OPINION OF ADVOCATE GENERAL COSMAS
delivered on 18 May 1999 *

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I — Introduction

1. In this case, the Court has been asked to answer two questions referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Première Instance (Court of First Instance), Namur (Belgium). The Court thus has the opportunity to supplement its case-law concerning the way in which sport falls within the scope of, and is linked to, Community law. More specifically, the present case raises the question whether the fundamental principles of primary Community law relating to freedom of movement for persons and the protection of fair competition (Articles 48 and 59 of the EC Treaty, now, after amendment, Articles 39 EC and 49 EC, and Articles 60, 85 and 86 of the EC Treaty, now Articles 50 EC, 81 EC and 82 EC; I shall henceforth refer to the numbering used prior to the entry into force of the Treaty of Amsterdam) apply within the context of the relationship between sportsmen and the federations to which they belong. The dispute under consideration differs from *Bosman* in two major respects: first, it relates to an individual rather than a team sport (judo); and second, the sport in question is a so-called amateur sport, that is to say one whose practitioners do not automatically have professional status.

II — Facts

2. Ms Deliège, a Belgian national and the applicant in the main proceedings, is a judoka in Belgium. She has achieved considerable success in that sport. [1] According to her, however, she has fallen into disfavour with the sports federations in her country. [2] She claims that they repeatedly prevented her from taking part in tournaments in order to damage her career and to make it easier for rival athletes to join the national team due to participate in the Atlanta Olympic Games. The defendant federations contend that Ms Deliège was excluded from the international tournaments on strictly sport-related and disci-

1 — She has been Belgian champion on several occasions, European champion once and under-19s world champion once.

2 — The Ligue Belge de Judo ('the LBJ') and the Ligue Francophone de Judo ('the LFJ').

plinary grounds. It appears, first, that the applicant's ability and performance do not match those of the sportswomen chosen to take part in international tournaments and second, that she has a difficult character and is inclined to commit disciplinary offences.

3. That feud between Ms Deliège and the Belgian sports authorities formed the backdrop to a number of incidents which led to the dispute currently pending before the national court. Ms Deliège wished to take part in the 1995 European judo championships, and the international judo tournaments held in Basle on 2 and 3 December 1995, Paris on 10 and 11 February 1996 and Leonding on 16, 17 and 18 February 1996. It was particularly important for her to take part in those tournaments because her place in the Belgian Olympic team depended largely on how well she performed in them.

4. At this point, it is appropriate to examine the criteria and mechanism for selecting judokas for the Atlanta Olympic Games. The International Judo Federation ('the IJF') had decided that those qualifying for those games would be the first eight in each category from the most recent world championships and a number of judokas for each continent (for Europe, nine men and five women in each of the seven categories [3]). In order to implement the IJF's decisions — that is to say, to select the European sportsmen and sportswomen who would be sent to Atlanta — the European Judo Union ('the EJU') met in Nicosia, where it took the following decisions: the European selection list for the Olympic Games would be drawn up on the basis of the results achieved at the major European tournaments ('Category A' tournaments) and in the European championships. The right to enter judokas for those tournaments (including those in Basle, Paris and Leonding) was held exclusively by the national federations, each of which was allowed to put forward only seven men and seven women in total, including no more than one or two male or female judokas per category. Qualification for the selection list was based on the best results achieved by each sportsman or sportswoman at three Category A tournaments and his or her results at the European championships. Every athlete, male or female, therefore had an interest in participating in those tournaments in order to be one of the nine best men and five best women from each category to be entered on the European selection list. It should be pointed out, however, that any right to participate in the Olympic Games on the basis of past results accrued not to the athlete himself but to his country's national federation. In other words, it was quite possible for an athlete to be ranked first on the European selection list but ultimately not to participate in the Atlanta Games if his federation asked someone else to represent his country.

3 — As in other combat sports, athletes are divided into categories according to weight. Ms Deliège, for example, usually fought in the under-52 kilo category.

5. In order not to lose all hope of being selected for Atlanta, on 26 January 1996 Ms Deliège made an application for interim measures to the Tribunal de Première Instance, Namur. She sought, first, an order requiring the Belgian sports federations (the LFJ and the LBJ) to take the appropriate steps to enter her for the international tournament in Paris and, second, an order referring to the Court of Justice for a preliminary ruling a question on the extent to which the EJU's aforementioned rules on participation in Category A tournaments are in conformity with Article 59 et seq. and Articles 85 and 86 of the Treaty.

6. Before the same court, Ms Deliège then brought against the LFJ, the LBJ and the president of the LBJ, François Pacquée, an action seeking, first, a ruling that the system of selecting judokas for international tournaments is unlawful because it is contrary to the principle of freedom to provide services and the freedom of sportsmen to pursue their profession, second — in the event that the national court considered it appropriate to refer a question for a preliminary ruling to the Court of Justice — the adoption of a delaying measure pending an answer to the question referred and third, an order requiring the defendant federations and the president of the LBJ to pay her BEF 30 million by way of compensation.

III — The questions referred

7. When making the order granting interim measures, the President of the Tribunal de Première Instance, Namur, sought from the Court of Justice a preliminary ruling (Case C-51/96), as to:

'Whether or not rules requiring professional or semi-professional sportsmen or persons aspiring to such status to have been authorised or selected by their national federation in order to be able to compete in an international competition and laying down national entry quotas for similar competitions are contrary to the Treaty of Rome, in particular Articles 59 to 66 and Articles 85 and 86.'

8. When required to give judgment on the substance of the case, the Tribunal de Première Instance, Namur, taking the view that there was a risk that the Court of Justice would declare the question referred in Case C-51/96 inadmissible, considered it appropriate to stay proceedings pending a preliminary ruling (Case C-191/97) as to:

'Whether or not it is contrary to the Treaty of Rome, in particular Articles 59, 85 and 86 of the Treaty, to require professional or

semi-professional athletes or persons aspiring to professional or semi-professional activity to be authorised by their federation in order to be able to compete in an international competition which does not involve national teams competing against each other.'

IV — Case C-51/96

9. The sports federations, the Belgian, Greek and Italian Governments and the Commission submit that the question referred in Case C-51/96 is inadmissible. They put forward three arguments in support of that view. First, they submit that the answer to the question concerned would be of absolutely no use to the national court. The proceedings for interim measures in which the question was submitted had come to an end when the matter was referred to the Court of Justice and the referring court had therefore ceased to be seised of the case. The point of law raised in the question referred relates to the substance of the case, in respect of which the court hearing the application for interim measures is not entitled to take action. Consequently, in accordance with the rule in *Pardini*, [4] the question referred should not be answered. The second argument in favour of inadmissibility is based on the content of the question. In particular, it states in effect that that question is manifestly hypothetical and unrelated to Community law, inasmuch as it concerns amateur sport. Finally, by way of the third plea as to inadmissibility, the aforementioned parties claim that the court making the reference has not adequately described the factual and legal circumstances in which the question arose. More specifically, in the absence of a full and clear explanation of the facts and law involved in the dispute, the Court of Justice will not be able to give a satisfactory answer to the question referred, especially as that question concerns complex legal issues such as those relating to Community competition law. [5]

10. I consider it appropriate to look more closely at the first of the pleas as to inadmissibility. According to *Pardini*, [6] the Court of Justice has jurisdiction to answer questions referred for a preliminary ruling in the context of proceedings for interim measures provided that the answer may be of use to the court making the reference. Conversely, 'the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated.' [7] Similarly, a national court hearing an application for interim measures cannot refer a question for a preliminary ruling with a view to assisting the national court which will have to dispose of the substance of the case. The Court clearly stated that '[i]t follows from both the wording and the

4 — Case 338/85 *Pardini* [1988] ECR 2041.

5 — Reference is made in particular to Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393.

6 — Cited in footnote 4 above.

7 — *Pardini*, cited in footnote 4 above, paragraph 11.

scheme' of Article 177 (now Article 234 EC) that 'only a national court or tribunal which considers that the preliminary ruling requested is necessary to enable *it* to give judgment may exercise the right to bring a matter before the Court'. [8]

11. Under Belgian procedural law, in particular Articles 584 and 1039(1) of the Code Judiciare (Judicial Code), an order granting interim measures does not constitute the final ruling but merely provides a temporary remedy in cases of urgency. A court hearing an application for interim measures cannot, in its decision, encroach upon matters which fall within the exclusive jurisdiction of the court dealing with the substance of the case. That prohibition is not in any way affected by the case-law of the Belgian Court of Cassation which permits a court hearing an application for interim measures to examine certain legal aspects of the dispute. [9] That right is granted within the very limited context in which courts hearing applications for interim measures operate, that is to say provisional settlement in cases of urgency.

12. In addition to referring a question for a preliminary ruling, the order for reference also provisionally settled the relationship between Ms Deliège and the sports federations concerned. The proceedings on the substance were initiated by Ms Deliège on 26 February and 1 March 1996 before the Tribunal de Première Instance, Namur, which has since had exclusive jurisdiction to rule on the substance. Accordingly, even if the court hearing the application for interim measures were to receive an answer to the question referred, it could not take any further action to apply Community rules to the relationship between Ms Deliège and the sports federations because, in so doing, it would have to address matters jurisdiction over which lies exclusively with the court required to give judgment on the substance. In other words, it would be acting in a manner detrimental to the main proceedings, in direct conflict with national rules of procedure.

13. It is therefore clear that, when the time came to answer the question referred for a preliminary ruling in Case C-51/96, the proceedings for interim measures which gave rise to that question had come to an end and the referring court had therefore necessarily exhausted its jurisdiction. Nor is it possible, in accordance with *Pardini*, [10] to answer the question referred merely in order to assist the national court required to give judgment on the substance. Indeed, it was for that very reason that, in view of the risk that the question referred might be dismissed as inadmissible, the court required to dispose of the substance of the case submitted a new question, this time in Case C-191/97. In the light of all those factors, I do not consider that there is any need to examine the substance of the question in Case C-51/96.

8 — *Pardini*, cited in footnote 4 above, paragraph 10.

9 — See, in particular, Cass. 9 September 1982, J.T. 1982, p. 727.

10 — Cited in footnote 4 above.

V — Case C-191/97

14. The sports federations, the Greek Government and the Commission argue in their observations that the question referred in Case C-191/97 is inadmissible, first, because it does not set out the legal and factual background to the case in sufficient detail to make a reply possible, second, because it does not relate to Community law, third, because any answer would infringe the rights of the defence of the IJF and the EJU which, although directly involved in the case, have not been able to express their views and fourth, because the question is hypothetical. The Netherlands and Italian Governments have also cast doubt on the admissibility of the question in their oral observations.

15. I believe that the question at issue is not of a hypothetical nature and that its subject-matter, as I shall explain later, [11] does not necessarily fall outside the scope of Community law. Furthermore, the assertion that the rights of the defence of the IJF and the EJU have been infringed must be rejected. First of all, an indirect examination of the conformity of rules with Community law in the context of an answer to a question referred for a preliminary ruling does not infringe the rights of the party responsible for those rules in such a way as to necessitate its being granted an independent right to defend itself against the Court's findings. Moreover, the Court does not have jurisdiction to examine the merits of the order for reference as regards the participation of the IJF and the EJU in the main proceedings. In so far as those federations are not parties to the proceedings before the national court, they do not have the right to submit observations before the Court. They can, however, avail themselves of the remedies available under national procedural law to challenge the decisions of the referring court, if they have been wrongfully excluded from the main proceedings.

16. It remains to be examined to what extent the Court of Justice has sufficient information regarding the legal and factual context within which it has been called upon to answer the question referred. I shall return to that point when examining the two specific issues raised in the question. The question concerns the compatibility of certain sports rules adopted by the EJU with Community law, from the point of view, first, of the Community provisions on freedom of movement and, second, of the Community rules on the protection of competition. The following examination will look at each of those two fundamental issues in turn.

A — *Application of the Community provisions on freedom of movement*

17. It is beyond doubt that, in principle, a sporting activity pursued in a strictly pro-

11 — See below, point 20 et seq.

fessional context is governed by the rules on freedom of movement. In particular, I would point out that, in *Bosman*, the provisions of Article 48 et seq. of the Treaty were applied to a professional sportsman engaged in gainful employment. The reasoning followed by the Court in that case can be transposed to professional athletes who excel in individual sports and who are comparable rather to providers of professional services, governed by Article 59 et seq. of the Treaty.

18. The above finding is not sufficient, however, to provide an answer to the question referred. The present case must be examined from two not entirely unconnected points of view. First, does Ms Deliège's sporting activity as a judoka fall within the scope of the relevant articles of the Treaty? In other words, does it exhibit the economic dimension necessary for it to be covered by the principle of freedom of movement? Second, even if the first question is answered in the affirmative, are the relevant sports rules adopted by the EJU with a view to restricting the number of potential participants in international tournaments contrary to Article 59 et seq. of the Treaty?

19. I shall answer those questions in the following points of my examination. Moreover, I believe that the elements of law and fact which are essential in order to address those questions in a satisfactory manner are already known to the Court, so that the arguments raised with regard to inadmissibility must be rejected.

(a) *The economic nature of Ms Deliège's activity*

20. The Court has held that 'sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty (now, after amendment, Article 2 EC)'. [12] It is therefore necessary to determine the extent to which Ms Deliège's practice of judo constitutes an 'economic activity'. If the answer is in the affirmative, Article 59 et seq. of the Treaty will, in principle, have to be applied.

21. This is the most important issue in providing a useful answer to the question referred. A finding that Ms Deliège is to be regarded as pursuing an economic activity enjoying the protection of Community rules will in itself lend considerable weight to her case in the main proceedings, irrespective of the Court's final ruling on the compatibility of the contested EJU rules

12 — See Case 13/76 *Donà* [1976] ECR 1333, paragraph 12; Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73.

with Community law. It should be noted once again that the purpose of my analysis is not to determine the extent to which Ms Deliège is to be regarded as a professional, a semi-professional or a person aspiring to professional or semi-professional activity. The question is whether the activity in question is or is not of an 'economic' nature.

(1) The arguments of the parties

22. Ms Deliège maintains that the participation of a high-level judoka (such as she) in major European tournaments constitutes an economic activity. That activity can be broken down into four different types of service. First, those which Ms Deliège provides to the tournament organisers, in so far as such competitions are entertainment events staged for spectators for remuneration which generate revenue from the sale of television broadcasting rights or from advertising. Secondly, the athlete herself is the recipient of services provided by the organisers, in so far as she has to pay a registration fee in order to take part in the tournaments. Thirdly, she provides services to her sponsors who, in return for financial consideration, conduct their advertising through their connection with the athlete. According to Ms Deliège, the fact that the income from sponsorship constitutes direct consideration not for her sporting success but for the promotion of her sponsors through advertising is not important because the sporting and advertising dimensions of her activity are indissociable. Fourthly, Ms Deliège submits that she provides to her federation and to its sponsors services for which she receives remuneration in the form of travelling expenses, bonuses and premiums.

Ms Deliège submits that the trilateral relationship between the sporting operators, the non-sporting operators and the athletes themselves is therefore characterised by the provision or receipt of various kinds of service. These are always cross-border services, whether because the suppliers or the recipients of the services are established in different Member States, [13] or because they are required to move from one Member State to another. [14] The services are generally provided 'for remuneration' within the meaning of Article 60 of the Treaty, as interpreted by case-law. [15]

Ms Deliège submits, finally, that her income from judo, in particular from sponsorship, and the financial aid paid by the Belgian federations enabled her to earn a living exclusively from that sport, at least until the incidents which gave rise to the

13 — Case 352/85 *Bond van Adverteerders* [1988] ECR 2085.

14 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

15 — See Case 263/86 *Humbel* [1988] ECR 5365, and Case C-275/92 *Schindler* [1994] ECR I-1039.

dispute currently pending before the national court.

23. The LFJ, the LBJ and Mr. Pacquée, on the other hand, contend that judo, at least as it is practised in Belgium, is a purely sporting and recreational activity which is not of an economic nature. In order for the contrary to be true, practice of that sport would have to guarantee an appreciable return, which is not so in the present case. Ms Deliège is not attached to the federation by any form of employment relationship and does not receive any other kind of remuneration for practising her sport. The LFJ describes the grants and travelling expenses as aid to improve sporting performance, comparable to that granted to a diligent student to finance his studies. The LBJ and Mr. Pacquée make the same analogy, drawing a parallel between amateur sport — their classification of judo — and State education. They also refer to *Humbel*, [16] from which they infer that an activity which is not pursued with a view to profit, but which aims to satisfy social and cultural aspirations, does not fall within the scope of Article 60 of the Treaty. The practice of judo, they submit, constitutes an activity of that kind in Belgium.

They further contend that any earnings from sponsorship — which, in the case of judo, are non-existent or marginal in any event — constitutes not 'remuneration' for the sporting activity but consideration for the provision of advertising services. They cannot therefore make the sporting activity as such economic in nature. In the same context, judokas cannot be regarded as recipients of services provided by tournament organisers. They are not asked to pay any financial consideration in order to take part in the events. Moreover, the tournaments are not profit-making; they are sometimes held without spectators or on a free-entry basis.

24. The Governments of most of the States which have submitted observations, and the Commission, take the same view as the Belgian judo federations. They conclude that there is insufficient evidence to support the view that, in the light of the conditions and the context in which it is pursued, Ms Deliège's sporting activity constitutes an economic activity within the meaning of Article 2 of the Treaty. They submit that there is no evidence of remuneration, that is to say financial consideration received by the athlete for practising judo, and that Article 59 et seq. of the Treaty are not therefore applicable. Only the Finnish and Netherlands Governments maintain that

16 — Cited in footnote 15 above.

Ms Deliège's situation may, under certain circumstances, fall within the scope of Article 60 of the Treaty.

(2) My views on the above issue

(aa) Preliminary observations

25. Resolution of the complex issues raised above requires a legal reading of the economic and social dimensions of contemporary sport. In order to answer the specific question referred, the Court will have to venture into uncharted territory, where its case-law will be of only partial assistance in that it relates only indirectly to the matters raised in the present dispute.

26. It should be stated to begin with that the fact that judo is in principle an amateur sport, as contended by the Belgian federations and most of the Member States, does not in itself exclude Ms Deliège's situation from the scope of Article 59 et seq. of the Treaty. Whether or not Ms Deliège's activity is economic will emerge from the particular characteristics of the activity itself, not from the sports federations' assertions regarding the image of judo today. Even if it is accepted that the present wish of the sport's governing bodies is to preserve its amateur status and to remove any form of professionalisation, that does not mean that, in certain cases, the practice of judo cannot be classified as an economic activity from the point of view of Community law.

27. Furthermore, such a legal approach cannot be objected to on the ground that it disregards the specific nature of sport and touches on questions and choices which fall within the exclusive competence of the sports federations. The right of association on which the federations rely in order to guarantee their self-regulation cannot be so absolute as to afford them complete immunity from Community law, thereby creating gaps in the Community legal order. Applied to the present case, the reasoning followed by the Court in *Bosman* [17] leads to the inevitable conclusion that, while freedom of association may be protected by Community law, it does not extend to excluding the activity pursued by Ms Deliège from the

17 — Cf paragraphs 79 and 80 of the judgment in *Bosman*, cited in footnote 12 above.
'As regards the arguments based on the principle of freedom of association, it must be recognised that this principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.
However, the rules laid down by sporting associations to which the national court refers cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof.'

scope of Article 59 et seq. of the Treaty, since the problem does not directly affect the exercise of that freedom. However, I shall return to the issue of the limits to self-regulation in sport later in my examination. [18]

(bb) 'Services' within the meaning of Community law

28. Before assessing the merits of the parties' assertions, I consider it appropriate to give a broad outline of the conditions under which an activity constitutes a 'service' within the meaning of Community law. Article 60 of the Treaty provides that 'services shall be considered to be "services"... where they are normally provided for remuneration.' The Court of Justice has clarified the concept of remuneration in its case-law.

29. In *Humbel* [19] and *Wirth*, [20] the Court held that 'the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service'. [21] On that basis, it held that courses taught under the national secondary education system or in an institute of higher education financed out of public funds cannot be regarded as consideration for teaching or enrolment fees which the students might have to pay.

30. However, the Court has by no means been strict in its interpretation of the concept of remuneration. In *Schindler*, [22] it held that lotteries fell within the scope of Article 60 of the Treaty, and that the sale of lottery tickets therefore constituted an economic activity, on the ground that 'a normal lottery transaction consists of the payment of a sum by a gambler who hopes in return to receive a prize or winnings. The element of chance inherent in that return does not prevent the transaction having an economic nature.' [23]

31. The Court sometimes shows a degree of flexibility even as regards the link that must exist between the provider of the service and the recipient, and between the remuneration and the services provided. The *Bond van Adverteerders* case [24] required an examination under Article 60 of the Treaty of the cross-border transmission by cable of television programmes containing advertisements. In the main, that activity involves four categories of person: the broadcasters of television programmes; the cable network operators; the adverti-

18 — See points 76 and 87 et seq. below.

19 — Cited in footnote 15 above.

20 — Case C-109/92 *Wirth* [1993] ECR I-6447.

21 — *Humbel*, cited in footnote 15 above, paragraph 17, and *Wirth*, cited in footnote 20 above, paragraph 15.

22 — Cited in footnote 15 above.

23 — *Schindler*, cited in footnote 15 above, paragraph 33.

24 — Cited in footnote 13 above.

sers; and the cable network subscribers as final recipients. The Court recognised that at least two separate services were involved: the first provided by cable network operators to broadcasters of television programmes; the second provided by broadcasters to advertisers. It also held that '[t]he two services in question are also provided for remuneration within the meaning of Article 60 of the Treaty. Firstly, the cable network operators are paid, in the form of the fees which they charge their subscribers, for the service which they provide for the broadcasters. It is irrelevant that the broadcasters generally do not themselves pay the cable network operators for relaying their programmes. *Article 60 does not require the service to be paid for by those for whom it is performed.* [25] Secondly, the broadcasters are paid by the advertisers for the service which they perform for them in scheduling their advertisements.' [26]

32. The Court's judgment in *Steymann*, [27] concerning the nature of activities performed by a person in his capacity as a member of a religious community, is also of interest. It was held in that case that work carried out within that community by its members, in so far as the work aims to ensure its economic independence, 'constitutes an essential part of participation in that community'; [28] consequently, the services provided by the community to its members 'may be regarded as being an indirect quid pro quo for their work.' [29] That judgment breaks new ground in that, first, the fact that the activity in question is pursued within a religious context does not prevent it from being recognised as economic in nature; secondly, general provision for the material needs of the members of the community (food, clothing, pocket money) constitutes remuneration within the meaning of Article 60 of the Treaty, even though it does not take the traditional form of financial consideration; and thirdly, the relationship between the services provided and the consideration for them may be indirect.

(cc) Ms Deliège's alleged earnings from judo

33. I shall turn now to examine each party's submissions concerning whether or not Ms Deliège performs an economic activity by providing services for remuneration. As stated above, Ms Deliège puts forward four types of service within the meaning of Article 60 of the Treaty as being directly linked to her sporting activity and to her participation in international tournaments in Europe. Unless the Court is minded to accept that the other three types of service which she says she provides do not meet the requirements of Article 60 of the Treaty, I do not consider it appropriate

25 — My emphasis.

26 — *Bond van Adverteerders*, cited in footnote 13 above, paragraph 16.

27 — Case 196/87 *Steymann* [1988] ECR 6159.

28 — *Steymann*, cited in footnote 27 above, paragraph 12.

29 — *Ibidem*, paragraph 12.

to examine her assertions regarding the services she claims to receive from the tournament organisers. [30] I shall look at the services which she allegedly provides, first, to the LFJ and the LBJ, secondly, to the competition organisers and, thirdly, to her sponsors.

34. As I see it, in order to be fully understood, the issue must be addressed primarily from the point of view of the earnings which Ms Deliège claims she has received or might receive for her participation in international judo tournaments. Do those earnings, if they exist, constitute consideration for certain services provided by Ms Deliège in the context of her sporting activities? If the answer is yes, I do not see why those activities could not be regarded as 'services' within the meaning of the Treaty. Furthermore, a general examination of the economic aspects of international competitions in which a high-level judoka may compete should not be overlooked.

35. In these circumstances, the analysis that follows falls into two parts: the first consists of a legal assessment of the financial and other aid which Ms Deliège has received from the judo federations in Belgium; while the second looks at the broader issue of sponsorship, irrespective of whether the sums in question are paid to Ms Deliège, to the competition organisers or to the judo federations.

(i) The aid paid by sports federations to high-level athletes

36. With regard to the services she says she has provided to the LBJ and the LFJ, Ms Deliège claims that she has received by way of consideration (or could have received, if she had carried on her activity unimpeded) financial aid in the form of grants, travelling expenses and bonuses. The defendants in the main proceedings, most of the Member States, and the Commission maintain that the aforementioned aid cannot be regarded as remuneration within the meaning of Article 60 of the Treaty and does not therefore constitute a financial reward for practising judo.

37. Let us therefore examine each of the arguments raised against Ms Deliège's assertions. Doubt has been cast first of all on whether a sum of money which is not paid by way of consideration under a contract of employment or any other contractual relationship between the athlete and the federation, and which has not been fixed by agreement between the two parties, may be classified as remuneration within the meaning of Article 60. It is

30 — I consider that, in the circumstances of this dispute, where the Court is asked to assess the validity of the way in which athletes are selected to participate in tournaments, the primary consideration is the extent to which those athletes are providers of services rather than recipients of services.

important not to be confined by the words used or by a strict interpretation of the concept of remuneration. In *Schindler* [31] and *Steymann*, [32] the Court made clear its intention to give that concept a substantive rather than a formal interpretation which might also be extended to the situation in this case, provided of course that that situation proves, on examination, to meet the criteria necessary in order for it to fall within the scope of Article 60. In other words, it remains to be determined whether the sums paid by the federations to Ms Deliège did in fact constitute consideration for the services provided, irrespective of the names given to those sums and/or the fact that there was no contractual relationship between the athlete and her federation.

38. That point forms the basis of the second argument put forward by Ms Deliège's opponents and primarily the defendant federations in the main proceedings. As has been seen, the federations submit that the mechanism of providing financial aid to athletes is intended solely to help them improve their performance, and therefore to ensure their development as athletes, in the same way as a State education system offers bursaries to pupils who excel at school. The fact that the federations are non-profit-making and that the aid they provide serves purely social and cultural purposes argues in favour of the non-application of Article 60 in the present case, as indeed the Court held with regard to State education in *Humbel* [33] and *Wirth*. [34]

39. For its part, the Commission points to another flaw in Ms Deliège's interpretation of the law: it observes that, under Article 60 of the Treaty, an activity constitutes a service only where it is 'normally' provided for remuneration. Accordingly, even if, at certain times in her sporting career, Ms Deliège has been remunerated for performing judo, that is not sufficient to bring her within the ambit of the freedom laid down in Article 59 et seq. of the Treaty, in so far as the practice of that sport cannot be regarded — on the present evidence and in the view of the Commission — as 'normally' securing remuneration.

40. The above arguments, which are contrary to Ms Deliège's views, are not without logic. They are, nonetheless, based on a potentially unsound generalisation. In the vast majority of cases, it is true, the practice of judo is not at all economic in nature and is not the concern of Community law. It is an entirely non-economic activity organised to promote educational, social and cultural aims connected with the ideals of sport. Is

31 — Cited in footnote 15 above.
32 — Cited in footnote 27 above.
33 — Cited in footnote 15 above.
34 — Cited in footnote 20 above.

this true, however, of all judokas, male and female, whatever the conditions under which they practise their sport? I think not.

41. The fact that an athlete in a so-called 'amateur' sport regularly receives from the governing bodies of that sport various forms of aid for good performance, which aid enables him to pursue his sporting career in the same way and under the same conditions as a professional — that is to say to earn a living from his sporting activity — argues in favour of a distinction being drawn between that athlete and other (purely amateur) athletes engaged in the same activity. The former athlete belongs to a special category which might be called 'high-level non-amateur athletes.' That special category is entitled to the guarantees which Community law accords to workers or to providers of services.

42. The first major problem of interpretation lies in defining that category. How is a distinction to be drawn between purely amateur athletes and those who are protected by the provisions of the Treaty? Clearly not every athlete who is highly successful or receives some form of subsidy or aid will necessarily fall within the 'non-amateur' category. It is useful here to draw between sport and State education a parallel which has already been referred to by the LFJ and the LBJ. A pupil or student who excels at school or university and receives bursaries or other forms of aid on account of his performance cannot be classified as a provider of services for remuneration. However, a scientist who, after obtaining his doctorate, is paid certain sums — whatever their names (grants, premiums, etc.) — by a university or other public body for working on a permanent basis as a researcher in the university's laboratories in order to undertake post-doctoral studies there must, whether or not he is classified as a post-doctoral student, be treated as an employee of the research department of an undertaking rather than as a student. I consider that 'non-amateur' athletes are in a similar intermediate legal position.

43. The criteria for defining the category at issue may be objective or subjective. I shall look first at the former, which are also the most reliable. A sportsman is a 'non-amateur' falling within the scope of Article 59 et seq. of the Treaty where his practice of sport, viewed objectively, must be treated in the same way as the practice of a profession, and therefore constitutes the regular pursuit of the funds necessary to support himself. Classification as such will depend primarily on the objective conditions of practice which the federation or some other institution attaches to the award of financial aid: daily training, other obligations requiring exclusive dedication

to the sport, substantial investment of time and effort, a high level of performance, and medals. [35] Furthermore, in order to be regarded as 'non-amateur', a sportsman must be subject to the conditions described above for a certain period of time, that is to say that there must be a degree of continuity in his activity. [36] Finally, the amount of aid received is not immaterial: travelling expenses and even benefits in kind which amount to more than an average salary constitute pay rather than aid awarded for purely sport-related reasons. [37]

44. The subjective criteria for assessing a sportsman's activities. First of all, there is the question whether he wishes to turn his sporting activity into a source of income. This is not a reliable criterion, however, and I do not think it should be taken into account, particularly in determining the nature of the aid paid to a sportsman by an amateur sports federation. Reference may also be had to the aim pursued in paying the aid. The federations maintain that the grants, premiums and assorted benefits are intended to enable an athlete to develop his sporting skills and do not constitute consideration for his performance. I consider, however, that the criterion of the aim pursued is not in general sufficient to invalidate the conclusions that emerge from application of the aforementioned objective criteria; in fact, if anything, it corroborates them. In my opinion, the aid paid to sportsmen in the special 'non-amateur' category is not aimed primarily at improving their performance, and the arguments raised in rebuttal appear, upon examination, to be incorrect, a point which, in my view, should be emphasised.

45. It is true that, because of the many forms in which the aid is granted, it is not always possible to determine its true purpose. [38] However, I believe that the regular payment of aid by federations to their champions often extends beyond the context of performance enhancement. A high-level athlete provides an important service to the sport's governing bodies. His success makes him an 'idol' for the young people the federation wishes to attract, a magnet for sponsors, and another argument for sports organisations to rely on when seek-

35 — It is worth noting that the conditions for receiving financial aid on a regular basis are laid down by the federations themselves in a general and abstract manner. They stipulate, for example, that athletes who can demonstrate a degree of success in competition and who follow a certain training regime are to receive periodic financial aid or remuneration in the form of lump-sum bonuses.

36 — This raises a difficult issue. Must a person's practice of sport be successful in order to exhibit an economic interest? In other words, does Community law protect only successful athletes? The answer is not obvious. I believe that some performance at a high level — a criterion which falls outside the scope of legal assessment — is essential, and that, without it, it is objectively clear that an athlete is not eligible for the aid which federations make available for champions. I do not, however, consider that 'high-level non-amateur athletes' who have obtained aid from the federation should be treated differently from athletes who, because of the circumstances under which they practise the sport and their results, may legitimately claim such aid.

37 — Caution must be exercised, however: while the large amount of the aid received supports the argument that the sporting activity is economic in nature, that does not mean that athletes who receive a negligible amount by way of aid do not pursue an economic activity solely because their income is low. The primary criterion remains the conditions under which they pursue the sporting activity in question.

38 — However, the premiums paid to champions in amateur sports after a major success (e.g. winning a medal in the Olympic Games) are clearly a reward for success rather than an aid to improve performance.

ing a larger share of publicly-funded subsidies. Sporting performance is a valuable commodity nowadays, money being present in all aspects of sport, not least because of television and sponsorship. Since sports federations are not external to those financial arrangements, which I shall examine in the next section,[39] many economic interests depend on the success of their athletes, which success must therefore, in certain cases, be regarded as a service 'normally'[40] provided as consideration for the regular payment of financial aid by federations to athletes.

46. In conclusion, the application of objective and (in the alternative) teleological criteria shows that, in certain cases, a group of athletes I have described as 'non-amateurs' provides to the governing bodies of a so-called 'amateur' sport services in return for which it receives various forms of material or financial aid on a regular basis. Those athletes pursue an economic activity which falls within the scope of Community law.

47. It remains to be determined whether Ms Deliège falls into the 'high-level non-amateur' category. That question is a matter for the national court, which appears to be inclined in principle towards an affirmative reply. And indeed support for an affirmative reply can be found in some of the evidence Ms Deliège has adduced before the Court, which shows that, up until her exclusion by the LBJ, she had been receiving financial aid to facilitate her preparation for the Olympic Games, some of which was even subject to tax.[41] Other evidence brought to the Court's attention, which has never been disputed, also shows that judo champions[42] in Belgium are paid a fixed monthly allowance by their federation;[43] similarly, if they win an Olympic medal, they receive a substantial premium.[44] Taking into account, therefore, the sums which Ms Deliège received or could have received for performing and regularly practising judo,[45] I believe that her pursuit of that

39 — Sport practised on a purely amateur basis does not need champions or any special support for them. It is the federations which establish mechanisms for granting aid to the best athletes and determine the conditions under which they may practise their sport. Through those mechanisms they encourage champions to see their sporting career as a means of earning a living.

40 — In reply to the Commission's argument in this respect, while judo does not 'normally' lead to remuneration, the fact remains that some judokas are 'normally' remunerated for their performance and their activity. More generally, I think that, nowadays, any Olympic-standard athlete 'normally' practises his sport, whatever that may be, for remuneration or with a view to obtaining remuneration.

41 — BEF 250 000 in 1993 and BEF 200 000 in 1994.

42 — Those who qualify for the 'high-level non-amateur athlete' category.

43 — Approximately BEF 30 000.

44 — BEF 1 000 000 for a gold medal, BEF 600 000 for silver and BEF 400 000 for bronze.

45 — The documents before the Court show that, in return for being guaranteed financial support from the judo federation, athletes who receive it must submit to significant obligations and undertakings. Failure to attend a number of training sessions is enough for an athlete to lose such benefits.

sport must be regarded as an economic activity within the meaning of the Treaty. That conclusion is corroborated by the analysis that follows.

(ii) The link between sport and economic life

48. Ms Deliège further maintains that she provides services, on the one hand, to her own sponsors[46] and, on the other, to the organisers of certain judo competitions, in particular international Category A tournaments. In response to that interpretation, (some of) the sports federations, the Commission, and most of the Member States contend, first, that the income and other earnings which Ms Deliège derives from her sponsors constitute remuneration for an advertising service which is clearly separate from her sporting achievements and, second, that there can be no question here of a provision of services to the tournament organisers, since those taking part in such tournaments do not receive any kind of remuneration from the organisers.

49. I consider that, in order to give a correct answer to the question of the extent to which Ms Deliège's sporting activity also constitutes an economic activity on account of the services which she claims to offer her sponsors and the tournament organisers, it is necessary, first of all, to undertake a more general analysis of the relationship between sport and economic life. By examining the form and strength of the link between business and sport, it will be possible to draw conclusions which will be useful in resolving this dispute, although the following basic rule can be established here and now: the closer the relationship between sporting activity and economic activity, the more the sporting activity will be subject to the rules of Community law on freedom of movement.

50. Two observations must be made before I continue. First, the purpose of the analysis is not to determine the extent to which certain activities connected with sport also exhibit an economic interest. This is self-evident in the case of activities such as the construction of sports facilities or the trade in sports goods. The aim of this analysis, however, is to ascertain whether sporting activity *per se*, that is to say sports events and sporting performance, is concerned not only with noble competition and other sporting ideals but also has an economic dimension. Secondly, I think it appropriate to point out that, in order for a sporting activity to be subject to the Community rules on freedom of movement, the economic dimension of that activity must not be merely marginal. In other words, the economic component of the sports event must be significant, that is to say quite distinctive and separate from the purely sporting aspect of the event. This is parti-

46 — Ms Deliège produced before the Court a sponsorship contract with a Belgian bank; she also states that she concluded a similar contract with a well-known motor manufacturer, which is said to have placed a car at her disposal in exchange for the provision of advertising services.

cularly so where the economic component of the sporting activity affects the sporting event as a whole, in the sense that, without it, the sporting event would be dramatically different, or could not take place at all.

51. Having made those preliminary observations, I can now examine the potential significance for the application of Community law on freedom to provide services of the fact that a sportswoman such as Ms Deliège has signed individual sponsorship contracts with a number of undertakings. I consider first of all that it is wrong to separate completely an athlete's performance and sporting activity from the advertising service he provides to his sponsors. Sporting performance and advertising services are in most cases closely linked and constitute two manifestations of the same activity. It is true that sponsorship, as a form of advertising, obeys its own rules and is not based solely on how well athletes perform in their sports. An athlete's external appearance, attributes and characteristics are also taken into consideration. It is therefore not inconceivable that, for reasons of advertising policy, the person called upon to lend his name to the product or undertaking being promoted will not be the champion but some other sportsman. Such exceptions aside, however, there is no doubt that advertising through sponsorship requires high-level athletes who are known to the general public precisely because of their participation in major sporting events. From that point of view, there is, in principle, a relationship of dependence between the advertising services which an athlete can provide and how well he performs in his sport. His future as an 'advertising idol' goes hand in hand with the success of his sporting career.

52. However, I do not believe that the above observations and the fact that a sportsman has his own sponsors are sufficient in themselves to make his practice of sport an economic activity. Athletes' economic expectations and the interest of entrepreneurs in their performance do not define the essence of sport. If the other factors involved in sporting activities (in particular the rules governing those activities and the organisation of competitions) were entirely unconnected with economics, athletes and their sponsors alone could not change the face of sport, in the sense that they themselves could not make sporting events any more economic in nature. For example, it used to be prohibited to derive any economic advantage from practising certain sports; sportsmen who chose to depart from that rule were excluded from major sporting events, in particular the Olympic Games. [47] At the time when that prohibition was actually enforced, nobody could have maintained that an athlete's participation in the Olympic Games was linked to the exercise of an economic activity.

47 — Other such examples can be found in the distinction formerly drawn between amateur skating and professional skating, as well as in the field of boxing.

53. However, the existence of personal sponsors, as in Ms Deliège's case, is not insignificant, particularly where other objective factors argue in favour of the contention that practice of the sport concerned may, under certain circumstances, exhibit a more general economic interest.

54. On that premiss, I shall now address an issue which, in my opinion, is crucial to a precise definition of the economic dimension of a sporting activity. I shall no longer be examining the individual conduct and subjective intentions of sportsmen, but the sporting event itself, viewed objectively, that is to say the specific characteristics of sporting competition. Indeed sportsmen can only be assessed by reference to the competitions they enter, their individual performances being largely meaningless unless combined with success in particular competitions in which they pit themselves against their rivals. The question therefore arises whether sporting activities — in the present case, international Category A judo tournaments — exhibit an economic interest. If the significance of the sports event does not relate purely to sport, in the sense that it does not merely represent confrontation and reward for being the best, but also exhibits an intrinsic economic interest, then the economic dimension of the sporting event is clearly such that the event in itself constitutes an economic activity within the meaning of Article 2 of the Treaty. Wherein, however, does that economic dimension lie? First of all, in the fact that spectators may have to pay to attend a sports event; secondly, in that a sports event may also become a television product which will generate substantial revenue for those who hold the television broadcasting rights; and, lastly — if not most importantly —, in that it may provide a framework for promotion through advertising, that is to say that it may become a means of providing advertising services. Those factors must be taken into account when considering the extent to which a sporting event constitutes an economic activity.

55. Common experience shows that economics are, as a matter of course, becoming an increasingly prominent dimension of sports events. The more important a sporting event is for the world of sport, the greater its economic dimension tends to be. A case in point is the Olympic Games and how they have changed in recent years. As well as being the most important sports event of all, the Games have also become a major television entertainment event and a leading vehicle for various forms of promotion through advertising; they therefore

represent a fundamental source of revenue for their organisers.[48] Furthermore, to come back to an idea I expressed earlier, the economic dimension of a sporting activity can also be measured by its impact on the purely sporting element of that activity. To take the example of the Olympic Games once again, it is no coincidence that professional athletes[49] are now allowed to compete as a means of attracting public interest, nor that new sports with no connection with Olympic history are regularly being introduced for exactly the same reason.

56. To return to our main focus of interest (judo competitions and, in particular, international Category A judo tournaments), certain factors incline me towards the view that, as well as being purely sporting events, such tournaments, or at least some of them, are television entertainment events and advertising products, since a large part of the budget for their organisation comes from sponsors or television broadcasting rights.[50] In its observations, the Commission disputes the significance of that finding and maintains that common experience shows that the economic value of judo competitions is not so high and could quite conceivably be regarded as marginal. There is, in fact, support for that view. On the basis of the above description, the term 'economic product' does appear to be more applicable to other sports, such as tennis or athletics, and sporting events other than Category A judo tournaments. The final decision on the matter rests with the national court, whose task it will be to carry out the examination necessary to make that determination. I, however, would not be quite so strict as the Commission in addressing the question whether certain judo events are to be regarded as economic in nature. I consider that, in Ms Deliège's case, the economic nature of the activity results from a combination of various factors. She has her own sponsors and wishes to take part in competitions which, as well as being sporting occasions, are entertainment events, products or services with a degree of economic interest.

48 — This also accounts for the fierce competition between cities bidding to stage the Olympic Games. In any event, the tarnishing of the sporting ideal as a result of the impact of economic interests on sport is not a uniquely modern phenomenon. In ancient times, by the end of the first century BC, the Olympic Games had lost much of their prestige; as it became increasingly common for those competing to be professional sportsmen, public interest turned away from traditional athletics to equestrian sports, at which the rich excelled and spent large sums of money maintaining their stables. Nevertheless, professional sport is not necessarily a sign of decadence. Even in classical times, the heyday of the Olympic era, many of the athletes who took part in the Games were in fact professionals financed primarily by the city they represented. In addition to the olive-tree crown (a wild olive-tree branch) presented to them at Olympia, athletes enjoyed a number of material advantages, such as being fed at public expense and being exempt from public charges, etc. In Athens, Solon had fixed the amount of the bonus for an Olympic champion at 500 drachmas, a sum sufficiently large to put him in the highest social class (those with an income of five hundred or more measures of cereals, or *méthimnos*). In other even richer cities in Southern Italy, the amount of the bonus could be as high as five talents, an enormous sum for the time, given that Solon had fixed the value of the Attic talent at 6 000 drachmas. In summary, the phenomena which the Court has been asked to examine in the present case (the interrelationship between amateur and professional sport and sponsorship in sport) date back to antiquity. See, for example, H. Daremberg and E. Saglio, *Dictionnaire des Antiquités Grecques et Romaines*, Vol. IV, Graz, 1963, p. 182, 1st Edition, Paris 1907; N. Yialouris, *History of the Olympic Games*, Ekthotikí Athinón (Athens Publishing House) 1976, p.108 ff.

49 — In particular in sports such as football and basketball.

50 — This is true at least of the judo tournament in Paris, according to the information which Ms Deliège has supplied to the Court, and which has not been called into question by the other parties.

57. Let us therefore examine Ms Deliège's circumstances in greater detail: by participating in Category A judo tournaments, she is said to provide services to the holders of the television broadcasting rights and/or to those who use such events for advertising purposes; the intermediaries for the services are the tournament organisers who, as such, obtain revenue from the television broadcasting rights and from advertising. It is true that Ms Deliège does not receive any remuneration direct from the recipients of her services, but she does receive, by way of consideration from the organisers, the right to participate in those tournaments; by participating, she satisfies her sponsors and is then rewarded by them in various ways. The fact that this is not a provision of services in its traditional form — whereby the supplier provides a service direct to the recipient and is remunerated by him — should not necessarily lead us to the conclusion that the relationship between athletes, tournament organisers and television broadcasters or advertisers, as described above, does not fall within the scope of the Community rules on freedom to provide services. Those rules were introduced to cover complex situations of this kind also.

58. I think it appropriate to refer in this respect to the Opinion of Advocate General Mancini in *Bond van Adverteerders* [51] which, it will be recalled, concerned the distribution by cable network of television programmes containing advertising. Interpreting Articles 59 and 60 of the Treaty and the case-law of the Court, the Advocate General concluded that, in order for 'a service' to exist, the provision of the service did not have to give rise to payment on the part of the recipient. He also pointed out that 'in making these observations it is not my intention to deny that the participants in the broadcasting, transmission and reception of a signal — the broadcaster, the advertiser, the owner of the satellite, the cable operator, the viewer — pursue an economic interest or, in other words, that the supply of the service has an economic aspect. I simply wish to point out that, *precisely because manifest interests are at stake, the supply of services does not cease to be economic in nature where, as in this case, no transfer of money takes place between the broadcaster and the viewer.* [52] Indeed, in my opinion, the supply of the service may still be economic in nature even where there is no remuneration at all (as in the case of charitable programmes in which well-known sportsmen or actors take part...)'. [53]

59. Applying the above observations to Ms Deliège's case, the conclusion can be drawn that the economic nature of her activity is not in any way affected by the fact that she does not appear to be remunerated for her services in international judo tournaments by the tournament organisers, their sponsors, or the holders of the television broadcasting rights. To reiterate the view expressed by Advocate General Mancini,

51 — Cited in footnote 13 above.

52 — My emphasis.

53 — Point 8 of the Opinion of Advocate General Mancini in *Bond van Adverteerders*, cited in footnote 13 above.

where the interests at stake are many and complex, as indeed they are in the case of the sporting events referred to by Ms Deliège, the economic nature of the activity may derive from other factors, even if no transfer of money takes place between the provider and the recipient of one of the many services involved.

60. To recapitulate, it is my opinion that the participation of a high-level non-amateur sportswoman with her own sponsors in international tournaments which involve not only sport but also constitute an economic event amounts to the exercise of an activity which would 'normally' be economic in nature. She is in principle protected by Community law and, in particular, by the rules on freedom to provide services. I have yet to examine whether the rules governing the conditions for participating in the tournaments in question fall within the scope of Article 59 and, if so, to what extent they are compatible with that article.

(b) Conformity of the contested EJU rules with Article 59 et seq. of the Treaty

61. Assuming, on the basis of the foregoing considerations, that Ms Deliège's practice of judo, precisely because of the special conditions under which it takes place, constitutes an economic activity and is therefore protected by the Treaty, the question arises as to the extent to which the EJU rules on the basis of which Ms Deliège was excluded from certain international tournaments are compatible with the primary Community rules on freedom to provide services. Under the EJU rules, men and women are selected for certain international tournaments in accordance with two basic principles: first, national federations have exclusive responsibility for selection; and, secondly, the number of sportsmen and sportswomen who can be put forward by each national federation is limited to one (or, exceptionally, two) per category.

62. The EJU rules must be examined from two angles: first, it is essential to determine the extent to which they fall within the scope of Article 59 of the Treaty or — inasmuch as they relate purely to sports matters — whether they fall completely outside it. Secondly, in the event of a negative answer to the latter question, it will be necessary to examine those rules from the point of view of the conditions and restrictions imposed by Article 59 of the Treaty. The question will then arise as to the extent to which the system for selecting athletes is valid and does not constitute an obstacle to freedom to provide services.

(1) Exclusion of the application of Article 59 to the contested rules

63. There are two possible legal bases for the argument that the EJU rules are not subject to the requirements of Article 59, which I shall examine below.

(aa) The rule in *Keck and Mithouard*

64. The Danish and Norwegian Governments maintain that, in accordance with *Keck and Mithouard*[54] and *Alpine Investments*,[55] the question of the applicability of Article 59 of the Treaty in the present case does not arise. They submit that the contested measures adopted by the EJU do not in themselves impede access to the provision of services (assuming of course that participation in the judo tournaments in question constitutes such a 'service' in Ms Deliège's case), but affect only the way in which those services are provided. Measures which relate to the 'manner of providing' a service — such as those which, without discrimination, govern the 'selling arrangements' for a product — do not fall within the scope of Articles 59 and 30 of the Treaty (now, after amendment, Articles 49 EC and 28 EC).

65. Certain sports rules can indeed be excluded from the scope of the Community provisions relating to freedom of movement, on the basis of the rule established in *Keck and Mithouard* and *Alpine Investments*. This is at odds, however, with *Bosman*. According to *Bosman*, rules governing the transfer of professional footballers 'directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 30 of the Treaty'.[56]

66. I take the view, however, that, despite the assertions to the contrary by the Danish and Norwegian Governments, the EJU rules at issue do not relate merely to the way in which a service is organised, but are concerned directly with the question of access to that service. Both the rule concerning 'one (or two) sportsmen or sportswomen per category' and the principle that participants in certain international competitions should be selected by the national federations alone apply directly to access for 'high-level non-amateur athletes', such as Ms Deliège, to the market in services in other Member States. The rule in *Keck and Mithouard* should not therefore be applied in the present case.

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

55 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

56 — *Bosman*, cited in footnote 12 above, paragraph 103.

(bb) The rules which derive from the particular nature of sport

67. Most of the Member States and the sports federations contend that the contested EJU rules are not subject to the application of the Community freedoms because they relate purely to matters of sport.

68. The particular nature of sport has indeed been accepted by the Court as grounds for excluding application of the principle of free movement. In *Donà*, it was expressly held that the provisions of Community law on freedom of movement for persons and freedom to provide services 'do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries'. [57]

As long ago as *Walrave and Koch*, the Community judicature held that the composition of national teams 'is a question of purely sporting interest and as such has nothing to do with economic activity.' [58] The above findings were confirmed in *Bosman*, where the Court recognised that the Community provisions on freedom of movement for persons and freedom to provide services 'do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches.' [59] It must be stressed, however, that this restriction on the scope of Community law 'must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.' [60]

69. The following conclusions can be drawn from the above case-law. First, certain rules or practices relating to sport do not fall within the scope of Article 59 of the Treaty. Secondly, in order for that exception to apply, the rules or practices in question must be justified by specific, non-economic reasons which relate purely to sport; the organisation of matches between national teams is a prime example of such a reason. Thirdly, the gap created in the application of Community law is clearly delimited; departures from Community obligations may not exceed the purpose for which they are created.

70. I shall now apply the above rules to the facts of this case. The first argument that could be put forward in favour of upholding the contested decisions of the EJU is their ultimate objective. They were

57 — *Donà*, cited in footnote 12 above, paragraph 14.

58 — *Walrave and Koch*, cited in footnote 12 above, paragraph 8.

59 — *Bosman*, cited in footnote 12 above, paragraph 76.

60 — *Ibidem*, paragraph 76.

intended to serve as the basis for selecting the national teams which would represent Europe in the Atlanta Olympic Games. More specifically, the international Category A judo tournaments to which Ms Deliège refers involved competition not only between individual sportsmen but also between national teams, the first prize being the right to send athletes to the next Olympic Games. Even though national teams were not competing directly against each another in those tournaments, the outcome of the tournaments was nevertheless vitally important to each of the European national teams. Similarly, the composition of the European national teams which would have the honour of attending the greatest international sports event of all, the Olympic Games, is a purely sporting matter which, in principle, has no economic dimension.

71. Consequently, the central aim of the contested EJU rules was the selection of national teams for Atlanta. Logically, those rules are premised on the need to send to Atlanta the best national teams in Europe. The best teams are those made up of the athletes who have performed best in their sport. That is why selection at European level is based on athletes' success in certain international tournaments and in the European championships. Two questions remain, however. First, was it essential to make the national federations exclusively responsible for deciding which athletes would take part in the international tournaments at issue? Secondly, was it necessary to restrict the number of athletes which each national federation was entitled to enter for the tournaments? Those are the questions I shall answer below.

72. As far as the first question is concerned, it must be observed that, in accordance with standard practice throughout the world, the success or failure of a country's national team in a particular sport lies in the hands of the national federation responsible for that sport. National federations have been entrusted with a task in the public interest, which consists in managing and promoting the interests of national teams so that they achieve the highest international honours. It is widely recognised that the highest honour for a national team is to be selected for the Olympic Games, that is to say for athletes wearing the national colours to represent their country there. Accordingly, since national teams were necessarily selected on the basis of performances in international Category A judo tournaments, it was quite logical that national federations should be given the exclusive right to decide which athletes would take part in those tournaments. The very essence of the system would clearly be undermined if national judo federations were allowed to bear the responsibility for promoting the interests of the national team in that sport but could not themselves choose the sportsmen or sportswomen they considered capable of defending those interests. Moreover, it is essential that participants be selected exclusively by the national federations. The effect of introducing a different system enabling athletes to enter international tournaments individually, as Ms Deliège wishes, would be to upset the balance between national federa-

tions, inasmuch as they would no longer each be represented by the same number of athletes.

73. That observation brings me to the answer to the second question. When defending the interests of their national teams with a view to selection for the Games, national federations must be afforded the same opportunities. Accordingly, in order to ensure that they compete on equal terms, the EJU considered it appropriate, first, to grant national federations the exclusive right to select athletes for international Category A tournaments and, secondly, to restrict the number of participants from each federation to one or two sportsmen or sportswomen per category. It is certainly not for the Court to consider the scope for increasing that number to three, four or more athletes per category.

74. In the light of the foregoing, it is my opinion that the contested EJU rules introduce provisions which are justified on 'non-economic grounds which relate to the particular nature and context of certain matches.' Consequently, the Community provisions on freedom to provide services are not applicable. Nor does the restriction on the scope of Article 59 exceed its purpose, which is to preserve the sporting ideal of noble competition between States.

75. It should again be noted that highlighting that dimension of sport appears to have been one of the concerns of the Community's constitutional legislature during the discussions leading to the conclusion of the Treaty of Amsterdam. [61] In Declaration No 29 on sport, the Conference 'emphasises the social significance of sport, in particular its role in forging identity and bringing people together.' Nor is it a coincidence that the same declaration recognises the need to listen to sports associations when important questions affecting sport are at issue, and to give special consideration to the particular characteristics of amateur sport.

76. In summary, Community law recognises sporting authorities as having limited powers of self-management and self-regulation on non-economic questions relating to the particular nature of sport. It is my view that, in adopting the contested rules, the EJU did not exceed that limited power of self-management and self-regulation. The question of the application of Article 59 of the Treaty does not therefore arise.

(2) Examination of the contested EJU rules in the light of Article 59 of the Treaty

77. In the alternative, in the event that the contested sports rules are not inherently

61 — I believe that reference to the Treaty of Amsterdam, even though it did not enter into force until 1 May 1999, is useful because it reveals the intentions of the Member States and the Community institutions with regard to the prospects for further European unification.

exempt from Article 59, it is appropriate to make the following observations.

78. It should be pointed out first of all that, contrary to what Ms Deliège maintains, the EJU rules do not appear to give rise to discrimination. Ms Deliège claims that the rule restricting the number of judokas per category who may take part in international Category A tournaments creates a restriction which has discriminatory effects. Such discrimination is certainly not based directly on the nationality of the athlete, since national federations can accept athletes of other nationalities for Category A judo tournaments, provided that they are registered with the relevant federations and have a licence issued by them. However, Ms Deliège sees this as a potential source of discrimination based on the place where the athlete is established, which discrimination is prohibited by Community law.

79. In my opinion, that assertion is incorrect. The quantitative restriction imposed by the EJU applies to all judokas in Europe, irrespective of their nationality or their place of establishment. Ms Deliège would be subject to exactly the same restrictions relating to selection for international Category A judo tournaments, whatever her nationality or place of establishment.

80. That finding does not necessarily mean that the contested sports rules are compatible with the requirements of Article 59 of the Treaty. It is very clear from the case-law of the Court that Article 59 relates not only to discriminatory restrictions, that is to say restrictions which provide for different treatment detrimental to the provider of services by reason of his nationality or the fact that he is established in a Member State other than that in which the services are provided. Article 59 also covers restrictions which do not give rise to discrimination. I refer in particular to *Säger*, [62] which states that 'Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State'. [63]

81. From that point of view, it must be recognised that, first, by limiting the number of judokas allowed to participate in international Category A judo tournaments and, secondly, by granting national sports federations the exclusive power to select those judokas, the EJU rules create obstacles capable of precluding or impeding the freedom to provide services enjoyed by

62 — Case C-76/90 *Säger* [1991] ECR 1-4221.

63 — *Säger*, cited in footnote 62 above, paragraph 12. See also Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007; *Alpine Investments*, cited in footnote 55 above; and *Schindler*, cited in footnote 15 above.

'high-level non-amateur athletes.' [64] Those obstacles therefore constitute restrictions on the freedom to provide services which are in principle contrary to Article 59 of the Treaty.

82. It remains to be examined to what extent the restrictions on the freedom to provide services imposed by the EJU rules are consistent with the rules of the Treaty. The Court has consistently held [65] that obstacles to freedom of movement can be tolerated by the Community legal order where the following conditions are met: firstly, where a derogation is expressly provided for by Community law, as in the case of Article 56 of the Treaty (now, after amendment, Article 46 EC), concerning national rules justified on grounds of public policy, public security or public health; and, secondly, in the case of measures which, without giving rise to discrimination, are justified by overriding needs in the public interest, are appropriate to the attainment of the aim pursued and are not binding beyond the degree necessary for the attainment of that aim. The EJU rules were not adopted on grounds of public policy, public security or public health. Nevertheless, they may be objectively justified by another overriding need in the public interest. It is therefore appropriate to apply the set of criteria developed by the Court in its case-law in order to determine whether the obstacles imposed by the EJU rules can or cannot be tolerated by Community law.

83. What therefore might justify the existence of the EJU rules? On the basis of the arguments put forward by the parties, I consider that the following three points should be emphasised in this respect.

84. First, I have already referred to the relationship between the contested sports rules and the selection of the European national teams for the Atlanta Olympic Games. Even if it is not accepted that those rules do not fall entirely outside the scope of Article 59, inasmuch as they relate to particular matches between national teams, the fact remains that they are objectively justified in so far as they apply to Member States' national judo teams. Allow me to explain. The pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services. In order to meet that overriding need, it is possible to grant certain powers to the sports teams or to the national sports federations, which are also exclusively responsible for selecting national teams. One such justified prerogative is to confer on judo federations the exclusive right to select the sportsmen and sportswomen who will take part in international Category A judo tournaments. I also believe that the introduction of a mechanism for selecting the best

64 — For the definition of this category, see point 41 et seq. above.

65 — See *Alpine Investments*, cited in footnote 55 above; *Säger*, cited in footnote 62 above; *Collectieve Antennevoorziening Gouda*, cited in footnote 63 above, and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069.

national teams to represent Europe in the Atlanta Olympic Games may be treated as an overriding need in the public interest, the meeting of which justifies certain measures restricting access for judokas to international tournaments. It was the exclusive responsibility of the EJU to devise arrangements for selecting European national teams for the Atlanta Games. By adopting the contested rules, the EJU took the measures necessary to perform that task. That is why the rules in question constitute a legitimate restriction on the freedom to provide services.

85. A second point which must be emphasised is the representativeness ensured by the contested system for selecting participants in Category A judo tournaments. Through the sports rules which it has chosen, the EJU promotes a particular form of tournament which ensures that the widest possible range of European countries are represented. In other words, it enables sportsmen from every Member State of the EJU to take part. It thus strengthens the position of countries in which judo is less developed, first, because judokas from those countries are able to take part in high-level competitions to which they would not have access if the sole criterion were their performance, and, secondly, because it raises the awareness of the country's sports fans, who would otherwise be indifferent to judo because of their national judokas' poor performance. In other words, the idea of representativeness also includes the need for balanced development of the sport at pan-European level; that need is directly linked to the ideal of noble competition which is, or at least should be, espoused in sport. Accordingly, the restrictions on access to certain international tournaments which are imposed on judokas in order to make those tournaments more representative and, by extension, in the interest of the balanced development of the sport at pan-European level, are justified, even if they may be equivalent to restrictions on the freedom to provide services.

86. In response to that interpretation, Ms Deliège submits that the objectives, first, of selecting the best national teams for the Atlanta Games, and, second, of organising as many representative international judo tournaments as possible, do not require protection so absolute as to justify the restrictions imposed by the contested rules. Indeed, a less restrictive system based on more objective criteria such as each athlete's individual track record and ability, without any prior involvement by the federations, could, in her view, be created. Ms Deliège believes that such a system would be easy to operate, particularly in individual sports such as judo. In that regard, she cites the example of tennis, the organisation of which reflects an ideal combination of the promotion of the general interests of the sport and the protection of the economic and professional interests of the athletes.

87. Ms Deliège's reasoning is unacceptable because it disregards both the importance of the particular nature of sport and the limited extent to which Community law may intervene in the practicalities of sporting activity. This brings me to the third point in my observations on this matter. Community law does not require sport to

develop in a particular direction, in the sense that it does not demand that individual sports become fully commercialised or fully professional. On the contrary, in principle, it respects the choices made by the governing bodies of each sport, who are also the legitimate representatives of its practitioners, its fans and anyone with an interest in it generally. The Community legal order merely prohibits the commercialisation or professionalisation of sport in breach of the rules of the Treaty. I take the view, in other words, that the right of self-regulation which sport enjoys and to which I referred above is protected by Community law. It ensures that sporting institutions have the power to promote a sport in a manner which they consider to be most consistent with their objectives, provided that their choices do not give rise to discrimination or conceal the pursuit of economic interests. Accordingly, any decision by sporting institutions which has as its exclusive aim or objective the promotion of the social dimension of sport, over and above any intention of an economic nature, is in principle justified, even where it entails a restriction on Community freedoms. This is dictated by the need to guarantee sport's right of self-regulation.

88. In conclusion, it has been seen that, even in a so-called 'amateur' sport, there is scope for application of the principles of freedom of movement for persons and freedom to provide services. That does not in any way mean, however, that such a sport must become purely professional, in the sense of being fully comparable to a professional activity. Indeed, very few sports can be classified as purely professional or purely amateur. It is the governing bodies of a sport which have the last word in determining whether it is predominantly professional or amateur. In any event, the contested EJU rules cannot be regarded as contrary to the Community rules on freedom of movement or freedom to provide services.

B. *The EJU rules in the light of Articles 85 and 86 of the Treaty*

(a) *The arguments of the parties*

89. According to Ms Deliège's observations, any judoka may be regarded as an undertaking within the meaning of Article 85 of the Treaty, in so far as he provides services or at least participates in the provision of services. By the same token, the judo federations constitute associations of undertakings or autonomous undertakings in so far as they pursue economic activities. Consequently, the contested EJU rules must, in her view, be regarded either as a decision of an association of undertakings or as an agreement between undertakings, and Article 85 of the Treaty should therefore be applied.

90. Ms Deliège claims, next, that the contested rules have at least the potential

to produce a significant impact on intra-Community trade, in so far as judokas cannot move freely within the common market in order to provide their services there; the market associated with judo is under the absolute and exclusive control of the sporting federations. Ms Deliège submits that the contested EJU rules restrict competition both on the market in judo tournaments and on the market in advertising services provided within the context of such tournaments. More specifically, the restriction on the number of athletes allowed to take part in international Category A judo tournaments precludes the participation of athletes from countries where that sport is highly developed. Accordingly, the restriction on competition adversely affects the quality of the services provided in the sector of judo tournaments. Furthermore, the contested rules allow federations to control competition within the sport in a permanent and unlawful manner which precludes the participation of a greater number of athletes.

91. Ms Deliège also observes that only the Commission has the power, under Article 85(3) of the Treaty, to grant an exemption by virtue of which the contested sports rules would cease to infringe the Community provisions on competition. However, no such exemption has as yet been requested and, in Ms Deliège's opinion, could not in any event be granted in respect of agreements or practices affecting Article 59 of the Treaty.

92. As regards Article 86, Ms Deliège has endeavoured to define the market in question. It is (in her submission) the market in judo services provided at international judo tournaments not involving competition between national teams. Geographically, the market covers the whole of the European market on which the EJU rules apply and, in any event, the Belgian market. Ms Deliège maintains that the LBJ holds a dominant position on the Belgian market, while the EJU holds a dominant position on the European market. She submits that the LBJ and the EJU abuse their dominant positions by imposing rules which deny certain athletes access to the financial resources which they could derive from practising their sport. According to Ms Deliège, the abuse lies in the fact that the federations do not merely regulate matters relating to the practice of judo, but also determine in a way which is unlawful the conditions governing access to tournaments. First of all, the right of selection enjoyed by national federations could be deemed comparable to the imposition by an undertaking in a dominant position of different rules of cooperation to the detriment of its business partners, namely sportsmen. Secondly, the effect of restricting the number of judokas taking part in international Category A tournaments is to apply different conditions to the provision of equivalent services. Ms Deliège considers such conduct to constitute abuse inasmuch as it adversely affects intra-Community trade and restricts free competition; she refers in this respect to her submissions relating to Article 85 of the Treaty.

93. The LFJ, the LBJ and most of the Member States reject the premiss that this

dispute may fall within the scope of the Community rules on competition. They submit that not only can a judoka not be regarded as an undertaking, but also that judo federations or associations cannot be classified as undertakings or associations of undertakings, because their objective is not the pursuit of economic interests but the promotion of social and cultural ideals such as noble competition and the development of sport. In any event, even assuming that a judoka could be regarded as an undertaking, that would not be so in Ms Deliège's case; furthermore, even if an athlete such as Ms Deliège were deemed to have the status of an undertaking by virtue of sponsorship, that would not be sufficient for the federations to be classified as associations of undertakings, inasmuch as athletes are not attached to those federations as providers of advertising services, but because of their status as athletes. In other words, since judo federations have no commercial or economic objectives, they cannot be regarded as undertakings or associations of undertakings, even if certain judokas may be classified as undertakings.

94. Furthermore, the above parties draw attention to the fact that the application of Article 85 presupposes the existence of effective competition and the risk of a barrier to intra-Community trade. As the sports federations and most of the Member States point out, those conditions are not fulfilled in the present case. In any event, the rules for selecting athletes to take part in tournaments, which are based exclusively on objective and non-discriminatory sport-related criteria, are consistent with the principles of free competition. For the same reasons, it cannot be maintained that the sports federations in question occupy a dominant position which they abuse.

95. The Spanish Government takes an intermediate view. It observes first of all that, while it is true that athletes belonging to sports federations may be regarded as undertakings or associations of undertakings, the determination of whether or not that is so must be based on objective criteria and a close examination of each dispute. As far as the present case is concerned, there is no evidence to show that the adoption of the contested rules by the EJU is in fact equivalent to the pursuit of an economic activity capable of giving rise to the application of the Community competition rules. In any event, the Spanish Government adds, it is not clear that the contested rules do, or could, appreciably affect trade between Member States or restrict competition to an unjustified degree.

96. The need for an ad hoc assessment of the present case is also highlighted by the Netherlands Government, while the Norwegian Government states that, in assessing sports legislation with reference to the competition rules, regard must also be had to questions such as sponsorship, advertising and the distribution of earnings. On the basis of those criteria, it must be

examined to what extent the contested EJU rules affect trade between States and competition. The Norwegian Government does not automatically rule out the possibility that sports legislation may lead to results which are contrary to the requirements of Article 85(1) of the Treaty. It considers it important, however, to examine also the extent to which the relevant sports rules may be regarded as justified by their purpose.

97. Finally, the Commission points out that the possibility cannot automatically be ruled out that the prohibitions laid down in Articles 85 and 86 of the Treaty may also be applicable to sports provisions which regulate or organise the selection of athletes for participation in tournaments on the basis of unobjective and discriminatory criteria. Selection which is based on results or introduces objectively justified restrictions, on the other hand, does not infringe Community competition law as long as it is not disproportionate to the purpose for which it is intended.

(b) My position on the above issue

98. The Court has not yet stated its position on the direct impact which the Community competition rules may have on sport. In *Bosman*,[66] the Court considered it appropriate not to answer the referring court's questions as to the compatibility with the Community competition rules of certain rules of the Union of European Football Associations (UEFA) concerning the transfer of professional footballers. However, Advocate General Lenz made some very interesting points on that issue in his Opinion in that case, from which it follows that the provisions of Article 85 et seq. of the Treaty are applicable to sport.

(1) Admissibility

99. As far as this case is concerned, the Court's task is not to give a hypothetical answer to the question referred but to provide the referring court with guidelines which will be useful to it in resolving the dispute in the main proceedings. I am afraid, however, that this is not possible in the present case. The examination of an activity from the point of view of Community competition law must be preceded by the combined analysis of a large amount of complex legal and factual data in order to be able to determine which (if any) undertakings are involved, what form they take, what the particular market conditions are, what (if any) level of intra-Community trade is involved, whether there is a dominant position, whether the conduct in question constitutes abuse and, finally, what effect the contested act or practice has on competition. That information, which is essential in order to determine satisfactorily to what extent the contested

66 — See footnote 12.

EJU rules are contrary to Articles 85 and 86 of the Treaty, has not been furnished to the Community judicature by the referring court. The latter confines itself to vague and general observations on whether the contested EJU rules are in conformity with competition law. It is therefore clearly impossible to give a satisfactory answer to the question referred.

100. Certain aspects of the position I have taken may be open to question. It is ultimately debatable whether the same question may be addressed from the point of view of Article 59 et seq. of the Treaty, but not from the point of view of Article 85 et seq. There is, however, an essential difference between the rules on freedom to provide services and those on the protection of competition. In the first case, the point of law is examined in its *individual* dimension: the question is whether the relationship between certain persons is that of supplier and recipient of a 'service' within the meaning of Community law. It is therefore sufficient to ascertain the extent to which a sportswoman provides services only for remuneration in order to determine whether the articles of the Treaty relating to freedom to provide services are in principle applicable to her. An activity examined from the point of view of the rules on competition, on the other hand, must be considered in its overall *institutional* dimension. The examination focuses not on the assessment of an individual activity but on the description and delimitation of a global *market*. Defining the market conditions and the overall conduct of all those trading on it is clearly a more complex affair than ascertaining whether, in a particular case, there is a provision of services within the meaning of the Treaty. Similarly, the issues of fact and law of which the Community judicature must be aware in order to give a correct and satisfactory answer to a question relating to competition law are quite clearly more numerous than those which must be taken into account in order to deal with a case concerning the Community rules on freedom of movement.

101. The Court has already noted, in its judgment in *Telemarsicabruzzo*,[67] the increased need to define and analyse the facts in the main proceedings in order to make it possible to answer questions relating to Community competition law. In that case, it held that: '[i]t must be pointed out that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the field of competition, which is characterised by complex factual and legal situations.'[68]

102. Consequently, in the absence of sufficient factual and legal information to make a satisfactory answer possible, I believe that the contested EJU rules cannot be examined in the light of the Community competition rules. In particular, it is not clear how many

67 — Cited in footnote 5 above.

68 — *Telemarsicabruzzo*, cited in footnote 5 above, paragraphs 6 and 7.

judokas practise their sport by way of an economic activity, and it is therefore impossible to determine how many undertakings are supposed to be operating on the relevant market. Nor do we know the precise extent of the economic activity (if any) pursued by the national judo federations, the EJU or the organisers of international judo tournaments. Furthermore, the questions concerning the existence of intra-Community trade in the field of international judo tournaments, the effects of the contested EJU rules on such trade and their effect on competition generally can only be answered hypothetically, an approach which does not by any means provide the national court with a useful and satisfactory reply.

(2) Substance

103. As an entirely secondary submission, however, I shall make a number of points below as regards the extent to which the contested EJU rules are contrary to Community competition law.

104. First of all, it is my view that any judoka in the 'high-level non-amateur' category — as described above — must be regarded as an undertaking within the meaning of Article 85 of the Treaty. That term 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.' [69] By extension, the national judo federations and the EJU may be regarded as associations of undertakings within the meaning of Article 85. As Advocate General Lenz rightly observed in his Opinion in *Bosman*, [70] that conclusion is not affected by the fact that members of national federations include not only 'high-level non-amateur athletes', but also a large number of amateur clubs and purely amateur athletes. Furthermore, the national federations and the EJU may themselves be regarded as undertakings within the meaning of Article 85 of the Treaty, inasmuch as they pursue an independent economic activity, whether or not they do so with a view directly to financial gain. The Community judicature has not held a profit-making aim to be one of the constituent elements of the concept of an 'undertaking' within the meaning of Article 85. [71] [72]

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

70 — Point 256 of the Opinion of Advocate General Lenz in *Bosman*, cited in footnote 12 above.

71 — See Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* [1980] ECR 3125, paragraph 88.

72 — With regard more specifically to national federations, reference can be made to the judgment of the Court of First Instance in Case T-46/92 *Scottish Football* v *Commission* [1994] ECR II-1039, in which the Scottish Football Association was found to constitute an undertaking or an association of undertakings within the meaning of Articles 85 and 86 of the Treaty. Similarly, in its Decision 92/521/EEC of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 — Distribution of package tours during the 1990 World Cup) (OJ 1992 L 326, p. 31), the Commission stated that FIFA (International Federation of Association Football) and the Italian Football Federation were exercising an economic activity, in particular in the context of the distribution of tickets for the 1990 Football World Cup in Italy, and that they must therefore be regarded as undertakings.

105. In summary, it is not inconceivable that the EJU and the national federations which belong to it may be regarded as undertakings within the meaning of Articles 85 and 86 of the Treaty. However, certain points remain unclear. First, it is not possible, on the basis of the information brought to the attention of the Court, to determine the number of judokas who, like Ms Deliège, are to be regarded as 'undertakings'. It is not therefore possible to determine accurately which judokas fall into the 'high-level non-amateur' category. It is merely safe to assume that it includes some of the best practitioners of that sport from countries throughout Europe. It is also impossible to determine accurately the extent to which the LBJ and the EJU directly pursue an economic activity (when organising tournaments, concluding contracts with sponsors or selling television broadcasting rights) and whether there is any link between that activity and the sports rules at the centre of this dispute.

106. In any event, even assuming that the contested rules do constitute an agreement between undertakings or a decision of an association of undertakings, [73] an infringement of Article 85 also requires an obstacle to trade between Member States and a restriction on competition.

107. As regards the impact on trade between States, it should be pointed out that the prohibition laid down in Article 85 applies to any agreement 'which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States,' [74] provided that the effect in question is 'appreciable'. [75]

108. In my opinion it is unclear whether the contested sports rules lead to consequences of that kind. To what extent are the circumstances prevailing on the market in entertainment events and the market in advertising services, the markets involved in international judo tournaments, changed by the sole fact that an athlete cannot compete in those tournaments? I do not think there is any danger that the fundamental choice made by the EJU to make certain international judo matches more representative will jeopardise freedom of trade between Member States at all, let alone appreciably. The fact that the EJU has decided that the need for tournaments to be representative should take priority over the need for them to be open to those objectively best qualified to compete in them is

73 — As Advocate General Lenz rightly observes in *Bosman*, cited in footnote 12 above, the distinction between an agreement between undertakings and a decision of an association of undertakings is of no importance in practice (point 258 of the Opinion).

74 — Case 22/78 *Hugin* [1979] ECR 1869, paragraph 17.

75 — By way of guidance, see Case 28/77 *Tepea* v *Commission* [1978] ECR 1391, paragraphs 46 and 47.

in my opinion a legitimate choice. It is an attempt by the EJU (which it is entitled to make) to adapt to the needs of the market. [76] More specifically, it prefers to organise tournaments featuring athletes from as many countries as possible, rather than tournaments involving only a few countries where judo is already well developed. Not only does that choice not hinder intra-Community trade, it may strengthen it, in so far as it ensures that international judo tournaments are entered by athletes from all Member States and not just from those where the sport is developed.

109. However, two observations can be set against the above interpretation. First, it seems to be settled case-law that intra-Community trade is affected even in cases where an agreement or a decision between undertakings or associations of undertakings gives rise to an increase rather than a decrease in the volume of trade between Member States. [77] Consequently, the fact that the contested EJU rules seek to ensure that athletes from all Member States take part in a series of international tournaments, while this would be impossible without those rules, does not necessarily mean that there is no obstacle to trade between Member States. Secondly, the obstacle in question may be merely potential: in other words, it is sufficient that there be a possibility of significant impact on trade between Member States. [78] Consequently, the mere fact that the EJU rules are capable of excluding a number of high-level athletes from taking part in international judo tournaments may be sufficient to support the finding that a potential obstacle to intra-Community trade exists.

110. However, even on the basis of that broad interpretation, which I do not endorse, I am still of the opinion that there has been no infringement of Article 85(1) of the Treaty in the present case, since there has been no unlawful restriction of competition. I would say first of all that I agree with the Commission's argument that measures adopted by a sports federation in the field of access for athletes to international tournaments may constitute a restriction of competition. It must also be recognised, however, that Article 85(1) does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition.

76 — The more representative a tournament is, the greater the revenue television broadcasting rights and advertising will generate, since those tournaments will (potentially) attract public interest in all the Member States of the EJU.

77 — Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235.

78 — Case 19/77 *Miller* [1978] ECR 131, paragraphs 14 and 15.

111. That was the interpretation adopted by the Court in *DLG*, [79] concerning the lawfulness of the statutes of a cooperative which prohibited its members from also participating in other organisations in direct competition with it. Having held that compatibility with the rules on competition could not be assessed in the abstract but depended on the content of the clauses at issue and the 'economic conditions prevailing on the markets concerned', the Court concluded that restrictions on competition which were 'necessary' to ensure that the cooperative functioned properly and to strengthen its position when a contract was concluded did not fall within the scope of Article 85(1). The Court also examined the extent to which the provisions of the statutes were 'reasonable' and did not contain any 'disproportionate' penalties. [80]

112. As Advocate General Lenz pointed out in his Opinion in *Bosman*, [81] the above legal construction must be transposed to the relationship between sport and Community competition law. Applying that reasoning to this case, I also take the view that, even if they were to be regarded as reducing competition, in the sense that they prevent certain judokas from taking part in certain international tournaments, the contested rules do not fall within the scope of Article 85 of the Treaty because they are indispensable for attaining the legitimate objectives deriving from the particular nature of judo. [82] As regards the description and legitimacy of those objectives, I refer to the analysis above, [83] which shows that the contested sports rules were intended, first, to establish a mechanism for selecting national teams to represent Europe in the Atlanta Olympic Games and, secondly, to ensure that certain international judo tournaments are as representative as possible. Consequently, there is, in my view, no infringement of Article 85(1) of the Treaty.

113. Indeed, even if the Court were minded to accept that the EJU occupies a dominant position on the market in judo tourna-

79 — Case C-250/92 *DLG* [1994] ECR I-5641.

80 — *DLG*, cited in footnote 79 above, paragraphs 31 to 36.

81 — Cited in footnote 12 above, point 268 et seq.

82 — In answer to an argument raised by Ms Deliège in this respect, I would say the following: the extent to which an agreement or a practice falls within the scope of Article 85 is a matter for the Court to decide. If, however, the Court were minded to accept that the agreement or practice in question fell within the scope of the prohibitions contained in Article 85(1), it would be for the Commission to decide whether or not to grant an exemption under Article 85(3) of the Treaty.

83 — See points 70 to 76 and 84 to 88 above.

ments, the particular objectives pursued by the measures which it has adopted would still mean that its conduct could not be classified as abuse and does not therefore fall within the scope of the prohibitions contained in Article 86 of the Treaty.

114. In conclusion, in the light of the evidence submitted for the Court's consideration, I do not see how the EJU rules could be regarded as contrary to the requirements of Articles 85 and 86 of the Treaty.

VI — Conclusion

115. On those grounds, I propose that the Court reply as follows to the questions referred for a preliminary ruling:

(1) The question referred in Case C-51/96 is inadmissible.

(2) With regard to the question referred in Case C-191/97:

(a) A sporting activity from which an athlete derives economic advantages in the form of financial aid from the sports federations in her country and in the form of bonuses, under the conditions described in the present case, constitutes an economic activity within the meaning of Article 2 of the EC Treaty (now, after amendment, Article 2 EC) and therefore enjoys the protection of Community law.

(b) Community law and, more specifically, Article 59 et seq. of the Treaty (now, after amendment, Article 49 EC et seq.) do not preclude sports rules which, first, require 'high-level non-amateur athletes' to obtain authorisation from the national federation with which they are registered to take part in international tournaments not involving direct competition between national teams and, secondly, limit the number of athletes selected by the national federations to take part in those tournaments, in so far as those rules are justified on non-economic grounds deriving from the particular nature of certain sports matches and from the particular needs of sport in general; those grounds include, in particular, organising the selection of European national teams to take part in the Olympic Games and guaranteeing the representative nature of international matches as a constituent part of the balanced development of sport at pan-European level.

(c) In the absence of sufficient information, it is impossible to reply to the question referred as regards Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).