OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 July 2001 [1]

1. This request for a preliminary ruling concerns Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC).

2. The Pretore di Pinerolo (Magistrate, Pinerolo), Italy, has been asked to rule on the legality of a scale setting the minimum and maximum fees chargeable by avvocati and procuratori ('members of the Bar') for their services in that country. The scale in question was adopted by the Italian Minister for Justice on the basis of a draft prepared by the National Council of the Bar.

I — The national legal background

A — *The Consiglio Nazionale Forense*

3. The Consiglio Nazionale Forense (National Council of the Bar, hereinafter 'the CNF') is to be established under the auspices of the Minister for Justice under Articles 52 to 55 of Royal Decree-Law No 1578 of 27 November 1933. [2]

4. The CNF is a body composed of members of the Bar elected by their fellow members, with one representative for each appeal court district. One of the purposes of the CNF is to set the scale of fees.

B — *The legal provisions relating to fees*

5. Article 57 of the Decree-Law states that the criteria for determining fees and emoluments payable to members of the Bar in respect of civil and criminal proceedings and out-of-court work are to be set every two years by decision of the CNF.

6. When the CNF decides upon the scale of fees, it is referred to the Minister for Justice for approval. Before granting this approval, the Minister must obtain the opinion of the Interministerial Committee on Prices (here-

1 — Original language: French.

2 — As subsequently amended (hereinafter 'the Decree-Law').

inafter 'the CIP') [3] and consult the Consiglio di Stato (Council of State). [4] The ministerial decree approving the fee scale must then be endorsed and registered by the Corte dei Conti (Court of Auditors). The scale is then binding.

7. Under Article 58 of the Decree-Law, the criteria referred to in Article 57 are to be determined on the basis of the monetary value of the dispute and the level of court hearing the case. For each step, or series of steps, maximum and minimum limits must be set. Fees for out-of-court work are to be determined on the basis of the complexity of the case.

8. Article 60 of the Decree-Law is concerned with the settlement of fees by the court.

9. It provides that fees are settled by the court on the basis of the criteria established under Article 57, having regard to the seriousness and the number of issues determined. The settlement must remain within the maximum and minimum limits set by Article 58. However, in certain exceptional circumstances, the court may depart from these limits on condition that it gives reasons for so doing.

C — *The contested fee scale*

10. The fee scale in issue in the main proceedings was adopted by decision of the CNF of 12 June 1993 and approved by Ministerial Decree No 585 of 5 October 1994 (hereinafter 'Ministerial Decree No 585/94' or 'the contested decree') [5].

11. Article 1 of the contested decree approves the CNF decision.

12. Article 2 of that decree provides that 'the increases set out in the fee scales in the annex shall apply with effect from 1 October 1994 as to 50%, and as to the remaining 50% with effect from 1 April 1995'.

13. Article 1 of the CNF decision states that the fees for 'avvocati' are set out in the table in Annex A to that decision. The fees for 'procuratori' are set out in the table in Annex B.

14. Under Article 4 of the CNF decision, it is prohibited to depart from the minimum

3 — Under Article 14.20 of Law No 887 of 22 December 1984.

4 — Under Article 17(3) of Law No 400 of 23 August 1988.

5 — GURI No 247 of 21 October 1994.

fee limits for the services of avvocati and procuratori.

15. However, where the services provided are manifestly disproportionate to the fees allowed, it is possible to depart from the stated maxima. It is also possible to go below the minima, provided that the party who has an interest in the matter produces an opinion from the Council of the competent Bar.

II — Facts and procedure

16. Mr Arduino was prosecuted for overtaking on a 'no overtaking' stretch of road, contrary to the road traffic legislation. The accused's vehicle collided with that of Mr Dessi, who claimed damages before the Pretore di Pinerolo.

17. At the end of these proceedings, Mr Arduino was ordered to pay Mr Dessi's costs. Mr Dessi's lawyer presented his fee note based on the scale set by Ministerial Decree No 585/94. However, the Pretore di Pinerolo decided not to apply the contested scale and to set the fees below the minimum rate.

18. An appeal was brought against that judgment before the Corte Suprema di Cassazione (Supreme Court of Cassation), Italy, which set aside the judgment. It held that it was unlawful not to apply the contested scale and remitted the case to the Pretore di Pinerolo on this point.

19. The referring court states [6] that, in Italian law, there are two conflicting lines of case-law as to whether the scale set by Ministerial Decree No 585/94 constitutes an agreement, decision or concerted practice restricting competition under Article 85 of the Treaty.

According to the first line of case-law, [7] the contested decree is similar to the legislation that was the subject of the Court's decision of 18 June 1998. [8] The CNF is an association of undertakings within the meaning of Article 85(1) of the Treaty, and no statutory provision requires it to adopt decisions in the public interest. Since the contested scale is such as to restrict competition, the national court is required to disapply it.

According to the other line of case-law, [9] the contested scale is not the product of the

6 — Order for reference (paragraphs 12 to 15).

7 — The referring court cites Judgment No 791/98 of the Corte d'Appello Torino (Court of Appeal, Turin) of 19 June and 11 July 1998 (order for reference, paragraph 12).

8 — Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851 ('*CNSD*').

9 — The referring court cites Judgment No 351/98 of the Tribunale Tempio Pausania (District Court, Tempio Pausania) (order for reference, paragraph 15).

CNF's discretion. The Italian public authorities play a decisive role in drawing up and approving the scale. It cannot therefore be said that the Italian public authorities have delegated to private economic operators responsibility for taking decisions affecting the economic sphere.

20. The referring court explains [10] that, faced with these two lines of authority, it is confronted with the following problem of interpretation.

It wonders whether, 'with specific reference to the involvement of the public bodies in the approval procedure, the fee scale ... provided for by Ministerial Decree No 585/94 contains the essential elements of a decision by an association of undertakings which has the effect of ... restricting ... competition' within the meaning of Article 85(1) of the Treaty. [11]

If so, the referring court wonders whether 'the special nature of the professional activity performed by a member of the Bar ... justifies the laying down of binding tariffs ... , with the result that the CNF decisions are in any event compatible with the EC Treaty in the light of Article 85(3) [of the Treaty]'. [12]

10 — Order for reference (English translation, pp. 5 to 7).

11 — Ibid. (p. 5).

12 — Ibid. (p. 7).

III — The questions submitted for a preliminary ruling

21. Consequently, the Pretore di Pinerolo decided to stay proceedings and to refer the following two questions to the Court:

'(1) Does the decision of the CNF, approved by Ministerial Decree No 585/94, fixing binding tariffs for the professional activity of members of the Bar, come within the scope of the prohibition in Article 85(1) of the EC Treaty?

If the answer to (1) is in the affirmative:

(2) Does the case none the less correspond to one of the situations envisaged in Article 85(3) of the Treaty to which that prohibition does not apply?'

IV — Admissibility of the reference for a preliminary ruling

22. The Italian Government expresses doubts as to the admissibility of the present reference for a preliminary ruling. [13] It puts forward two sets of observations in this respect.

13 — Written observations of the Italian Government (pp. 2 to 5).

23. Firstly, the Italian Government questions the genuineness of the dispute in the main proceedings.

It explains that, following the judgment of the Corte Suprema di Cassazione, Mr Arduino's insurance company paid the costs incurred by Mr Dessi. In the light of this payment, Mr Dessi withdrew from the remainder of the proceedings, and Mr Arduino's lawyer requested the Pretore di Pinerolo to order that the case should not proceed to judgment. In the current state of proceedings, the main dispute therefore has no purpose.

In these circumstances, the Italian Government fails to understand the referring court's insistence on determining the compatibility of the contested fee scale with Community law. It takes the view that the Pretore di Pinerolo has seized the opportunity to settle an issue which is controversial in Italy.

24. Secondly, the Italian Government considers that the order for reference inadequately sets out the legal and factual context in which the questions have arisen. The Pretore di Pinerolo has not set out the reasons why it failed to apply the contested fee scale.

25. It should be pointed out that, according to settled case-law, the procedure provided for by Article 177 of the EC Treaty (now Article 234 EC) is an instrument of cooperation between the Court of Justice and the national courts. [14] Within the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. [15] Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [16]

However, the Court has also stated that, in exceptional circumstances, it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine the conditions in which the case has been referred to it by the national court. [17] It cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action, or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [18]

14 — See, in particular, Case 16/65 *Schwarze* [1965] ECR 877, 886.

15 — See, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

16 — *Idem.*

17 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21.

18 — See, in particular, Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 17; and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 31.

26. In respect of the Italian Government's first observation, I consider that there is insufficient evidence before the Court to show that the dispute in the main proceedings is hypothetical.

It would have been preferable, in the interests of the sound administration of justice, for the Pretore di Pinerolo to have satisfied himself of the genuineness of the dispute in the main proceedings and, in particular, of the lack of any agreement between the parties on the question of costs. However, the fact remains that the Italian Government has not produced evidence that such an agreement exists. In these circumstances, the Court can only refer to the information supplied by the national court.

In the order for reference the Pretore di Pinerolo states that he has to rule on the compatibility of the contested fee scale with Community law. Without giving reasons, the referring court states that it 'must bring the proceedings to a conclusion and ... make an order for payment of the costs of the party claiming damages based on the note produced by his lawyer ... , applying the tariffs set out in the [contested] decree, only being able to depart from them in the exceptional and compelling circumstances provided for in the applicable [Italian] rules'. [19]

19 — Order for reference (paragraph 4, free translation).

Furthermore, it is possible that, notwithstanding the existence of any agreement between the parties as to costs, the national court is required of its own motion to determine the lawfulness of the contested fee scale.

27. In these circumstances, the evidence before the Court does not lead to the conclusion that the dispute in the main proceedings is purely hypothetical in nature.

28. As regards the Italian Government's second observation, I would point out that the requirement adequately to describe the legal and factual context of the dispute principally pursues two objectives.

29. Firstly, the information provided in the decision referring the matter for a preliminary ruling must enable the Court to provide an interpretation of Community law which will be of use to the national court. [20] Those requirements are of particular importance in certain fields, such as that of competition law, where the factual and legal situations are often complex. [21]

20 — See, in particular, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 26; and Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 5.

21 — See, in particular, Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22.

In the present case, there are certain gaps in the order for reference. The Pretore di Pinerolo only partially sets out the powers available to the Italian authorities in the procedure for approval of the fee scale set by the CNF. However, these pieces of information have been supplemented by the Italian Government's replies to the questions addressed to it by the Court on this subject. I therefore consider that, in spite of these gaps in the order for reference, the Court is in a position to provide an answer to the questions raised that will be of use to the Pretore di Pinerolo.

30. Secondly, the information provided in orders for reference must give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. [22] It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that only the orders for reference are notified to the interested parties. [23]

In the present case, it appears from the observations of the Governments of the Member States [24] that the information contained in the order for reference was such as to enable them usefully to adopt a position on the questions referred for a preliminary ruling. [25] Whilst it is true that in its written observations, [26] the French Government considered that certain aspects of the procedure for approval of the contested fee scale were imprecise, nevertheless this information was supplemented by the written observations of the parties and notified to the French Government. At the hearing, that Government put forward a balanced and definitive view on the questions raised by the referring court.

31. Consequently, I consider that the questions referred for a preliminary ruling by the Pretore di Pinerolo are admissible.

V — The subject-matter of the questions referred for a preliminary ruling

32. In common with most of the intervening parties, I think that the questions referred for a preliminary ruling need to be reformulated.

33. As worded, the national court's questions refer only to Article 85 of the Treaty.

22 — See, in particular, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 40.

23 — *Idem*.

24 — In accordance with the EC Statute of the Court of Justice, written observations have been lodged by the Finnish, French and Italian Governments. The German Government submitted oral observations.

25 — In its written observations, the Commission stated, however, that it was 'not yet able to adopt a final position' (paragraph 36). However, this failure to adopt a position does not seem to arise from the lack of information in the order for reference. In Case C-309/99 *Wouters and Others*, the Commission voluntarily refrained from adopting a position on certain questions referred by the Netherlands court (see my Opinion in *Wouters* delivered today, [2002] ECR I-1577, I-1582, points 98 and 106).

26 — Paragraph 17.

The court seeks to know whether the contested fee scale is prohibited by Article 85(1) and, if so, whether it qualifies for exemption under Article 85(3).

34. It is apparent, however, from the description of the legal background to the case that the contested fee scale is a *State measure*. The decision of the CNF setting the scale of fees was formally incorporated in Ministerial Decree No 585/94. The contested fee scale thus seems to be a measure of a legislative or regulatory nature.

35. It is settled case-law [27] that, in itself, Article 85 of the Treaty is not concerned with laws or regulations adopted by Member States. It is concerned solely with the conduct of undertakings. Only Article 5 of the Treaty, in conjunction with Article 85 of the Treaty, requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

36. It follows that, to enable the referring court to adjudicate on the compatibility of the contested fee scale with Community law, the questions referred for a preliminary ruling must be understood as referring to Articles 5 and 85 of the Treaty. [28]

37. In the current state of the case-law, [29] the Court considers that a State measure is liable to negate the effectiveness of the competition rules in three situations: (1) where a Member State requires, or favours, the adoption of agreements, decisions of associations of undertakings or concerted practices contrary to Article 85 of the Treaty; (2) where a Member State reinforces the effects of such conduct; and (3) where a Member State deprives its own rules of their legislative character by delegating to private economic operators the responsibility for taking decisions affecting the economic sphere.

38. The subject-matter of the reference therefore needs to be restated in terms of this case-law.

27 — See, in particular, Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 48; Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 10; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20; Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257, paragraph 14; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 41; *CNSD*, paragraph 53; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 35; and *Albany*, paragraph 65.

28 — If the replies were confined to the questions asked, the referring court would onlybe in a position to determine the lawfulness of the CNF decision. Even if the national court held this decision to be unlawful on the basis of Article 85(2) of the Treaty it would still be required to uphold Ministerial Decree No 585/94 which is a legislative or regulatory measure.

29 — See, in particular, *Van Eycke*, paragraph 16; *Meng*, paragraph 14; *Reiff*, paragraph 14; *Ohra Schadeverzekeringen*, paragraph 10; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; *Centro Servizi Spediporto*, paragraph 21; *DIP*, paragraph 15; *Sodemare*, paragraph 42; *CNSD*, paragraph 54; *Corsica Ferries France*, paragraph 49; and *Albany*, paragraph 65.

39. The Pretore di Pinerolo does not mention the first situation.

It is true that Article 57 of the Decree-Law requires the CNF, every two years, to set the criteria for determining the fees and emoluments payable to members of the Bar. It might thus be wondered whether this provision requires, or favours, the adoption of decisions of associations of undertakings contrary to Article 85 of the Treaty. However, as the Italian Government emphasises, [30] there is no evidence on the file to suggest that the referring court is concerned with the compatibility of Article 57 of the Decree-Law with the provisions of Articles 5 and 85 of the Treaty.

40. By contrast, the second situation does seem to me to apply in this case.

It is not in dispute that the Pretore di Pinerolo seeks an interpretation of Community law so as to enable him to determine the lawfulness of the contested fee scale. This scale might be incompatible with Articles 5 and 85 of the Treaty if the Italian authorities, in adopting Ministerial Decree No 585/94, reinforced the effects of an agreement, decision or concerted practice within the meaning of Article 85 of the Treaty. In order to give an answer that will be of use to the referring court, it is therefore necessary to examine this issue.

30 — Written observations of the Italian Government (p. 6).

41. Lastly, the Pretore di Pinerolo seems to have the third situation expressly in mind.

It appears from the file [31] that the national court made a reference to this Court following the judgment in *CNSD*, which held that the Italian legislation at issue in that case had 'wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs'. [32] Furthermore, in setting out the divergent authorities in Italian case-law, the Pretore di Pinerolo, in my opinion, asks whether the Italian public authorities have delegated to private economic operators responsibility for taking decisions affecting the economic sphere. [33]

42. Based on the foregoing considerations, I propose that the Court reformulate the questions referred for a preliminary ruling in the sense that they seek to determine:

— whether Articles 5 and 85 of the Treaty preclude a Member State from adopting a legislative or regulatory measure approving, on the basis of a draft prepared by a professional body of members of the Bar, such as the CNF, a scale setting the minimum and maximum fees for services provided by

31 — See order for reference (paragraphs 5 to 9).

32 — *CNSD*, paragraph 57.

33 — See points 19 and 20 above.

members of the profession, where that State measure is adopted following a procedure such as that provided for by Italian legislation; and

— whether Articles 5 and 85 of the Treaty preclude a Member State, in the context of such a procedure, from conferring on a professional body of members of the Bar, such as the CNF, power to adopt a draft scale setting the minimum and maximum fees for services provided by members of the profession.

VI — Reinforcing the effects of an agreement, decision or concerted practice (Question 1)

43. On the first question, I would point out that the Court's case-law as it now stands requires, if a legislative or regulatory measure is to be declared incompatible with Articles 5 and 85 of the Treaty, that the State measure be preceded by an agreement, decision or concerted practice that is itself contrary to Article 85(1) of the Treaty. [34]

In order to determine whether the Italian authorities have infringed Articles 5 and 85 of the Treaty by reinforcing the effects of an agreement, decision or concerted practice, it is first necessary to see whether the conditions for the application of Article 85(1) of the Treaty are met in this case.

A — *Article 85(1) of the Treaty*

44. 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'.

45. It is necessary to consider four issues in succession to determine whether: (1) members of the Bar practising in Italy constitute 'undertakings'; (2) the CNF is to be regarded as an 'association of undertakings'; (3) the decisions adopted by the CNF have as their object or effect the restriction of competition within the common market; and (4) those decisions may affect trade between Member States.

1. The concept of *undertaking*

46. According to settled case-law, the Court considers that the concept of under-

34 — See, in particular, *Meng*, paragraphs 16 and 17; *Ohra Schadeverzekeringen*, paragraph 12; *CNSD*, paragraphs 53 to 60; *Corsica Ferries France*, paragraphs 50 to 54; *Albany*, paragraph 66; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 99 and 100.

taking in the context of competition law encompasses 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. [35]

The Court has also held that the term 'economic activity' applies to any activity involving the offer of goods or services on a particular market. [36] In general, an activity is economic in nature when it is carried on, at least in principle, by a private operator with a view to making a profit. [37]

47. In the present case, it appears from the file [38] that members of the Bar practising in Italy, as independent operators, offer services of legal advice and representation of their clients before the courts. Members of the Bar in Italy therefore offer services on a market, namely the market in legal services. Furthermore, it is clear from the file [39] that Members of the Bar in Italy practise with a view to making a profit. The referring court has stated that they demand and receive from their clients remuneration in consideration for the services provided.

48. In these circumstances, the supply of legal services by Members of the Bar in Italy must be regarded as an economic activity within the meaning of the Court's case-law.

49. Contrary to the Italian Government's submission, [40] this conclusion is not altered by the fact that members of the Bar are required to observe rules of professional conduct, nor by the fact that they carry out activities related to the administration of justice.

In *CNSD*, the Court characterised Italian customs agents as undertakings within the meaning of Article 85 of the Treaty [41] even though, like members of the Bar, they are governed by disciplinary rules laid down by a professional body. [42] Furthermore, the 'public-service' tasks with which members of the Bar are entrusted do not remove them from the sphere of competition law, but may, in my opinion, bring them within the scope of Article 90(2) of the EC Treaty (now Article 86(2) EC). [43]

50. Consequently, a member of the Bar practising in Italy is to be regarded as an

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

36 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7.

37 — Opinion of Advocate General Tesauro in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, point 8; and in Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, point 9.

38 — Order for reference (paragraph 7).

39 — *Idem.*

40 — Written observations of the Italian Government (p. 7).

41 — *CNSD*, paragraphs 36 to 38.

42 — See *CNSD*, paragraph 7, as well as Advocate General Cosmas' Opinion in that case (point 71).

43 — See my Opinion in *Wouters*, points 170 to 178.

undertaking within the meaning of Community competition law.

2. The concept of *association of undertakings*

51. The second question is whether the CNF is to be regarded as an association of undertakings.

52. In my Opinion in *Wouters*,[44] I considered in detail the circumstances in which the concept of association of undertakings may apply to a professional body of members of the Bar. I will therefore refer, to a large extent, to my treatment of this topic in that case.

53. As set out in *CNSD*[45] and *Pavlov*,[46] the Court considers that an entity is not an association of undertakings within the meaning of Article 85(1) of the Treaty where, firstly, it is composed of a majority of representatives of the State and, secondly, it is required by national legislation to take into account certain public-interest criteria in adopting decisions.

54. In the present case, the CNF does not meet this twofold condition. It appears from the evidence before the Court[47] that the CNF is composed exclusively of members of the Bar elected by members of the profession. Furthermore, the referring court states,[48] without contradiction from the Italian Government, that there is no provision of national law either requiring or encouraging the CNF to set fee scales having regard to public-interest criteria.

55. As a result, the CNF must be regarded as an association of undertakings within the meaning of Article 85(1) of the Treaty.

56. In contrast to the Italian Government's submissions,[49] this conclusion is not altered by the fact that the CNF is a body governed by public law,[50] vested with disciplinary powers.[51] Nor does it matter that the CNF does not itself carry out any

44 — Points 56 to 86.

45 — Paragraphs 39 to 44.

46 — Paragraphs 83 to 89.

47 — See the order for reference (paragraph 9) and the written observations of the Italian Government (p. 8).

48 — Order for reference (paragraph 9).

49 — Written observations of the Italian government (p. 8).

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

51 — See *CNSD*, paragraph 7, and Advocate General Cosmas' Opinion in that case, point 71.

economic activity,[52] that it is entrusted with tasks in the public interest,[53] or that it may, in fact, adopt its decisions in the public interest.[54]

57. It follows from these considerations that the decisions of the CNF constitute decisions of an association of undertakings within the meaning of Article 85(1) of the Treaty.

3. Restriction of competition

58. The third question is whether the decisions adopted by the CNF 'have as their object or effect the prevention, restriction or distortion of competition'.

59. The Court generally adopts a two-stage procedure for determining whether an agreement is compatible with Article 85(1) of the Treaty.[55]

60. Firstly, it ascertains whether the agreement has as its *object* the restriction of competition. To this end, it carries out an objective examination of the aims of the agreement, having regard to the economic context in which it is to be applied.[56] If the agreement has an anti-competitive object it is prohibited under Article 85(1) of the Treaty without its being necessary to take account of its concrete effects.[57] The same considerations apply to decisions of associations of undertakings.[58]

Therefore, agreements or decisions of associations of undertakings whose sole objective is to restrict or distort competition between the parties, or between the parties and third parties, are contrary to Article 85(1) of the Treaty. This is the case for horizontal agreements fixing the selling price of goods[59] or services.[60]

61. Where the agreement does not specifically have as its object the restriction of competition, the Court goes on to determine whether its *effect* is the prevention, restriction or distortion of competition.[61] In this regard, Article 85(1) of the Treaty

52 — 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.

53 — See the Report for the Hearing in *BNIC* (paragraph 1.1), paragraph 16 of the judgment, and Commission Decision 82/896/EEC of 15 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.883 — AROW/BNIC) (OJ 1982 L 379, p. 1; paragraphs 2 and 3 of the account of the facts). See also my Opinion in *Wouters*, points 79 and 80.

54 — See *IAZ* v *Commission*, paragraphs 19 to 25, and my Opinion in *Wouters*, points 81 to 86.

55 — Case 56/65 *Société Technique Minière* [1966] ECR 235, 249.

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

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

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

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

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

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

prohibits both actual anti-competitive effects and purely potential effects, provided that they are sufficiently appreciable. [62]

62. In the present case, the CNF adopted two separate decisions. The first was that adopting the draft scale setting the minimum and maximum fees for services provided by members of the profession. The second was that submitting the draft scale to the Italian authorities with a view to making the tariffs binding.

63. I will examine those two decisions in the light of Article 85(1) of the Treaty.

(a) The draft fee scale

64. In Community competition law, price-fixing agreements are 'particularly serious'. [63] The Court considers that, *by its very nature*, an agreement fixing the price of goods or services has as its *object* the restriction of competition on the market. [64]

65. Article 85(1) of the Treaty prohibits agreements, decisions and concerted practices fixing sales prices, [65] minimum prices, [66] maximum prices [67] or target prices. [68]

66. In the present case, I do not think that these principles apply to the decision of the CNF adopting the draft scale of fees.

67. Firstly, the CNF decision does not have as its *object* the restriction of competition within the meaning of Article 85(1) of the Treaty. [69]

68. It should be pointed out that, under Article 57 of the Decree-Law, the CNF is required, every two years, to set the criteria for determining the fees and emoluments payable to members of the Bar. The draft fee scale is then submitted to the Minister for Justice who must obtain the opinion of the CIP and of the Consiglio di Stato. On

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

63 — 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 82.

64 — *BNIC*, paragraph 22; and Case 243/83 *Binon* [1985] ECR 2015, paragraph 44.

65 — Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 132 and 133; Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 115 to 119; and Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraphs 12 to 16.

66 — *BNIC*, paragraph 22; and *CNSD*, paragraphs 45 and 46.

67 — *CNSD*, paragraphs 45 and 46.

68 — Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 15 to 25; *Van Landewyck and Others* v *Commission*, paragraph 102 et seq.; *Verband der Sachversicherer* v *Commission*, paragraphs 34 to 43; and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 157 to 164.

69 — See also points 77 to 79 below.

the basis of all of this information, the Minister for Justice decides whether it is appropriate to incorporate the scale into a legislative measure making the tariffs binding.

69. It follows that, in contrast to classic price agreements, the decision of the CNF adopting the draft scale is a preparatory act in the legislative procedure laid down by Italian law. It is required by national legislation and enjoys purely consultative status. The object of the contested decision is, therefore, to enable the public authorities to adopt rules adapted to the particular features and needs of the profession. [70]

70. Secondly, the CNF decision on the draft scale does not have the *effect* of restricting competition within the common market.

71. It appears from the evidence on the file [71] that the draft scale is submitted exclusively to the Italian Minister for Justice. Without approval by the Minister, the members of the profession and third parties are legally bound to apply the scale contained in the preceding ministerial decree.

The contested decision therefore does not have the effect of restricting competition on the Italian market in legal services. [72] Any restriction of competition is only the consequence of a subsequent act of the Italian authorities when they adopt the ministerial decree approving the decision of the CNF.

72. Consequently, I consider that Article 85(1) of the Treaty does not preclude a professional body of members of the Bar, such as the CNF, from adopting a draft scale setting the minimum and maximum fees for services provided by members of the profession, where this draft scale is intended *exclusively* for submission to the public authorities of the Member State concerned in the context of a legislative procedure such as that provided for by Article 57 of the Decree-Law.

(b) The submission of the draft fee scale to the public authorities

73. The second decision of the CNF may be characterised as an application lodged by private economic operators with the public

70 — It is clear that my opinion on this point would have been different if the decision of the CNF adopting the draft scale had not formed a part of the legislative procedure laid down by the Italian legal system.

71 — See, in particular, the Commission's written observations, paragraph 19.

72 — My opinion on this point would be otherwise if it appeared that the CNF decision was circulated amongst the members of the profession and that, even without the approval of the Minister for Justice, members of the Bar based their fees on the tariffs set out in the draft scale. In that case, the decision of the CNF could be characterised as a system of target prices such as to restrict competition within the common market.

authorities of a Member State for the purpose of conferring binding effect on the draft agreement concluded by those operators.

74. In his Opinion in *Albany*, cited above, Advocate General Jacobs clearly set out the reasons why such a request should not be prohibited by Article 85(1) of the Treaty. Mr Jacobs said that: [73]

'Mere efforts on the part of undertakings to convince public authorities to extend the effects of a certain agreement to other economic actors are not caught by Article 85(1) [of the Treaty].

First, such action by itself does not affect the competitive process or the freedom to compete of anyone. Any restriction [of competition] is a consequence of subsequent State action.

Secondly, coordinated application to the State authorities is part of our democratic societies. Natural or legal persons are entitled to organise themselves and to submit jointly their requests to the government or the legislature. The public authorities then have to decide whether the proposed action is in the public interest. They have sole power, but also sole responsibility for their decision'.

75. Since I endorse this analysis, I propose that the Court declare that Article 85(1) of the Treaty does not preclude a professional body of members of the Bar, such as the CNF, from submitting to the public authorities of a Member State a draft scale setting the minimum and maximum fees for services provided by members of the profession for the purpose of making the scale binding on all members of the profession and third parties.

76. In these circumstances, the two decisions adopted by the CNF are compatible with the provisions of Article 85(1) of the Treaty.

77. It should be noted that, in *BNIC*, the Court reached a different conclusion with respect to agreements concluded by the National Inter-Trade Board for Cognac ('BNIC').

The BNIC was a professional body made up of representatives of the dealers' 'group' and the winegrowers' 'group'. It had concluded an agreement fixing a minimum

73 — Paragraphs 291 to 293.

price for certain goods and submitted this agreement to the French authorities with a view to making it binding on all members of the professions represented. One of the dealers, against whom the BNIC had instituted proceedings, had challenged the compatibility of the agreement with the Treaty provisions on competition.

Before the Court, the BNIC submitted 'that agreements concluded within it are not binding and that its role is solely to advise the central public authorities, which alone may make the said agreements binding by means of ministerial orders'. [74]

The Court rejected this argument on the ground that 'for the purposes of Article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market'. [75]

78. I consider that the principles established in *BNIC* are too strict to be applied to cases such as this.

79. It is common ground that most economic sectors are characterised by the complex nature of the goods or services offered and their permanent evolution through rapidly changing knowledge and technical developments. [76] Because of these characteristics, State authorities can face major difficulties in adopting, alone, detailed legislative measures that are up to date and adapted to the various sectors concerned. It is therefore necessary to enable the State authorities to set up, in one way or another, mechanisms for consultation with the representatives of the economic sectors liable to be affected by particular rules. [77]

As the Commission has emphasised, [78] the principles laid down in *BNIC* are such as to prevent the establishment of such mechanisms. The risk is that measures by which economic operators submit proposals — in particular, on prices — to public authorities or measures by which these operators respond to requests from the public authorities themselves will have to be characterised as agreements restricting competition within the meaning of

74 — *BNIC*, paragraph 21.

75 — Ibid., paragraph 22.

76 — Opinion of Advocate General Jacobs in *Pavlov*, paragraph 92.

77 — See also, to this effect, the Opinion of Advocate General Fennelly in *DIP*, paragraph 55.

78 — Written observations of the Commission, paragraph 19.

Article 85(1) of the Treaty. In other words, there is a risk that Article 85(1) of the Treaty will be interpreted in such a way as to preclude any concerted action on the part of private operators which is intended to inform the public authorities or to influence the content of their decisions. [79]

80. On the basis of the foregoing considerations, I therefore propose that the Court find that Article 85(1) of the Treaty does not preclude a professional body of members of the Bar, such as the CNF, from adopting a draft scale setting the minimum and maximum fees for services supplied by members of the profession and from submitting, in compliance with the national measures in force, this draft scale to the authorities of the Member State concerned for the purpose of making the said scale binding on the whole profession and on third parties.

81. Since the two decisions adopted by the CNF are not such as to restrict competition, it is not necessary to determine whether they may affect trade between Member States.

79 — For a different analysis of *BNIC*, see R. Joliet, 'National Anti-competitive Legislation and Community Law', *Fordham International Law Journal*, 1989, p. 163, pp. 178 to 180.

B — *Articles 5 and 85 of the Treaty*

82. I now turn to consider whether the Italian authorities have infringed Articles 5 and 85 of the Treaty on the ground that they have reinforced the effects of a decision by an association of undertakings within the meaning of Article 85(1) of the Treaty, in adopting Ministerial Decree No 585/94.

83. In that regard, I would point out that, in order for a legislative or regulatory measure to be declared incompatible with Articles 5 and 85 of the Treaty, the case-law requires that there be a link between the State measure and private conduct on the part of one or more undertakings. [80] This requirement is intended to preclude the examination of State measures on the basis of anti-competitive effects peculiar to them. In their Opinions in *Meng*, *Reiff*, *Ohra Schadeverzekeringen* and *DIP*, [81] Advocates General Tesauro, [82] Darmon [83] and Fennelly [84] conclusively set out the reasons why the case-law should be upheld on this point. It is not therefore necessary to go over those various arguments.

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

81 — Cited above.

82 — Opinion in *Meng* and *Ohra Schadeverzekeringen*, already cited.

83 — Opinion in *Reiff*.

84 — Opinion in *DIP*.

84. However, in certain recent judgments, [85] the Court has clarified its requirements by taking a further step. It has established a parallel between the legality of the private conduct and that of the State measure. The Court considers that when an agreement, decision of an association of undertakings or concerted practice is not contrary to Article 85(1), the State measure reinforcing its effects is *automatically* compatible with Articles 5 and 85 of the Treaty.

85. In accordance with this recent case-law, it would be right to conclude that Articles 5 and 85 of the Treaty do not preclude the application of Ministerial Decree No 585/94. The contested decree would be compatible with those articles on the *sole ground* that the measures adopted by the CNF are not contrary to Article 85(1) of the Treaty.

86. However, I think that this automatic approach is hardly consistent with economic reality. The present case, in my opinion, illustrates the limitations of the case-law as it now stands. [86]

87. In the present case, I have found that the decision of the CNF adopting the draft scale is not such as to restrict competition since any restriction of competition would be the result of the subsequent action of the Italian State. Equally, the CNF decision submitting the draft scale to the Italian authorities is not contrary to Article 85(1) of the Treaty since only the ministerial decree approving the scale would have effects restricting competition.

Under the case-law as it now stands, the Ministerial Decree is not caught by Article 5 of the Treaty on the ground that — specifically — the CNF decisions are not such as to restrict competition. It follows that, as the case-law now stands, Community competition law prohibits neither the measures adopted by the CNF nor the measure adopted by the State, even though the combination of these two measures may be such as appreciably to restrict competition.

88. Like Advocate General Jacobs, [87] I consider that, in cases such as this, it is more justified to accept that the State measure may infringe Articles 5 and 85 of the Treaty *independently* of the legality of the conduct of the private operators. In other words, it must be possible to find that a State measure appreciably restricts competition even if the conduct of the economic operators at the root of the State action is not, in itself, contrary to Article 85(1) of the Treaty.

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

86 — See the reasoning developed by Advocate General Jacobs in his Opinion in *Pavlov*, paragraph 161.

87 — Ibid., paragraph 163.

89. I consider that it is also necessary to permit the State to justify its conduct under Article 5 of the Treaty, [88] because a Member State may have legitimate reasons for reinforcing the effects of an agreement, decision or concerted practice within the meaning of Article 85 of the Treaty. In that case, the duty to cooperate in good faith under Article 5 of the Treaty cannot prohibit a Member State from adopting legislative or regulatory measures which, even though they restrict competition, pursue a legitimate goal.

90. It is therefore necessary to identify criteria enabling a Member State to justify a measure restricting competition on the basis of Article 5 of the Treaty.

91. In this respect, I suggest that the Court adopt three criteria of assessment. The Court could find that a legislative or regulatory measure which reinforces the effects of an agreement, decision or concerted practice is compatible with Articles 5 and 85 of the Treaty provided that: (1) the public authorities of the Member State concerned exercise effective control over the content of the agreement, decision or concerted practice; (2) the State measure pursues a legitimate aim in the public interest, and (3) the State measure is proportionate to the aim which it pursues.

The first condition, of effective control, would ensure that the State does in fact examine the content of the agreement, decision or concerted practice. It would therefore be intended to ensure that the State authorities do not give 'free rein' to the economic operators.

The second condition would make it possible to verify that the State measure has indeed been adopted in the public interest, because 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'. [89] By virtue of the second condition, the State authorities would thus be authorised to reinforce the effects of the concertation between the private operators if they are certain that the content of that concertation is in the public interest.

Lastly, the third condition would be intended to ensure that the effects restrictive of competition produced by the State measure are confined to that which is necessary in order to achieve the objective pursued.

88 — This was also the position put forward by the Commission in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, p. 21 of the Report for the Hearing.

89 — Opinion of Advocate General Jacobs in *Albany*, paragraph 184. See also, to that effect, A. Bach, note on *Reiff, Meng, and Ohra Schadeverzekeringen*, in *Common Market Law Review*, 1994, p. 1357, footnote 14. The author states that '[i]nstead of presuming corporate rulemaking 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 rulemaking and creates restrictive conditions for newcomers and outsiders'.

92. In accordance with the view I am advancing, I will proceed to examine whether Ministerial Decree No 585/94 is such as appreciably to restrict competition on the Italian market in legal services. If so, I will then consider whether the contested decree may be justified under Article 5 of the Treaty.

1. Restriction of competition

93. It should be noted that price is the principal instrument of competition. [90] The function of price competition is to keep prices down to the lowest possible level and to encourage the movement of goods and services between the Member States, [91] thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change. [92]

94. In the present case, Ministerial Decree No 585/94 provides a mandatory system of minimum and maximum tariffs for services provided by members of the Bar in Italy. [93]

95. In this respect, it is settled law that minimum prices constitute a significant restriction of competition. [94] They prevent operators from competing by setting prices below the minima laid down. Therefore, they deny consumers the opportunity to acquire the goods or services concerned at the best price. Furthermore, minimum prices artificially reinforce the barriers to entry for operators wishing to enter the market since they deprive the latter of a fast and effective means of penetrating the market. [95]

96. Maximum prices are also liable appreciably to restrict competition. One of the primary risks in the professions is for maximum prices to become, in practice, fixed prices, [96] thereby causing an artificial increase in market prices.

97. In these circumstances, I find that Ministerial Decree No 585/94 does appreciably restrict competition on the Italian market in legal services.

90 — M. Waelbroeck and A. Frignani, *Commentaire J. Megret, Le droit de la CE*, volume 4, Concurrence, Éditions de l'université de Bruxelles, Brussels, 1997, 2nd edition, paragraph 533.

91 — *ICI* v *Commission*, paragraph 115.

92 — *Idem*.

93 — Order for reference, paragraph 11.

94 — See, to this effect, *BNIC*, paragraph 22.

95 — See, to this effect, Commission Decision 95/188/EC of 30 January 1995 relating to a proceeding under Article 85 of the EC Treaty (IV/33.686 — COAPI) (OJ 1995 L 122, p. 37, paragraph 38 of the account of the facts).

96 — See *Politique de la concurrence et professions libérales*, OECD, Paris, 1985, paragraph 199.

2. Justification for restricting competition

98. The above finding does not, however, imply that Ministerial Decree No 585/94 is incompatible with Articles 5 and 85 of the Treaty. It remains to determine whether the contested decree can be justified on the basis of Article 5 of the Treaty. In accordance with the three conditions set out above, I will examine whether: (1) the Italian authorities have exercised effective control over the CNF decision; (2) Ministerial Decree No 585/94 pursues an aim in the public interest; and (3) the contested decree is proportionate to the aim pursued.

(a) Effective control by the Italian authorities

99. In relation to the first condition, I consider that the detailed rules of the procedure for approving the fee scale do afford the Italian authorities the opportunity to carry out effective control of the scale set by the CNF.

100. I say this because, before approving the scale, the Italian Minister for Justice must obtain the opinion of the CIP and consult the Consiglio di Stato. The ministerial decree must then be endorsed and registered by the Corte dei Conti.

101. It appears from the order for reference [97] that the CIP is an organ of the State, composed of eight ministers and three experts appointed by the President of the Council of Ministers. Its functions include fixing the prices of mass consumer goods, monitoring compliance with those prices, and giving an opinion on the tariffs set by the professions.

102. The Consiglio di Stato is responsible for assessing whether the scale set by the CNF is in accordance with the law and with the criteria which it lays down. [98]

103. The order for reference only partially sets out the powers vested in the Minister for Justice. The Court therefore requested the Italian Government to expand on this information at the hearing.

According to the information provided by the Italian Government,the Minister for

97 — Paragraph 13.
98 — Ibid., paragraph 15.

Justice has no power to substitute his own decisions for those of the CNF. However, the Minister does have the power, on his own initiative, to amend the content of those decisions. In this case, it is for the CNF to incorporate these amendments into the original draft fee scale. Furthermore, the Minister for Justice has the — indirect — power to force the CNF to amend the content of its decisions since, without an approving decree, the scale laid down by the CNF is not binding at all. In this case, the members of the profession and third parties are required to apply the tariffs laid down by the preceding ministerial decree.

104. Finally, before granting endorsement and registration, the Corte dei Conti carries out a review of the legality of the ministerial decree approving the fee scale. [99]

105. It follows from all of this information that the detailed rules of the procedure for approving the fee scale do give the Italian authorities the power to carry out particularly extensive control over the decisions of the CNF.

106. However, this finding is not enough to conclude that the Italian authorities carry out *effective* control over the content of the agreement, decision or concerted practice, because it is still necessary to determine whether, in practice, the State authorities genuinely exercise the powers conferred on them by law. [100] In the absence of an effective exercise of these powers, it must be concluded that the State authorities approve, without discussion, the concertation which took place within the CNF.

107. In the present case, the following information appears from the material in the file. [101] The CIP and the Consiglio di Stato prepared a series of observations on the impact on inflation of the entry into force of the CNF decision of 12 June 1993. These bodies proposed a gradual introduction of the tariff increases provided for by the CNF. The Minister for Justice endorsed the opinion of the CIP and the Consiglio di Stato: he requested the CNF to amend its decision and to postpone for six months one half of the tariff increases. The CNF incorporated the Minister for Justice's observations in a second decision dated 29 September 1994.

Furthermore, in its written observations, [102] the Italian Government stated that 'the Minister [for Justice] prepared a

99 — Ibid. (English translation, p. 6).

100 — On this point, it can be noted that some learned writers have criticised the reasoning in *Reiff* for its 'lack of realism' (see A. Bach, cited above, point 2.5). That case concerned the German procedure for approving tariffs for road transport.

101 — See the preamble to Ministerial Decree No 585/94, the order for reference (English translation, p. 6) and the written observations of the Italian Government (pp. 9 to 10).

102 — At p. 10.

whole series of observations which were only partly coterminous with those of the Consiglio di Stato, and with which the CNF had, to a large extent, to comply if the new scale was not to be denied effect (for want of approval)'.

108. I think that this information is not adequate for the Court to be able to rule on the question of the effectiveness of the control exercised by the Italian authorities.

The information relating to the postponement of the tariff increases suggests that the public authorities exercise genuine control over the CNF's decisions. Nevertheless, this information must, in my view, be confirmed by further evidence before the Pretore di Pinerolo.

The national court will, therefore, be able to examine the Minister for Justice's acts which have been referred to by the Italian Government during these proceedings. It will also be able to determine whether, with regard to the contested scale or other draft scales, the public authorities have made any objections or substantive observations *vis-à-vis* the CNF (for example, whether the Minister for Justice has already refused to approve a CNF decision on the ground that the tariff increases were too high).

The decisive criterion in this respect is not whether the public authorities have required numerous changes to the draft scale. It lies in establishing that the Italian authorities do indeed intervene to control the content of CNF decisions on aspects which are essential for the profession and third parties.

(b) The public-interest aim pursued by Ministerial Decree No 585/94

109. The file contains little information relevant to the second condition.

110. The Pretore di Pinerolo and the Italian Government have not specified the objectives pursued by Ministerial Decree No 585/94. Only the party claiming civil damages has advanced any comment on this subject in the course of these proceedings. At the hearing, he submitted that Ministerial Decree No 585/94 was primarily intended to guarantee a high level of quality in respect of the services supplied by members of the profession.

111. Since this information comes neither from the Italian Government nor from the referring court, I will assume that this is the case. It is, above all, for the Pretore di Pinerolo to identify the true objectives of the contested scale and to determine

whether these objectives are consistent with the public interest.

112. As for the objective referred to by the party claiming civil damages, it should be emphasised that the quality of the services provided by the professions is of crucial importance for several reasons.

Firstly, the professions provide services which concern essential aspects of society, such as public health (the medical professions), justice (the legal profession) or public safety and town planning (the architects' profession). These various services can also have an immediate and direct impact on fundamental aspects of the life of citizens, such as their physical safety.

Secondly, from an economic viewpoint, the services provided by the professions do not only have consequences for the recipients. As Advocate General Jacobs has pointed out, [103] they also generate 'externalities' in the form of losses or benefits for society as a whole. The demand for professional services 'is often of a derivative nature, which means that their output (a lawyer's advice, an architect's plan) is an intermediate good in a longer production chain. The quality of those services therefore [constitutes] one of the decisive inputs in many sectors of a national economy'. [104]

Lastly, the markets for professional services are characterised by 'asymmetric information'. [105] Since the consumer is rarely in a position to assess the quality of the services offered, it is essential to lay down certain rules to maintain the quality of these services.

113. It follows from these considerations that the maintenance of the high quality of the services supplied by members of the Bar would undoubtedly constitute a legitimate objective in the public interest.

(c) Proportionality of Ministerial Decree No 585/94

114. Following the third condition, it remains to consider whether the measures contained in Ministerial Decree No 585/94 are proportionate to the objective which they allegedly pursued. [106]

103 — Opinion in *Pavlov*, paragraph 85.

104 — *Idem.*

105 — Ibid., paragraph 86.

106 — It will be recalled that I am considering this question hypothetically since it is not proven that the objective pursued by the contested decree does indeed consist in maintaining the quality of services supplied by the members of the profession.

115. It is settled case-law [107] that, in order to establish whether a measure complies with the principle of proportionality, it is necessary to ascertain whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.

116. In the present case, Ministerial Decree No 585/94 provides for a mandatory system of minimum and maximum tariffs for the services supplied by members of the Bar in Italy. [108]

117. On the assumption that the objective of the contested decree is to maintain the quality of the services supplied by members of the profession, such a measure does not seem to me to be suitable for the purpose of achieving the desired objective. [109]

First, I consider that there is no causal effect between the level of fees charged and the quality of services supplied. I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services if, in any event, they lacked qualifications, competence or moral conscience. Second, the quality of services is — or ought to be — guaranteed by measures of a different type, such as those governing the conditions of entry to the profession and the professional liability of members of the Bar.

118. Consequently, I consider that, if the objective pursued by Ministerial Decree No 585/94 is to maintain the quality of the services supplied by members of the Bar in Italy, the contested decree cannot be justified on the basis of the provisions of Article 5 of the Treaty.

119. In the light of the foregoing considerations, I propose that the Court reply to the first question referred for a preliminary ruling in terms that Articles 5 and 85 of the Treaty do not preclude a Member State from adopting a legislative or regulatory measure approving, on the basis of a draft produced by a professional body of members of the Bar, a scale setting the minimum and maximum fees for the services provided by members of the profession on the threefold condition that: (1) the public authorities of the Member State concerned exercise effective control over the content of the fee scale proposed by the professional body; (2) the State measure approving the fee scale pursues a legitimate aim in the public interest; and (3) the State measure is proportionate to the aim which it pursues.

107 — See, for example, Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42; and Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 57.

108 — Order for reference, paragraph 11.

109 — See, to this effect, Decision 95/188, paragraph 41 of the account of the facts.

VII — Delegation of powers to private operators (Question 2)

120. By the second question, the Pretore di Pinerolo asks whether, having regard to the detailed rules of the procedure for approving the fee scale, the Italian authorities have infringed Articles 5 and 85 of the Treaty on the ground that they have deprived their own rules of their legislative character by delegating to private operators the responsibility for taking decisions affecting the economic sphere.

121. On this point, it will be recalled that 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'. [110]

The Court considers that rules retain their legislative character where the public authorities reserve to themselves the power to fix the essential terms of the economic decision. [111] This is clearly the case where the State measure itself contains the prohibition the effects of which may be restrictive of competition. [112] It is also the case where the decision is taken by private economic operators, but the public authorities have the power to approve, reject or amend it, or to replace it with their own decision. [113] In that case, the legislative nature of the rules is not called in question by the simple fact that it was adopted following consultations with representatives of the private economic operators. [114]

122. The question in the present case is whether the Italian authorities have reserved to themselves the power to fix the content of the fee scale of members of the Bar. In order to answer this question it is necessary to identify what powers the public authorities have in the procedure for approving the scale. Since I have dealt with this issue in the course of considering the first question, I will, to a large extent, refer to my earlier arguments.

123. At points 99 to 105 of this Opinion, I found that the detailed rules of the procedure for approving the scale give the Italian authorities the power to carry out particularly extensive control over the CNF's decisions.

110 — *R. Joliet*, cited above, p. 172.

111 — *Van Eycke*, already cited, paragraph 19.

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

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

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

124. As regards the powers of the Minister for Justice, I stated [115] that, according to the information provided by the Italian Government, the Minister for Justice has the power to amend, on his own initiative, the content of the decisions. In that case, it is for the CNF to incorporate these amendments into the original draft fee scale. Furthermore, the Minister for Justice has the power to force the CNF to amend the content of its decisions since, without an approving decree, the scale laid down by the CNF is not binding. In this case, the members of the profession and third parties are required to apply the tariffs laid down by the preceding ministerial decree.

125. In the light of these factors, I consider that the Italian public authorities have reserved to themselves the — indirect — power to determine the content of the fee scale of members of the Bar.

126. However, I maintained that the control exercised by the public authorities over the conduct of private economic operators had to be *effective*. [116] It is therefore necessary to ascertain whether, in practice, the Italian authorities genuinely exercise the powers conferred on them by law. If not, it must be concluded that the public authorities have in fact delegated to private economic operators their power in setting the tariffs.

127. In this respect, I have found [117] that the material in the file is insufficient to enable the Court itself to determine this question. The matter should therefore be remitted to the Pretore di Pinerolo for decision.

The determining criterion on this issue is whether the Italian authorities do indeed intervene to control the content of the CNF's decisions on aspects which are essential for the profession and third parties.

128. Consequently, I propose that the Court reply to the second question referred for a preliminary ruling in terms that Articles 5 and 85 of the Treaty do not preclude a Member State from conferring on a professional body of members of the Bar, such as the CNF, the power to adopt a draft scale setting the minimum and maximum fees for services provided by members of the profession on the twofold condition that: (1) the public authorities of the Member State concerned reserve to themselves the power to determine, directly or indirectly, the content of the fee scale; and (2) those authorities genuinely exercise the powers conferred on them by law.

115 — See point 103 above.

116 — See point 106 above. See also my Opinion in *Wouters* (point 221 et seq.).

117 — See points 107 and 108 above.

VIII — Conclusion

129. In the light of all of the foregoing, I therefore propose that the Court reply to the questions referred by the Pretore di Pinerolo in the following terms:

(1) Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude a Member State from adopting a legislative or regulatory measure approving, on the basis of a draft produced by a professional body of members of the Bar, such as the Consiglio Nazionale Forense, a scale setting the minimum and maximum fees for services provided by members of the profession on the threefold condition that: (1) the public authorities of the Member State concerned exercise effective control over the content of the fee scale proposed by the professional body; (2) the State measure approving the fee scale pursues a legitimate aim in the public interest; and (3) the State measure is proportionate to the aim which it pursues. It is for the national court to determine whether this is the case.

(2) Articles 5 and 85 of the Treaty do not preclude a Member State from conferring on a professional body of members of the Bar, such as the Consiglio Nazionale Forense, the power to adopt a draft scale setting the minimum and maximum fees for services provided by members of the profession on the twofold condition that: (1) the public authorities of the Member State concerned reserve to themselves the power to determine, directly or indirectly, the content of the fee scale; and (2) those authorities genuinely exercise the powers conferred on them by law. It is for the national court to determine whether this is the case.