Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 33).

170 — *Almelo*, paragraph 49. See also *Corbeau*, paragraph 14.

171 — *Sydhavnens Sten & Grus*, paragraph 80.

which is 'the least detrimental' [172] to competition to be chosen, having regard to the obligations and constraints borne by the undertaking.

166. Finally, the last condition demands that 'development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

To my knowledge, the Court has never yet ruled on the content and scope of that requirement. In its judgments in *Commission* v *Netherlands*, *Commission* v *Italy* and *Commission* v *France*, [173] it stated that 'it was incumbent on the Commission ... to define, subject to review by the Court, the Community interest in relation to which the development of trade must be assessed'. It is, however, difficult to draw any conclusions from those judgments since they were given in the particular context of infringement proceedings. The obligation incumbent on the applicant institution is explained, therefore, by the rules governing the burden of proof in such cases.

Certain Advocates General have, however, taken up a position on this issue. [174] In their view, effect on the development of intra-Community trade within the meaning of Article 90(2), unlike the classic definition of the concept of measures having an effect equivalent to a quantitative restriction, calls for proof that the measure in issue has in fact had a substantial effect on intra-Community trade. That assessment seems to me to be borne out in practice by the wording of Article 90(2) of the Treaty.

B — *The factual circumstances of the dispute in the main proceedings*

167. In this case, several of the interveners maintain that the Association falls within the scope of Article 90(2) of the Treaty.

They submit that the Association is entrusted with public-interest tasks since it has to further the proper practice of the legal profession and to draw up rules intended to ensure that individuals have access to the law and to the courts of the Netherlands. According to those interveners, if the Court were to consider that the Association constitutes an association of undertakings for the purposes of

172 — In the words of R. Kovar, 'La Cour de justice et les entreprises chargées de la gestion d'un service d'intérêt économique général. Un pas dans le bon sens vers une dérégulation réglée (2e partie)', in *Europe*, 1994, p. 2.

173 — Case C-157/94 *Commission* v *Netherlands*, paragraph 69; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 65; and *Commission* v *France*, paragraph 113.

174 — See Advocate General Rozès' Opinion in Case 78/82 *Commission* v *Italy* [1983] ECR 1955, point VI-C; and Advocate General Cosmas' Opinion in the abovementioned Joined Cases C-157/94, C-158/94, C-159/94 and C-160/94, point 126.

Article 85(1), it should also apply to it the derogating provisions contained in Article 90(2) of the Treaty.

168. I do not concur with that assessment.

169. When examining the third question, I concluded that the concept of undertaking in Article 86 of the Treaty did not apply to the Association where the latter adopts binding measures governing whether it is possible for lawyers in practice in the Netherlands to enter into multi-disciplinary partnerships with accountants.

Now, as we have seen, the concept of an undertaking contained in Article 90(2) has the same meaning as that assigned to it in the context of Article 86 of the Treaty. That concept has been given a uniform definition for all the Treaty provisions concerning competition. The Association cannot therefore be regarded as an undertaking for the purposes of Article 90(2) of the Treaty.

170. I do, however, believe that Article 90(2) may apply to the *lawyers* who practise in the Netherlands. The conditions for the application of that provision seem to me to be satisfied so far as that particular category of economic operators is concerned.

171. *In the first place*, where Netherlands lawyers act as independent operators they constitute undertakings for the purposes of Community competition law. [175] They offer services on the market for legal services. They demand and receive from their clients remuneration in exchange for the services performed. In addition, they bear the financial risks involved in the performance of their activity.

172. *In the second place*, I believe that lawyers may be regarded as undertakings 'entrusted' with the operation of 'services of general economic interest' within the meaning of Article 90(2) of the Treaty.

173. It is established that the European Union and its Member States are based on the principle of the rule of law. [176] The Community and national legal systems confer upon individuals rights which become part of their legal heritage. [177] In order to guarantee the principle of a State governed by the rule of law, the Member States have set up various institutions of a

175 — See point 51 above.

176 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23; and the preamble to the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1).

177 — With regard to the Community legal order, see Case 26/62 *Van Gend & Loos* [1963] ECR 1, at p. 12.

judicial nature. They have also laid down the principle that individuals must in any circumstances be able to turn to those authorities for recognition or enforcement of their rights.

174. Nevertheless, on account of the complexity of legislation and of the organisation of judicial power, individuals are rarely in a position to defend by themselves the rights they enjoy. Lawyers lend them the assistance which is essential for that purpose.

In connection with their activities as legal advisers, lawyers help their clients organise their various activities in compliance with the law. They also undertake the defence of their clients' rights against other individuals and the public authorities. They may also provide information as to whether it is advisable or necessary to bring proceedings before the courts. In connection with their assistance and representation activities, lawyers must ensure that individuals are adequately and efficiently defended. By virtue of their qualifications, they must be acquainted with the rules that enable them to present their client's point of view to advantage before the courts. To that effect, lawyers occupy 'a central position in the administration of justice as intermediaries between the public and the courts.' [178] Furthermore, the Court describes lawyers as assisting [179] and collaborating [180] in justice.

175. It follows that lawyers perform activities which are essential in a State governed by the rule of law. They make it possible for individuals to have a better knowledge and understanding of the rights granted to them and to enforce those rights more efficiently. In other words, in a State governed by the rule of law, lawyers ensure the *effectiveness* of the principle of access to the law and to the courts.

Furthermore, the importance of the role played by lawyers has prompted the European Union and its Member States to include among fundamental rights that of being advised, represented and defended by a legal adviser. [181] Similarly, most democratic societies have found it essential to set up legal aid systems enabling anyone, regardless of income or of the gravity of the charges laid, to receive the assistance of a lawyer.

176. Taking all those aspects into account, lawyers carry out activities which are 'of general economic interest exhibiting special

178 — Eur. Court HR, Schöpfer v Switzerland judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1042, paragraph 29.

179 — Case 33/74 *Binsbergen* [1974] ECR 1299, paragraph 14.

180 — Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 24.

181 — Charter of Fundamental Rights of the European Union, Article 47.

characteristics as compared with the general economic interest of other economic activities'. [182]

177. In addition, various provisions of Netherlands law give grounds for stating that lawyers registered in the Netherlands are in fact 'entrusted' with particular tasks by act of the public authorities.

Article 11(1) of the Advocatenwet gives lawyers registered in the Netherlands the right of audience before all courts in the Kingdom, in both civil and criminal matters. Furthermore, Article 46 of the Advocatenwet provides that lawyers are answerable to disciplinary bodies for 'any act or omission incompatible with the duty of care which they owe as lawyers to the persons whom they defend or whose interests they must defend'. That last provision assumes that lawyers bear special responsibility when performing the duties involved in defending the interests of members of the public.

In so far as the Court has greatly mitigated its requirements relating to the existence of a formal act on the part of the public authorities, provisions of such a kind ought to suffice for a finding that lawyers practising in the Netherlands are 'entrusted' with their particular tasks by the Netherlands authorities. [183]

178. In consequence, I consider that lawyers registered in the Netherlands constitute undertakings entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty.

179. *In the third place*, application of the Community competition rules may be liable to 'obstruct' the performance of the particular tasks assigned to lawyers.

180. In order to enable lawyers to carry out their 'public service' tasks, as I have defined them, the State authorities have given them certain professional powers and duties. These include three attributes which in all the Member States form part of the very essence of the legal profession. They are the duties relating to the independence of lawyers, respect of professional secrecy and the need to avoid conflicts of interest.

182 — *Merci Convenzionali Porto di Genova*, paragraph 27; *GT-Link*, paragraph 53; and *Corsica Ferries France*, paragraph 45.

183 — See also the *Commentaire J. Megret*, paragraph 290: 'No reason can be seen for excluding from Article 90(2) bodies the constitution of which is plainly inspired by a public-interest objective on the sole ground that that is not the result of a formal act. If the undertaking actually performs a public-interest activity and if it is subject in that activity to the scrutiny of the public authorities, there are no grounds for refusing it the right to rely on Article 90(2)'.

181. Independence requires lawyers to carry out their advisory duties and those of assistance and representation in the client's *exclusive* interest. Independence must be demonstrated *vis-à-vis* the public authorities, other operators and third parties, by whom they may never be influenced. Independence must also be demonstrated *vis-à-vis* the client who may not become his lawyer's employer. Independence is an essential guarantee for the individual and for the judiciary, with the result that lawyers are obliged not to get involved in business or joint activities which threaten to compromise it.

182. Professional secrecy forms the basis of the relationship of trust between lawyer and client. It requires the lawyer not to divulge any information imparted by the client, and extends *ratione temporis* to the period after the lawyer has ceased to act for the client and *ratione personæ* to third parties. Professional secrecy also constitutes an 'essential guarantee of the freedom of the individual and of the proper working of justice', [184] so that in most Member States it is a matter of public policy.

183. Lastly, lawyers owe a duty of loyalty to their clients which requires them to avoid conflicts of interest. That duty means that a lawyer may not advise, assist or represent parties whose interests are, or in the past were, opposed. In addition, lawyers may not use to the benefit of one client information concerning, or obtained from, another client.

184. In the light of those features, the prohibition on partnership laid down in the contested Regulation may be necessary if lawyers are to be able to perform the particular tasks assigned to them.

185. In the first place, the existence of multi-disciplinary structures including lawyers and accountants is liable to constitute a threat to the independence of the lawyers.

There is a certain incompatibility between the 'advisory' activities of a lawyer and the 'supervisory' activities of an accountant. The written observations submitted by the Association show that accountants in the Netherlands have the duty to certify accounts. [185] They undertake objective examination and scrutiny of their clients' records, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those bookkeeping data.

184 — P. Lambert, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Bruylant, Brussels, 1994, 3rd ed., p. 432. In the same vein, A. Damien, *La profession d'avocat*, Gazette du Palais, Litec, Paris, 1991, considers that 'the sole basis of professional secrecy is the interest of society' (p. 60).

185 — Written observations of the Association, paragraph 36 et seq.

Lawyers might no longer be in a position to advise and defend their clients independently if they were to belong to an organisation that had *also* to give an account of the financial results of the transactions in which they acted. In other words, setting up a body with financial interests in common with members of the professional category of accountants poses the risk of tempting — even forcing — lawyers to take account of considerations other than those exclusively linked to their clients' interests.

186. In the second place, the existence of multi-disciplinary partnerships between lawyers and accountants is such as to constitute a major obstacle to observance of lawyers' professional secrecy.

Once members of the two professional categories have undertaken to share the profits, losses and financial risks connected with their association, they will obviously have an interest in exchanging information about the clients they have in common. An accountant may be tempted to ask for and obtain information from a lawyer relating to, for example, negotiations conducted by the latter in a certain dispute. A lawyer may, vice versa, be tempted to ask questions of an accountant in order to obtain evidence which would help him to make a better presentation of his client's case in court.

The risk of violating legal professional secrecy is the greater because, in some circumstances, accountants are required by law to impart to the competent authorities information concerning their clients' activities.

187. In consequence, I believe that the restriction of competition caused by the Regulation is necessary if features which form part of the very essence of the legal profession in the Netherlands are to be protected in the public interest.

188. *In the fourth place*, the contested ban on partnership does not affect the development of trade to such an extent as would be contrary to the interests of the Community.

It is true that when I examined the second question referred I considered that the disputed Regulation was capable of affecting trade between Member States.[186] Nevertheless, I would point out that, unlike Article 85(1) of the Treaty, Article 90(2) requires the contested measure to have a significant effect on the development of intra-Community trade, which is not so in this case.

186 — See points 128 to 132 above.

The contested Regulation is capable only of restricting intra-Community trade in 'integrated' services. It does not prohibit lawyers and accountants from separately offering their services to clients established in other Member States. Nor does it affect the opportunity for lawyers and accountants established in other Member States to respond separately to demand from Netherlands clients. There are, therefore, no grounds for considering that the Regulation significantly obstructs the development of trade within the meaning of Article 90(2) of the Treaty.

189. *Last*, it remains to be considered whether, in accordance with the *proportionality test*, the contested ban on partnership is the solution least detrimental to competition.

190. In that connection, several factors indicate that the restriction of competition is confined to what is strictly necessary in order to enable Netherlands lawyers to perform their tasks.

191. First, the contested Regulation prohibits only the closest forms of partnership between lawyers and accountants. It does no more than prohibit the setting-up of 'integrated' structures, that is to say structures involving the sharing of profits, decision-making power and final responsibilities. [187] Outside that particular method of association, lawyers and accountants are authorised to pursue any other form of joint activity on the Netherlands market. [188]

192. Second, I think that the independence and professional secrecy of lawyers cannot be safeguarded by measures less restrictive of competition.

193. Supporters of the existence of integrated structures maintain generally that several mechanisms make it possible to ensure compliance with the rules of professional conduct particular to the legal profession. In their view: (1) the Association can adopt disciplinary measures in respect of lawyers who fail to fulfil their professional duties; [189] (2) contractual agreements may stipulate expressly that members of the structure must perform their obligations under the rules of professional conduct; and (3) a 'Chinese wall' mechanism makes it possible to prevent any transfer of information between lawyers and accountants.

194. I do not find those arguments persuasive.

187 — Order for reference, English translation, p. 21.

188 — Written observations of the Association, paragraphs 216 and 217.

189 — See the written observations of the appellants in the main proceedings, paragraph 12.

In the first place, it is not disputed that the Association's authorities cannot monitor the members of the profession generally and permanently. Moreover, such monitoring would not appear to be desirable, given the atmosphere of distrust which it would create within the profession.

In the second place, contractual undertakings and the 'Chinese wall' mechanism pose numerous problems in practice. [190] Thus, where confidential information is divulged, it becomes virtually impossible to distinguish between information communicated to the lawyer and information imparted to the accountant. In addition, I consider that, having regard to the financial interests at stake in some cases dealt with by integrated associations, the 'Chinese wall' mechanism and contractual undertakings do not in themselves constitute adequate measures for guaranteeing observance of lawyers' independence and professional secrecy. [191]

195. In the third place, I would note that, according to established case-law, the Court considers that: 'the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law'. [192] It is therefore immaterial that other Member States, such as the Federal Republic of Germany, authorise multi-disciplinary partnerships of lawyers and accountants. [193]

196. That being so, I believe that the Court is not in possession of sufficient evidence to settle the question itself of the proportionality of the contested Regulation.

197. The appellants in the main proceedings have put forward other arguments in order to demonstrate that the Regulation was disproportionate to the end it seeks. Assessment of the merit of those arguments calls for an in-depth examination of the facts of the dispute in the main proceedings and of questions of law special to the Netherlands legal system. Those questions are as follows.

198. First, it is the appellants' contention that the rules adopted by the Association

190 — See the written observations of the Association, paragraph 252, and the resolution of the CCBE on integrated forms of cooperation between lawyers and persons not belonging to the profession, adopted in Athens on 12 November 1999 [http://www.ccbe.org (p. 3)].

191 — To the same effect, H. Nallet, cited above, considers that: 'the networks must provide written guarantees concerning the way in which they will ensure the independence of the professions *vis-à-vis* each other and of lawyers within those networks. *The principle must remain the prohibition of fee-sharing*' (p. 107).

192 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 42, and Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 33.

193 — It ought, however, to be observed that in German law accountants are subject to professional regulation broadly identical to that of lawyers. In particular, accountants are not subject to an obligation to pass information to third parties.

are discriminatory. They point out that the Association expressly authorises lawyers to enter into multi-disciplinary partnerships with notaries, tax advisers and patent agents. By contrast, the Association forbids them to enter into multi-disciplinary partnerships with members of the professional category of accountants.

The question here is to establish whether there are any objective reasons capable of justifying such a difference in treatment of those professional categories. On that point the parties differ sharply. They have put forward a considerable number of arguments relating to the characteristics of the various professions concerned (impartiality, independence, professional secrecy, right to withdraw from acting). The Court is not in a position to rule on that question.

199. Second, the appellants have produced a report drawn up in July 1999 by a working group set up within the Ministry of Justice and the Ministry of Economic Affairs. [194] They maintain that the working group reached the conclusion that the prohibition of multi-disciplinary partnership between notaries and accountants was disproportionate and could not be justified on objective grounds. The appellants claim that that conclusion is transposable in full to multi-disciplinary partnerships between lawyers and accountants. The status and scope of that report were discussed at the hearing. The Court is not in a position to make an assessment of that question either.

200. In consequence, it is necessary to refer the examination of those various matters back to the Raad van State. To my mind, it is possible that the national court will conclude that the contested Regulation is compatible with Article 90(2) of the Treaty, if it finds that there exist objective reasons for authorising lawyers registered in the Netherlands to enter into multi-disciplinary partnerships with notaries, tax advisers and patent agents, but for prohibiting them from entering into multi-disciplinary partnerships with members of the professional category of accountants.

201. I therefore propose that the Court should reply to the fifth question to the effect that it is not contrary to Article 90(2) of the Treaty for a professional association of lawyers, such as the Association, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with

194 — 'Interdisciplinaire Samenwerking door Notarissen', *Interministerial Report of the Netherlands Ministry of Justice and the Netherlands Ministry of the Economy* (Annex 13 to the written observations of the appellants).

members of the professional category of accountants, if it appears that that measure is necessary in order to safeguard lawyers' independence and professional secrecy.

VIII — Articles 5 and 85 of the Treaty

202. The sixth question turns on Article 5 in conjunction with Articles 85 and 86 of the Treaty.

203. The Raad van State seeks to ascertain whether a Member State infringes those provisions by conferring on a professional association of lawyers, such as the Association, the power to adopt binding measures regulating whether or not it is possible for lawyers practising in its territory to enter into multi-disciplinary partnership with accountants, when that Member State does not reserve the option of substituting its own decisions for those adopted by the association.

204. When examining the third question referred, I decided that Article 86 of the Treaty was not applicable to the Association. The scope of the sixth question will therefore be confined to the interpretation of Article 5 in conjunction with Article 85 of the Treaty.

205. In this connection, the Court's case-law lays down the following principles. [195]

206. In itself, Article 85 of the Treaty concerns only the conduct of undertakings. It does not, therefore, in principle apply to legislative or regulatory measures issued by the Member States. None the less, Article 85 of the Treaty, read in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. That is the situation in three cases, where: (1) a Member State requires or encourages the adoption of agreements, decisions of associations of undertakings or concerted practices contrary to Article 85 of the Treaty; (2) a Member State reinforces the effects of such an agreement, decision or practice; and (3) a Member State deprives its own legislation of its official character by delegating to private operators responsibility for taking decisions affecting the economic sphere.

207. As regards the first two cases, if it is to be held that a measure of law or regulation is incompatible with Articles 5 and 85 of

195 — See, in particular, Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraphs 29 to 31; Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, paragraphs 22 to 24; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, paragraph 48; *Meng*, paragraph 14; *Reiff*, paragraph 14; *Ohra Schadeverzekeringen*, paragraph 10; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; *Centro Servizi Spediporto*, paragraphs 20 and 21; *DIP and Others*, paragraphs 14 and 15; *Sodemare*, paragraphs 41 and 42; *CNSD*, paragraphs 53 and 54; *Corsica Ferries France*, paragraphs 35 and 49; and *Albany*, paragraph 65.

the Treaty, case-law requires there to be a connection between the State measure and the private conduct of one or more undertakings. [196] The purpose of that requirement is to make it impossible to examine State measures because of the anti-competitive effects inherent in them. In their Opinions in *Meng*, *Reiff*, *Ohra Schadeverzekeringen* and *DIP and Others* [197] Advocates General Tesauro, [198] Darmon [199] and Fennelly [200] have convincingly explained why the case-law on that point ought to be upheld. There is therefore no need to go back over those various arguments.

Nevertheless, in some recent judgments, [201] the Court has specified its requirements by going one step further. It has drawn a parallel between the legality of the private conduct and the lawfulness of the State measure. The Court considers that where an agreement, decision or concerted practice is not contrary to Article 85(1), the State measure imposing, encouraging or reinforcing its effects is *automatically* compatible with the provisions of Articles 5 and 85 of the Treaty. Like Mr Jacobs, [202] I believe that such automatism is scarcely in keeping with economic reality. There are, in fact, numerous cases where an agreement, decision or practice is not in itself contrary to Article 85(1) but where the State measure, because it strengthens the effects of that conduct, entails an appreciable restriction of competition on the market. [203]

However that may be, the first two cases identified in the case-law are not relevant to our purposes. The national court has not supplied any evidence which would make it possible to state that the Netherlands public authorities had imposed, encouraged or reinforced the effects of the contested Regulation. Only the third case, that of a possible delegation of powers, need be examined.

208. With regard to the third case, the Court raises 'an objection in principle to the adoption of legislation in which the State gives up its role and confers on undertakings the powers required to give effect to *their* policy'. [204]

The Court considers that legislation keeps its official character if the public authorities reserve for themselves the power to set the

196 — See the operative part of the judgments in *Meng* and *Ohra Schadeverzekeringen*.

197 — Cited above.

198 — Opinion in *Meng* and *Ohra Schadeverzekeringen*.

199 — Opinion in *Reiff*.

200 — Opinion in *DIP and Others*.

201 — See, in particular, *Corsica Ferries France*, paragraphs 50 to 54; *Albany*, paragraph 66, and *Pavlov*, paragraphs 99 and 100.

202 — Opinion in *Pavlov*, points 160 to 164.

203 — See, to that effect, my Opinion in *Arduino*.

204 — R. Joliet, 'National Anti-competitive Legislation and Community Law', in *Fordham International Law Journal*, 1989, p. 163 (at p. 172).

essential terms of the economic decision.[205] Such is obviously the case where the State measure itself lays down the prohibition the effects of which may be restrictive of competition.[206] Such is also the case where the decision is taken by private economic operators but where the public authorities possess the power to approve, reject or amend it, or to replace it with their own decision.[207] In that situation, the official character of legislation is not called in question merely because it was adopted following consultations with representatives of private economic operators.[208]

On the other hand, in *CNSD*,[209] the Court held that the public authorities had wholly relinquished their powers to private operators. It relied on the following considerations: (1) the members of the CNSD were representatives of the customs agents; (2) the competent minister could not intervene in the appointment of the members of the CNSD, and (3) the members of the CNSD were not required by statute to take their decisions in compliance with a number of public-interest criteria. As a result, the Court has used criteria strictly identical to those which make it possible to identify an 'association of undertakings' for the purposes of Article 85(1) of the Treaty.

205 — *Van Eycke*, paragraph 19.

206 — *Meng*, paragraph 20; *Ohra Schadeverzekeringen*, paragraph 13; and *Corsica Ferries France*, paragraph 52.

207 — *Reiff*, paragraph 22; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 21; and *Centro Servizi Spediporto*, paragraph 27.

208 — *Van Eycke*, paragraph 19; and *Corsica Ferries France*, paragraph 52.

209 — Paragraph 57.

209. The question of the delegation of powers in the economic sphere is crucially important when we come to the professions. The matters at stake in this question were clearly set forth by Mr Jacobs in his Opinion in *Pavlov*. He observed that:

'the specific features of the markets for professional services require some form of regulation. Opponents of professional self-regulation insist that the State or at least State-controlled regulatory bodies should regulate the professions, since there are dangers of abuses of regulatory powers. However, in economic terms again an information problem arises. The complex nature of those services and their permanent evolution through rapidly changing knowledge and technical developments make it difficult for parliaments and governments to adopt the necessary detailed and up-to-date rules. Self-regulation by knowledgeable members of the professions is often more appropriate since it can react with the necessary flexibility. The main challenge for every competition law system is therefore to prevent abuses of regulatory powers without abolishing the regulatory autonomy of the professions.'[210]

210 — Paragraph 92.

210. The Court is therefore called upon to lay down criteria which will make it possible to strike a balance between, on the one hand, the need to allow the professions a certain power of self-regulation and, on the other, the need to avoid the risks of anti-competitive conduct inherent in the granting of such a power.

211. In this respect, I think that two conditions might bring about such a balance.

212. The first condition is already inherent in the Court's case-law as it stands. It requires public authorities to reserve themselves the power to determine the content of the essential rules of the profession and, in particular, of the rules likely to affect the rights of the persons concerned. That power may be exercised in different ways. It may be placed *upstream* of the regulatory process, by providing that the public authorities have the option to take part in that process. It may also be situated *downstream*, by introducing *ex post facto* review of the regulations adopted by the association's bodies.

213. The second condition relates to the legal remedies available to the members of the profession. It requires professionals to have the right to challenge decisions taken by the association's bodies, so as to be able to contest any anti-competitive conduct within the profession. In that regard, an action brought before the association's authorities seems to me insufficient to guarantee effective review by the public authorities. Such review would mean that professionals should have the right to apply to the courts of general jurisdiction, that is to say, to jurisdictions outside the profession. Review by the courts and tribunals would have to cover not only decisions of an individual nature but also measures of general application.

214. The facts of the case in the main proceedings must be examined in the light of those two conditions.

A — *The power of the Netherlands authorities to determine, directly or indirectly, the content of the essential rules of the profession*

215. So far as concerns the first condition, the papers submitted to the Court contain information concerning the existence of both prior scrutiny and subsequent review.

216. With regard to prior scrutiny, the Association has explained[211] that the

211 — The Association's written observations, paragraphs 32 and 197.

Netherlands authorities were closely involved in the procedure for adoption of its regulations. The Association has indicated that it systematically communicated its draft regulations to the Minister for Justice, so as to enable the minister to follow with attention developments in the profession. In its order for reference, [212] the Raad van State found, however, that the provisions of the Advocatenwet did not provide for the public authorities to play any part in drafting the Association's regulations.

Those two facts do not seem to me to be contradictory in themselves. It may be that, despite the lack of any formal provision in the Advocatenwet, the practice has grown up of the Minister for Justice exercising prior scrutiny of the content of the Association's regulations. The question raised is thus to ascertain whether such a practice exists and, if so, to determine its actual nature and scope.

217. The Court does not possess the information necessary to rule on that question. Examination of it must therefore be referred back to the Raad van State.

In this connection, I believe that the national court may decide that there is sufficient prior scrutiny if it finds that there exists a *constant* practice whereby the bodies of the Association are *obliged* to: (1) communicate to the Minister for Justice draft regulations concerning the *essential rules* of the legal profession in the Netherlands, and (2) take into consideration the observations made by the Minister for Justice about those drafts.

218. If the prior scrutiny carried out by the Minister for Justice does not satisfy those requirements, it does not necessarily follow that the Netherlands authorities have infringed the provisions of Articles 5 and 85 of the Treaty. The subsequent review introduced by Article 30 of the Advocatenwet remains to be examined.

Under the terms of that provision, 'decisions of the college of representatives, the Bar Council or other bodies of the Association may be suspended or annulled by royal decree in so far as they are contrary to law or the public interest'.

219. On that point, the appellants submit that the Advocatenwet is incompatible with Articles 5 and 85 of the Treaty. They maintain that the public authorities are unable to lay down themselves the rules governing the legal profession or to substitute their own decisions for the measures adopted by the bodies of the Association.

212 — English translation, pp. 17–18.

220. I do not think so.

221. It seems to me that the condition laid down in the Court's case-law — that the public authorities must be able to substitute their own decisions for the measures adopted by private economic operators — is no more than the expression of a more general principle, requiring the control exercised by the public authorities to be *effective*. In the circumstances, the power of direct substitution is only one of the possible methods of exercising State control.

222. The question arising is therefore that of determining whether the power to annul and suspend given to the Crown amounts to *effective* control. In my view, to that end three points need consideration. They relate to: (1) the frequency with which the power to annul or suspend is exercised; (2) the subject-matter of the measures annulled or suspended; and (3) the mandatory nature of the grounds leading to annulment or suspension.

223. With regard to the first two factors, the Association has indicated[213] that the Crown had already made use of its powers in the past. It has annulled in part a regulation concerning traineeships for lawyers (1955) and suspended certain provisions of a regulation concerning practice as a salaried employee (1977). In addition, the Crown has threatened to use its powers should certain regulations be adopted by the Association. It has also threatened to use its power of annulment in connection with a regulation relating to practice as a salaried employee (1977) and in connection with an amendment to the training regulation relating to 'external employers' (1984).

As for the third factor, the appellants have stated that 'even after a regulation has been annulled, the Association remains competent to settle for itself, independently, the content of the (new) regulation'.[214]

224. It is my belief that that information is insufficient to enable the Court to take up a position on the matter of the subsequent review exercised by the Crown.

225. From the information concerning the first two factors we may presume that the public authorities exercise actual control over the regulatory activity of the Association. Nevertheless, that information must, to my way of thinking, be confirmed by other evidence before the Raad van State.

213 — Written observations of the Association, paragraphs 33 to 35 and 106.

214 — Written observations of the appellants, paragraph 145.

The crucial criterion in this respect is to ascertain whether the Crown does in fact take steps to monitor the compatibility, in the light of the public interest, of regulations which are essential to access to, and practice of, the profession.

226. As regards the third factor, I find it difficult to imagine that the Association might, after the Crown has intervened, adopt a regulation identical to one that has been annulled or suspended. The rationale of the system set up by the Netherlands legal order would seem rather to demand that the Association should be obliged to adopt a fresh regulation in keeping with the grounds that led to the annulment or suspension. If such is actually the case, the national court may conclude that the public authorities have reserved to themselves the — indirect — power to decide the content of the rules relating to the legal profession in the Netherlands.

B — *The existence of a legal remedy available to members of the profession*

227. The second condition, relating to the existence of a legal remedy available to members of the profession, is clearly satisfied in the circumstances of the case.

The facts giving rise to this dispute show that it was open to Mr Wouters and Mr Savelbergh to turn to the courts of general jurisdiction in order to challenge an individual decision affecting them taken by bodies of the Association. When those proceedings were brought, the parties concerned were able to plead that the general measure (the contested Regulation) was unlawful, having regard to the provisions of competition law. Accordingly, lawyers registered in the Netherlands have an effective remedy before the courts of general jurisdiction against decisions of individual or general character adopted by the Association's bodies.

228. On the basis of the foregoing considerations, I propose that the Court should state in answer to the sixth question that it is not contrary to Articles 5 and 85 of the Treaty for a Member State to confer on a professional association of lawyers, such as the Association, the power to adopt binding measures governing whether or not it is possible for lawyers practising in its territory to enter into multi-disciplinary partnership with members of the professional category of accountants, subject to the twofold condition that (1) the authorities of the Member State concerned should reserve to themselves the power to determine, directly or indirectly, the content of the essential rules of the profession and (2) the members of the profession should have an effective legal remedy before the courts of general jurisdiction against the decisions adopted by the association's bodies.

IX — Articles 52 and 59 of the Treaty

229. The last three questions concern the Treaty provisions on the right of establishment (Article 52) and freedom to provide services (Article 59).

230. The seventh question seeks to identify the Treaty provisions applicable to this case. Before the Netherlands courts, the appellants have argued that the dispute fell within the ambit of *both* of those provisions. Conversely, the Association contends that Articles 52 and 59 of the Treaty cannot both apply to one set of circumstances at the same time.

231. By its eighth question, the national court wishes to know whether the contested ban on partnership amounts to an obstacle to the right of establishment and/or the freedom to provide services.

232. Finally, the ninth question concerns the reasons which might justify an obstacle to freedom of movement for persons. More exactly, the Raad van State wishes to know whether the prohibition of multi-disciplinary partnerships of lawyers and accountants may be treated as similar to a 'selling arrangement' within the meaning of the judgment in *Keck and Mithouard*[215] or whether, on the contrary, the prohibition ought to be examined in the light of the conditions laid down in *Gebhard*.[216]

233. During these proceedings, several of the interveners have argued that the dispute in the main proceedings had nothing to do with Community law. In their submission, it is a purely internal situation for the Netherlands. I shall tackle that argument when examining the seventh question.

A — *The provisions applicable to the dispute in the main proceedings*

234. Let me make the preliminary observation that the Treaty provisions on freedom of movement for persons and the free movement of services are not applicable only to measures taken by the public authorities. They also extend to measures of another kind which seek to regulate, collectively, the employment of workers

215 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

216 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

and the provision of services.[217] Articles 52 and 59 of the Treaty may therefore apply to rules adopted by associations or bodies such as professional associations.

235. We ought also to note that, by virtue of settled case-law, the provisions of the Treaty concerning establishment and services do not apply to purely internal situations, that is where all the facts are confined within one single Member State.[218]

236. In this case, the appellants submit[219] that, in order to determine which provisions do apply to this dispute, it is necessary to distinguish two sets of facts: those relating to Mr Wouters and Mr Savelbergh, and those relating to Arthur Andersen & Co. Belastingadviseurs and Price Waterhouse Belastingadviseurs BV.

Mr Wouters and Mr Savelbergh call in aid the provisions of the Treaty which refer to the freedom to provide services. The parties concerned wish to enter into partnership with those two firms in order to offer 'integrated' services to clients established in other Member States. By contrast, Arthur Andersen & Co. Belastingadviseurs and Price Waterhouse Belastingadviseurs BV plead the Community provisions on establishment. They claim, 'for themselves and for practitioners working together with them',[220] the right to establish themselves permanently in the Netherlands in order to enter into multi-disciplinary partnership with lawyers.

237. The appellants' argument is baseless.

238. The Treaty provisions on establishment apply to natural or legal persons wishing to 'participate, on a stable and continuous basis, in the economic life of a Member State *other* than [their] State of origin ... in the sphere of activities as self-employed persons'.[221]

239. In this instance, there is no evidence to support a finding that the dispute in the main proceedings has any such connection to Article 52 of the Treaty.

217 — See, *inter alia*, Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraphs 30 to 36.

218 — With regard to Article 59 of the Treaty, see, *inter alia*, Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 9; *Höfner and Elser*, paragraph 37; *Reisebüro Broede*, paragraph 14; and *Deliège*, paragraph 58. With regard to Article 52 of the Treaty, see, *inter alia*, Case 204/87 *Bekaert* [1988] ECR 2029, paragraph 12; and Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537, paragraph 11.

219 — Appellants' written observations, paragraph 162.

220 — Appellants' written observations, paragraph 162.

221 — *Gebhard*, paragraph 25, emphasis added.

It is clear from the file [222] that, when the Association's authorities prohibited the partnership in issue, all the appellants in the main proceedings were already established in the Netherlands. Mr Wouters, Mr Savelbergh, Arthur Andersen & Co. Belastingadviseurs, Price Waterhouse Belastingadviseurs BV and Arthur Andersen & Co. Accountants were already pursuing their professional activities on a stable and continuous basis in the Netherlands.

Moreover, contrary to what the appellants seem to suggest, there is nothing to support the argument that Arthur Andersen & Co. Belastingadviseurs and Price Waterhouse Belastingadviseurs BV have been given a special power to act on behalf of 'practitioners working together with them' and established in another Member State. That being so, the appellants cannot to advantage plead the Treaty provisions concerning the right of establishment. [223]

240. On the other hand, the Community provisions concerning the freedom to provide services are applicable to this case.

In accordance with settled case-law, the Court considers 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'. [224] Following this case-law, there is no need for the provider or recipient of services to move within the Community. The link to Community law may be found in the mere 'movement' of the service concerned, which is the case here, since the lawyers and firms who are the appellants in the main proceedings wish to offer 'integrated' services to clients established in other Member States. [225]

241. It follows that the contested Regulation must be examined in the light of Article 59 of the Treaty alone. The question which arises is to ascertain whether the ban on multi-disciplinary partnerships between lawyers and accountants amounts to an obstacle to the freedom to provide services.

222 — See the information supplied by the Association (paragraph 208 of its written observations), which has not been challenged by the appellants.

223 — In its order for reference (English translation, p. 21), the Raad van State stated that lawyers and tax advisers established in other Member States and belonging to the Arthur Andersen group or the Price Waterhouse group might intend to establish themselves permanently in the Netherlands with a view to practising there their activities in a multi-disciplinary partnership with Mr Wouters and Mr Savelbergh. Such a situation might, where appropriate, fall within the ambit of Article 52 of the Treaty. None the less, the question is, in the circumstances, hypothetical since there is no evidence in the file to suggest that the persons concerned are parties to the proceedings before the Raad van State.

224 — *Alpine Investments*, paragraph 30. See also Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 30; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 40; Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 14; *Sodemare*, paragraph 37; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 37.

225 — In its order for reference (English translation, p. 21), the Raad van State stated that lawyers and tax advisers established in other Member States and belonging to the Arthur Andersen group or the Price Waterhouse group might intend, in association with Mr Wouters and Mr Savelbergh, to offer 'integrated' services in or from the Netherlands. Such a situation might, where appropriate, fall within the ambit of Article 59 of the Treaty. None the less, the question is, in the circumstances, hypothetical since there is no evidence in the file to suggest that the persons concerned are parties to the proceedings before the Raad van State.

B — *The existence of an obstacle to freedom to provide services*

242. In this connection, the Raad van State wishes to know whether the criteria set forth in *Keck and Mithouard* are transposable to this case.

243. *Keck and Mithouard* was intended to put an end to the dangers of wandering off course inherent in the extremely broad definition of measures having effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty (now, after amendment, Article 28 EC). With the intention of orienting its decisions on the real objectives of the Treaty with regard to the free movement of goods, the Court has emphasised that:

'[C]ontrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain *selling arrangements* is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' [226]

244. As a result, the Court has removed from the scope of Article 30 of the Treaty measures which are not liable to prevent the access of imported products to the national market or to impede their access any more than they impede the access of domestic products. [227] Accordingly, the *substantive* test laid down in *Keck and Mithouard* is whether or not there is an obstacle to the access of imported products to the market. [228]

245. The question of the application of the rule in *Keck and Mithouard* to the field of freedom to provide services was expressly raised in *Alpine Investments*. [229]

Alpine Investments carried on business in the Netherlands. It specialised in commodities futures. The Netherlands authorities had forbidden it to resort to 'cold calling', or contacting individuals by telephone without their prior consent in writing in order to offer them various financial services. Alpine Investments challenged that

226 — *Keck and Mithouard*, paragraph 16, emphasis added.

227 — *Keck and Mithouard*, paragraph 17.

228 — See also, to this effect, the Opinion of Mr Lenz in Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 18.

229 — The Court has already transposed the criterion of 'access to the market' to the field of freedom of movement for workers. See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 103, and Case C-190/98 *Graf* [2000] ECR I-493, paragraphs 23 to 26.

decision on the basis of Article 59 of the Treaty. Before the Court, the Netherlands Government maintained that the contested prohibition ought to fall outside the scope of that provision. [230] In its submission, the prohibition of the practice of cold calling affected only the *way* in which services could be offered on the market, so that it had the characteristics of a 'selling arrangement' as defined in *Keck and Mithouard*.

In that respect, the Court found that: 'such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services'. [231]

The Court rejected the argument of the Netherlands Government on the ground that '[A] prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also *offers made to potential recipients in another Member State*. It therefore directly affects *access to the market in services in the other Member States* and is thus capable of hindering intra-Community trade in services'. [232]

246. It follows from that judgment that a measure will be caught by Article 59 of the Treaty if it restricts the right of service providers established in the Member State concerned to offer services to customers established in *another* Member State. [233] The rule in *Keck and Mithouard* cannot, therefore, be transposed to measures which directly affect access by traders to the market in services in the other Member States.

247. That is exactly the situation in the case of the contested Regulation.

The Regulation limits the right of lawyers and accountants established in the Netherlands to offer 'integrated' services to potential clients established in other Member States. By the same token, the contested Regulation affects access by operators to the market in services in other States. Such an obstacle to intra-Community trade in services is not hypothetical since other Member States, such as the Federal Repub-

230 — *Alpine Investments*, paragraph 33.
231 — Ibid., paragraph 28.
232 — Ibid., paragraph 38, emphasis added.
233 — See also *Gourmet International Products*, paragraph 38.

lic of Germany, authorise the setting-up of multi-disciplinary structures including members of both professional categories. Clients established in those States might therefore wish to make use of 'integrated' services offered by operators established in the Netherlands.

248. In consequence, the ban on partnership in issue cannot be equiparated to a 'selling arrangement' within the meaning of *Keck and Mithouard*. It constitutes an obstacle to freedom to provide services and must be examined in the light of the conditions laid down by Article 59 of the Treaty.

C — *Whether the obstacle is justified*

249. In *Gebhard*, [234] the Court pointed out that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions in order to be compatible with Community law. They must (1) be applied in a non-discriminatory manner, (2) be justified by imperative requirements in the general interest, (3) be suitable for securing the attainment of the objective which they pursue, and (4) not go beyond what is necessary in order to attain it.

250. The contested Regulation must now be considered in the light of those four conditions.

251. To that end, I refer for the greater part to the considerations set out above when I examined the fifth question concerning the interpretation of Article 90(2) of the Treaty.

252. In its order for reference, [235] the Raad van State found that the contested regulation satisfied the first condition laid down in *Gebhard*.

The documents in the case confirm that the Regulation does not discriminate on the grounds of the nationality of the operators concerned. In fact, by virtue of Article 29 of the Advocatenwet, regulations adopted by the governing bodies of the Association apply without distinction to lawyers registered in the Netherlands and to 'visiting lawyers', that is to say, persons who are not registered as lawyers in the Netherlands but who are authorised to carry on professional activity in another Member State under the title of lawyer or an equivalent title.

253. With regard to the second condition, the national court expressly stated that 'the

234 — Paragraph 37.

235 — English translation, p. 23.

aim of the Regulation is to safeguard the independence and duty of loyalty of lawyers'. [236] It is clear from points 182 and 186 above that the contested ban on partnership is also necessary in order to ensure observance of lawyers' professional secrecy.

In the field of freedom of movement of persons, the Court has invariably held that the application of professional rules to lawyers — in particular, rules relating to organisation, qualifications, professional ethics, supervision and liability — pursue an objective in the public interest. [237] The Court considers that the application of such professional rules ensures that the ultimate consumers of legal services are provided with the necessary guarantees in relation to integrity and experience and contributes to the sound administration of justice. [238]

254. The contested Regulation is therefore justified by overriding reasons relating to the public interest in accordance with the case-law.

255. So far as the third condition is concerned, I have already stated that the prohibition of multi-disciplinary partnerships between lawyers and accountants is apt to ensure the attainment of the objectives it pursues. I would therefore request the Court to refer to my analysis of that subject at points 185 and 186 above.

256. Finally, as regards the last condition, I have explained why several factors support the conclusion that the contested Regulation does not go beyond what is necessary in order to safeguard lawyers' independence and professional secrecy. [239] I have, however, indicated that to my mind the Court was not in possession of all the information required in order itself to settle the question of the Regulation's proportionality. [240] In consequence, consideration of that question must be referred back to the national court.

In that regard, the Raad van State may conclude that the contested Regulation is compatible with Article 59 of the Treaty if it finds that there are objective reasons for authorising lawyers registered in the Netherlands to enter into multi-disciplinary partnership with notaries, tax advisers and patent agents but for prohibiting lawyers registered in the Netherlands from entering into multi-disciplinary partnership with members of the professional category of accountants. [241]

236 — Order for reference, English translation, p. 12.

237 — See *Binsbergen*, paragraphs 12 to 14; Case 71/76 *Thieffry* [1977] ECR 765, paragraph 12; Case 292/86 *Gullung* [1988] ECR 111, paragraph 29; *Gebhard*, paragraph 35; and *Reisebüro Broede*, paragraph 38.

238 — *Reisebüro Broede*, paragraph 38.

239 — See points 190 to 195 above.

240 — See points 196 to 199 above.

241 — See point 200 above.

257. On the basis of the foregoing considerations, I accordingly propose that the Court should answer the last questions referred to the effect that it is not contrary to Article 59 of the Treaty for a professional association of lawyers, such as the Association, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with accountants if that measure is necessary in order to safeguard lawyers' independence and professional secrecy.

X — Conclusion

258. In the light of the foregoing, I therefore propose that the questions referred to the Court by the Raad van State should be answered as follows:

(1) On a proper construction of Article 85(1) of the EC Treaty (now Article 81(1) EC), the concept of association of undertakings is applicable to a professional association of lawyers such as the Nederlandse Orde van Advocaten.

If a professional association of lawyers is composed exclusively of members of the profession and is not required by law to take its decisions in compliance with a number of public-interest criteria, it must be considered to be an association of undertakings within the meaning of Article 85(1) of the Treaty in respect of all its activities, irrespective of the subject-matter and purpose of the measure adopted.

The fact that regulatory and disciplinary powers are conferred by statute on a professional association of lawyers is irrelevant to its classification as an association of undertakings within the meaning of Article 85(1) of the Treaty.

(2) Without prejudice to the application of Article 90(2) of the EC Treaty (now Article 86(2) EC), it is contrary to Article 85(1) of the Treaty for a professional association of lawyers, such as the Nederlandse Orde van Advocaten, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants.

(3) On a proper construction of Article 86 of the EC Treaty (now Article 82 EC), the concept of undertaking does not apply to a professional association of lawyers, such as the Nederlandse Orde van Advocaten, where it adopts, pursuant to regulatory powers conferred by statute, binding measures governing whether or not it is possible for lawyers practising in the territory of the Member State concerned to enter into multi-disciplinary partnership with members of the professional category of accountants.

(4) It is not contrary to Article 90(2) of the Treaty for a professional association of lawyers, such as the Nederlandse Orde van Advocaten, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants if that measure is necessary in order to safeguard lawyers' independence and professional secrecy. It is for the national court to determine whether that is the case.

(5) It is not contrary to Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of the Treaty for a Member State to confer on a professional association of lawyers, such as the Nederlandse Orde van Advocaten, the power to adopt binding measures governing whether or not it is possible for lawyers practising in its territory to enter into multi-disciplinary partnership with members of the professional category of accountants, subject to the twofold condition that (1) the authorities of the Member State concerned should reserve to themselves the power to determine, directly or indirectly, the content of the essential rules of the profession and (2) the members of the profession should have an effective legal remedy before the courts of general jurisdiction against the decisions adopted by the association's bodies. It is for the national court to determine whether that is the case.

(6) Article 52 of the EC Treaty (now, after amendment, Article 43 EC) is not applicable to situations which are purely internal to a Member State.

(7) It is not contrary to Article 59 of the EC Treaty (now, after amendment, Article 49 EC) for a professional association of lawyers, such as the Nederlandse Orde van Advocaten, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants if that measure is necessary in order to safeguard lawyers' independence and professional secrecy. It is for the national court to determine whether that is the case.