# COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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# COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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*The American model*

It is uncommon for politicians in the European Union to commend United States practice. Too often there is a feeling, wonderfully expressed by former Commissioner Bangemann, when asked to consider the adoption by the European Community of a law similar to that of the United States in the field of copyright protection, that there was no need for Europe to imitate America, as Europe could think for itself. This may be true; but the draftsmen of the original EEC Treaty certainly looked at United States experience in anti-trust matters when they drafted Articles 85 and 86 (now 81 and 82). Nor is the present Commissioner for Competition Policy afraid to give credit where it is due. Speaking in Madrid in February, he said: "I should like to emphasise that the Commission is in no way pursuing an anti-industry policy. On the contrary, top industry management has repeatedly and explicitly invited politicians to open up markets and to move closer towards the United States economic model. The greater dynamism which exists in the United States is correctly seen as a result of a more consumer oriented policy which stimulates efficiency, and finally advantages, for the production sector."

*State aid decisions*

It really is difficult sometimes to know which way the cat will jump in state aid cases. The Commission has approved the Irish Government's €12.7m equity injection in An Post. It has ordered the recovery of more incompatible aid from German textile manufacturer Neue Erba Lautex GmbH. It has closed a state aid investigation into Poste Italiana with a positive decision. It has started an investigation into the British Government's aid to Ford for its plant in Bridgend, Wales, because the aid does not appear to meet the criteria for the motor vehicle industry.

However, at least the Commission seems to have resolved the vexed question of state aid, in the form of special guarantees, to German savings and mortgage banks. An agreement has been reached between the Commission and the German authorities, to take effect from 15th March 2002, subject to subsequent implementation in legislative form. Essentially the two forms of guarantee (AL and GW for short) disappear, AL being replaced and GW abolished. The new regime follows far more closely the rules applying to other banks and to similar banks in other countries. If the parties who originally complained about the German system are satisfied, and the new system works to the satisfaction of owners, provincial governments and consumers, the Commission will have pulled off a notable success in a sector which has always been particularly sensitive in Germany. ■

## PRICE DIFFERENTIALS (CARS): COMMISSION REPORT

Subject: Price differentials

Industry: Cars

Source: Commission Statement IP/02/305, dated 25 February 2002 (and see endnote)

*(Note. In seeking to reduce the price differentials for cars within the European Union, the Commission pins its faith on two factors. The first is the introduction of the new block exemption regulation for distribution agreements for motor vehicles. The second is the imposition of heavy fines, as in the Volkswagen and other cases, for creating obstacles to parallel trade between Member States and for resale price fixing. Whether the first of these will have an effect on price differentials remains to be seen: it is likely to have some salutary results, but not necessarily in this area. As to the second factor, a great deal depends on how much is at stake: whether in fact the severity of the fines can outweigh the benefits to certain manufacturers of maintaining the differentials. Having all the car prices in the "euro-zone" expressed in the same currency may also be a marginal deterrent to differential pricing.)*

In its latest report on car prices, the Commission has found that price differentials for new cars in the internal market are still substantial, despite the introduction of the euro. The situation on 1 November 2001 shows that price convergence has not taken place. Spain, Greece, Finland and Denmark, a non-member of the Euro zone, are the markets where pre-tax list prices for cars are generally the lowest. Prices in Germany, the biggest market, and Austria, are the highest. It is also apparent that prices in the United Kingdom are still much higher than in the euro zone. The Commission takes the view that its monitoring of price differentials confirms that there is significant room for improving market conditions in the motor vehicle sector. The reform proposals presented by the Commission on 5 February 2002 (and reported on page 42 of our February issue) are intended to speed up the completion of the Internal Market and to clear the way for consumers to benefit from greater competition and increased choice, while reinforcing quality and safety in vehicle repair.

The Commission's report on car prices portrays the situation in national car markets on 1st November 2001, that is, two months before retail prices started to be denominated in euros in the twelve Member States participating in the monetary union. Since most list prices were no longer denominated in national currency, it would appear that the introduction of the euro had been anticipated. Therefore, the report gives a first indication as to the extent to which pricing policies have been adapted in response to monetary integration. The price differentials mentioned in this press release are based on the manufacturers' recommended retail prices net of tax. The full report gives prices both before and

after tax. It compares prices for a total of 80 models, representing the best selling cars of 24 manufacturers.

Within the euro zone, Germany and, to a lesser extent, Austria, still remain the most expensive markets. In Germany, a total of 41 models are sold at the highest prices in the euro zone and 40 of these are 20% more expensive than in at least one other euro zone market. In fact, differentials of more than 20% appear as well for 31 models in Austria. The cheapest markets in the euro zone are Spain, Greece and Finland, with differentials below 20% for more than 90% of the models surveyed.

As in the previous survey, the Commission has found that in the first four segments (A to D), where the high number of models from different competitors would normally lead one to suppose that competition should be strong, the average price differential within the euro zone is much higher (well above 20%) than in segments E, F and G. In absolute values, the price differential on a car in the middle of the segment spectrum (Fiat Marea, segment D) may, in certain cases, reach €4,488 within the euro zone and as much as €7,545 within the European Union as a whole.

As regards the United Kingdom, in general, new car prices remained stable. For 9 models, prices have diminished by more than 5% as compared with the situation on 1st May 2001, while for 7 models there are increases above 5%. This market continues to be the most expensive for 52 of the models examined. Since the prices in the United Kingdom are still much higher than elsewhere, many British consumers continue to try to buy their cars from Continental dealers; but the Commission still receives complaints from British consumers who encounter obstacles when purchasing a car in another Member State. Many of these complaints relate to high right-hand drive supplements and long delivery times. The Commission has re-affirmed its commitment to investigate restrictive practices by car manufacturers when they deter citizens of the European Union from buying a car in another Member State and has in fact fined Volkswagen (twice), Opel and Mercedes for placing obstacles in the way of parallel trade and for resale price fixing.

Overall, price convergence within different car segments has not greatly varied since the last report. Examples of the most popular car models show that price differentials have significantly (that is, more than 5%) decreased only for three models and increased for one model. The reduction in price differentials for the Opel Astra, as compared to the previous survey, is due to a sharp price reduction on most European markets for this model. The reduction in price differentials for the Volkswagen Polo is due to the launching of a new Polo model, for which prices have been submitted only for the eight countries where this new model had been introduced. A more general observation should be made in respect to the pricing behaviour in the different segments: Germany and Austria are the most expensive markets for nearly all models in segments A to C, while in segment D, this is true for only half of the models, and in the other segments, these countries rank as the most expensive market only occasionally.

Across the euro zone, General Motors (Opel-Vauxhall, Saab), the Fiat group (Fiat, Lancia, Alfa Romeo), PSA Group (Peugeot, Citroën) and the Volkswagen group (Audi, Seat, Volkswagen) are the groups which have the widest price differences. In particular, the PSA group, the Fiat group, the VW group (Volkswagen and Seat), Ford, Opel and a number of Japanese manufacturers pursue a high price market strategy in Germany. On the other hand, in general, certain German manufacturers (such as BMW and DaimlerChrysler) and, to a lesser extent, Ford (Ford, Volvo, Land Rover) limit price differentials within the euro zone to 15% or less.

The generally low pre-tax prices in Finland, Denmark and Greece are largely due to manufacturers' pricing policies. In response to high taxes on car purchase in those Member States, most manufacturers fix pre-tax list prices at a low level, alleging that this is necessary to make the after-tax prices affordable. However, in other Member states where no such taxes are charged, prices before tax may be roughly similar, as in Spain, or much higher, as in Germany. In the United Kingdom, car prices include the additional cost of UK specification, in particular right-hand drive, and are affected by the high value of the British Pound. All of these aspects have to be taken into account when analysing the causes for high price differentials. The Commission has found that for British and Irish consumers buying a car in another Member State, the supplement for right-hand drive specification is generally the lowest for models from the Japanese manufacturers, and the highest for models produced by the Volkswagen group (VW, Audi and Seat).

The methodology used is the same as that employed in previous reports: a total of 17 (previously 15) European and 7 Japanese manufacturers supplied the Commission with the recommended retail prices, as of 1 November 2001, of 80 of their best-selling models. The reference price for the calculation of differentials for any model is that of the cheapest country within the euro zone. Prices are adjusted for differences in standard equipment, and are given in local currency and in euros, both before and after tax. Prices for major options and for right-hand drive specification are also supplied, together with other information. For some models, further options and variations in standard equipment may exist on certain national markets. Actual retail prices may differ from recommended list prices, as dealers must be free to set their own prices and to offer additional financial benefits to customers, depending on the market.

The report itself and other useful information may be found on the European Union's Website:
Press release, electronic version of the report and manufacturers' price tables*:
http://europa.eu.int/comm/competition/car_sector/
Commission Offices where hard copies of the report are available:
http://europa.eu.int/comm/offices.htm
Information centres for car buyers (telephone "hotlines"):
http://europa.eu.int/comm/competition/car_sector/ ■

*[*As we go to press, we learn that the draft regulation is now on this site as well.]*

## ACQUISITIONS (PETFOODS): THE MASTERFOODS CASE

Subject: Acquisitions
Conditions

Industry: Petfoods
(Implications for other industries)

Parties: Masterfoods Holding
Mars Inc
Royal Canin SA

Source: Commission Statement IP/02/263, dated 15 February 2002

*(Note. On the face of it, the conditions accepted by the acquiring company in this case are somewhat drastic. In fact, the Commission itself observes that the commitment to divest the business connected to four of the brands concerned will reduce market presence to below the original level in France of the firm being acquired. Whether the commitment was the result of Commission pressure or was freely volunteered by the acquiring company, it seems that the use of the Mergers Regulation to reduce a market share existing before the acquisition is pushing the scope of the Regulation further than it was intended to go.)*

The Commission has granted conditional regulatory approval to the proposed acquisition of the French petfood company Royal Canin SA. by Masterfoods Holding, a French subsidiary of Mars Inc. of the United States. Mars has undertaken to divest for the whole of Europe its businesses connected to five of the merged group's petfood brands, namely, Advance, Premium, Royal Chien, Playdog and Brekkies, together with two major manufacturing plants in La Chappelle and Moulin, respectively in the centre (Loir-et-Cher) and south-east of France, as well as all other assets relating to the divested business. The merger cannot be implemented before the conditions have been fulfilled.

Mars is a privately-owned manufacturer of snack foods, ice cream, pet foods and various other products, with headquarters in Virginia (US). Masterfoods Holding is a wholly-owned French subsidiary created in 2000. Mars's pet foods brands include Pedigree, Advance, Cesar, Whiskas and Sheba, which are sold worldwide, and national/regional brands such as Canigou and Brekkies.

Royal Canin is a leading supplier of dry prepared pet food products headquartered in France and listed on the Paris stock exchange. Royal Canin has developed its branded business primarily through sales in specialist outlets throughout the European Union.

The Commission's investigation confirmed that markets for dry prepared food products for cats and dogs are still national in scope, due to appreciable

differences among Member States as concerns purchasing patterns, market structures, and marketing strategies.

The six week examination of the transaction identified competition concerns in the French dog food market as well as in Germany for both dog and cat food, regarding in particulatr the fast growing markets for dry food products. These markets are characterised by several large players, including Nestlé, Procter and Gamble and Colgate Palmolive, a number of smaller niche players, as well as own-label products. The products are distributed through traditional grocery shops as well as a wider group of specialist outlets, including pet shops, garden centers, Do-It-Yourself shops, breeders and veterinarians.

In France, Royal Canin is the clear market leader with about a third of all sales of dry prepared dog food products in the year 2000. Without remedies, the merger would have significantly strengthened this leading position, and led to very high market shares in specialist outlets. The commitment to divest the business connected to the brands Advance, Premium, Royal Chien, and Playdog will reduce market presence to below the original level of Royal Canin in France. Three of these brands were among the top-ten best selling products in the year 2000.

In Germany, the overlap between these two strong operators would have occurred in specialist outlets, leading to high overall market shares in particular for dry cat food products. For dry dog food, the divestment of the brands Advance, Premium and Playdog will reduce the overall market shares to below levels raising competition concerns. As regards dry cat food products, the divestment of Brekkies, the third largest individual dry cat food brand in the year 2000, together with the other divested assets, will offer the acquirer broad opportunities to compete with the merged entity.

The divested businesses include brands covering the whole of the quality spectrum and offer a critical mass for a purchaser. Given that strict conditions ensure that a sufficiently strong purchaser will be able to integrate these assets into its own brand strategy and develop them, the Commission concluded that the remedies were appropriate to remove the competition concerns raised during the investigation.

The Commission examined the impact of the acquisition only for the European Union, as pet food products are excluded from the application of the EEA-Agreement between the EU, Norway, Iceland and Liechtenstein. ■

The Court cases reported in this Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

## PRICING POLICY (SHIPPING): THE ATLANTIC CONTAINER CASE

Subject: Pricing policy
Obligations (imposed by Commission)

Industry: Shipping (liners)
(Some implications for other industries)

Parties: Atlantic Container Line AB (and fourteen other applicants)
(2 interveners in support of the applicants)
Commission of the European Communities
(3 interveners in support of the respondent)

Source: Judgment of the Court of First Instance, dated 28 February 2002 in Case T-395/94 (*Atlantic Container Line AB et al v Commission of the European Communities*)

*(Note. This is a complex judgment running to over four hundred paragraphs and, except on three points, is of limited interest. The first point of interest is that, behind all the technicalities of the case, the Court found that the tariff structure reflected an unacceptable pricing policy; the applicants therefore lost their case on almost all the main issues. The second point is the useful reminder, in paragraph 257, reproduced below, of the extent to which the Court is entitled to look at the economics of a case. The third point is that the Commission may impose obligations on the parties only if those conditions are both necessary and fully explained in the recitals to the Commission's formal decision. In paragraph 36 the Court set out the five Articles of the contested decision and, in paragraphs 410 to 415, the reasons for annulling Article 5.)*

### The contested decision

36. At the end of its analysis, the Commission decided as follows:

Article 1

The provisions of the TAA relating to price-fixing and capacity infringe Article 85(1) of the EC Treaty.

Article 2

Application of Article 85(3) of the EC Treaty and of Article 5 of Regulation (EEC) No 1017/68 to the provisions of the TAA referred to in Article 1 of this decision is hereby refused.

Article 3

The undertakings to which this decision is addressed are hereby required to bring an end forthwith to the infringements referred to in Article 1.

Article 4

The undertakings to which this decision is addressed are hereby required to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the agreements and practices referred to in Article 1.

Article 5

The undertakings to which this decision is addressed are hereby required, within a period of two months of the date of notification of this decision, to inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith.

## Economic appraisals

257. Before examining the abovementioned agreements, it must be borne in mind as a preliminary point that, according to settled case-law, in the context of an action for annulment pursuant to Article 173 of the Treaty, the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 62; Joined Cases T-39/92 and T-40/92, *CB and Europay* v *Commission*, paragraph 109; Case T-17/93, *Matra Hachette* v *Commission*, paragraph 104; Case T-29/92, *SPO and Others* v *Commission*, paragraph 288; and Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, paragraph 190).

## Obligations imposed on undertakings

410. It is clear from the case-law that, in the context of its power for the purpose of applying Article 3 of Regulation No 17, and thus also Article 11(1) of Regulations No 4056/86 and No 1017/68, the Commission may specify the scope of the obligations imposed on the undertakings concerned in order to bring an end to the infringements identified. That power must however be implemented according to the nature of the infringement declared (see, by analogy, Joined Cases 6/73 and 7/73, *Istituto chemioterapico italiano and Commercial Solvents* v *Commission*, paragraph 45; *RTE and ITP* v *Commission*, paragraph 90; and Case C-279/95 P, *Langnese-Iglo* v *Commission*, paragraph 74) and the obligations imposed must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (see Joined Cases 241 and 242/91, *RTE and ITP* v *Commission*, paragraph 93).

411. Article 5 of the TAA decision provides that the parties to the TAA must inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA "that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith".

412. The Commission acknowledges that the service contracts entered into by the applicants are not, in themselves, contrary to Article 85(1) of the Treaty. Those

contracts do not therefore form part of the infringements identified in the TAA decision. The Commission contends, however, that the order to the applicants to allow their customers to renegotiate or terminate those contracts was necessary, because the effects of the infringements identified in the contested decision might continue to exist if the addressees of that decision were able to continue to enjoy the economic advantages secured by ongoing contracts entered into on the basis of the horizontal agreement to fix prices and limit supply to which the TAA amounted.

413. It should be observed, in that respect, that most horizontal agreements to fix prices or divide up a market have such effects, more or less long-term, on third parties, but the Commission does not usually deem it necessary to include in its decisions declaring infringements an obligation comparable to that contained in Article 5 of the contested decision...

414. Moreover, apart from the penalty of nullity expressly provided for in Article 85(2) of the Treaty, the case-law establishes that the consequences in civil law attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law (see Case C-453/99, *Courage and Crehan*, paragraph 29; and Case T-24/90, *Automec* v *Commission*, paragraph 50), subject, however, to not undermining the effectiveness of the Treaty.

415. It follows that, in any event, the measure contained in Article 5 of the contested decision was not obviously necessary and does not correspond to an established line of Commission decisions. In those circumstances, it fell to the Commission to explain its reasoning (see, to that effect, Case 73/74, *Papiers peints and Others* v *Commission*, paragraph 31). Not only did the Commission not explain in the contested decision the reasons for which, even if the said contracts are not contrary to Article 85(1) of the Treaty, in order to bring to an end the infringements identified it would be necessary for the applicants to afford their customers the opportunity to renegotiate them but, furthermore, no part of the TAA decision deals with the issue of the fate of those service contracts entered into with shippers.

416. It follows that Article 5 of the TAA decision must be annulled on the ground of breach of the obligation to state reasons.

## Court's ruling

The Court of First Instance hereby:

1. Annuls Article 5 of Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 - Trans-Atlantic Agreement);
2. Dismisses the remainder of the application...

*[Paragraphs 3-5 of the Ruling concern Costs]* ■

## UNDERTAKINGS (BARRISTERS): THE WOUTERS CASE

Subject: Undertakings
Associations of undertakings
Groups of undertakings
Dominant position
Restrictions of competition
Trade between Member States
Public policy

Industry: The Bar; accountancy

Parties: JCJ Wouters
JW Savelbergh
Price Waterhouse Belastingsadviseurs BV
Algemene Raad van de Nederlandse Orde van Advocaten
Raad van de Balies van de Europese Gemeenschap (CCBE) (int)
(Submissions were made to the Court by the Netherlands, Danish, German, French, Luxembourg, Austrian, Portuguese and Swedish Governments, by the Government of the Principality of Liechtenstein and by the Commission)

Source: Judgment of the Court of Justice of the European Communities, dated 19 February 2002 in Case C-309/99 (*Wouters et al v Algemene Raad van de Nederlandse Orde van Advocaten*)

*(Note. This is a particularly interesting case, since it tackles head on – at last – the impact on the legal profession of the rules on competition. The case originated in proceedings in the Netherlands arising from Mr Wouters's decision as a member of the Dutch Bar to join the accountancy firm of Price Waterhouse, contrary to a Bar Council rule; and it reached the Court of Justice by way of a request for a preliminary ruling, with nine questions addressed to the Court. The last three concerned provisions of the Treaty unrelated to the rules on competition and are therefore omitted from the report below. The report also omits a detailed recital of the relevant Dutch law. The Court's judgment considers, among other things, the following matters:*

- *whether members of the Bar are "undertakings".*
- *whether the Bar Council is an "association of undertakings",*
- *whether the Bar Council is a "group of undertakings" under Article 82,*
- *whether restrictions of partnerships are restrictions of competition and*
- *whether those restrictions are prohibited or justifiable.*

*The answers to the first two questions are affirmative and to the third question negative. The answers to the fourth and fifth questions depend on the circumstances; Member States are free to arrange matters in such a way as to place the issue firmly in the domain of public policy: see paragraphs 68 and 69 of the judgment. Also, much of the judgment is devoted to a careful consideration of the competitive advantages and disadvantages of inter-professional partnerships.*

*For reasons largely influenced by the Advocate-General's Opinion, relying on the basic difference between the role of the "adviser" and the role of the "superviser", the Court came down in favour of the restriction: see paragraph 104. There is a topical element in the distinction drawn by the Advocate-General: it appears to have been the nub of the problem in the Enron case in the USA.)*

1. By judgment of 10 August 1999, received at the Court on 13 August 1999, the Netherlands Council of State referred to the Court for a preliminary ruling under Article [177, now 234 of the EC Treaty] nine questions on the interpretation of Articles 3(g) of the Treaty (now, after amendment, Article 3(1)(g)), 5 (now Article 10), 52 and 59 (now, after amendment, Articles 43 and 49), and 85, 86 and 90 (now Articles 81, 82 and 86).

2. Those questions were raised in proceedings brought by members of the Bar, among others, against the refusal of the Amsterdam District Court, to set aside the decisions of the Bar of the Netherlands refusing to set aside the decisions of the Supervisory Boards of the Amsterdam and Rotterdam Bars prohibiting them from practising as members of the Bar in full partnership with accountants.

*[Paragraphs 3 to 21 set out the law in the Netherlands governing the legal profession. Essentially, the Constitution of the Netherlands governs laws relating to public bodies; the Law of 23 June 1952 established the Bar of the Netherlands and laid down the internal regulations and the disciplinary rules; and the 1993 Regulation relates to professional partnerships, effectively prohibiting the type of partnership entered into by Mr Wouters.]*

22. According to the recitals of the 1993 Regulation, members of the Bar have already been authorised to enter into partnership with notaries, tax consultants and patent agents and authorisation for those three professional categories remains valid. On the other hand, accountants are mentioned as an example of a professional category with which members of the Bar are not authorised to enter into partnership.

## The disputes in the main proceedings

24. Mr Wouters, a member of the Amsterdam Bar, became a partner in the partnership Arthur Andersen & Co. Belastingadviseurs (tax consultants) in 1991. Late in 1994 Mr Wouters informed the Supervisory Board of the Rotterdam Bar of his intention to enrol at the Rotterdam Bar and to practise in that city under the name of 'Arthur Andersen & Co., advocaten en belastingadviseurs.

25. By decision of 27 July 1995, that Supervisory Board found that the members of the partnership Arthur Andersen & Co. Belastingadviseurs were in professional partnership, within the meaning of the 1993 Regulation, with the members of the partnership Arthur Andersen & Co. Accountants, that is to say with members of the profession of accountants. Accordingly, Mr Wouters was in breach of Article 4 of the 1993 Regulation. In addition, the Supervisory Board considered that Mr Wouterswould contravene Article 8 of the 1993 Regulation if he entered into a

partnership the collective name of which included the name of the natural person Arthur Andersen.

39. Consequently, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1(a) Is the term association of undertakings in Article 85(1) of the EC Treaty (now Article 81(1) EC) to be interpreted as meaning that there is such an association only if and in so far as it acts in the undertakings' interest, so that in applying that provision a distinction must be drawn between activities of theassociation carried out in the public interest and other activities, or is the mere fact that an association can also act in the undertakings' interest sufficient for it to be regarded as an association of undertakings within the meaning of the provision in respect of all its actions? Is the fact that the universally binding rules adopted by the relevant institution are adopted under a statutory power and in its capacity as a special legislature relevant as regards the application of Community competition law?

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

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

2. If the answers to the first question indicate that a rule such as [the 1993 Regulation] is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC), is such a decision, in so far as it adopts universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships such as the one in question to be regarded as having as its object or effect the restriction of competition within the common market and in that respect affecting trade between the Member States? What criteria of Community law are relevant to the determination of that issue?

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

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

5. If an institution such as the Bar of the Netherlands is to be regarded in its entirety as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) tobe

interpreted as extending to an institution such as the Bar of the Netherlands which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of its members who provide legal assistance, on cooperation between its members and members of other professions?

6. If an institution such as the Bar of the Netherlands is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 3(g), 10, 81 and 82 EC) preclude a Member State from providing that that institution (or one of its agencies) may adopt rules concerning *inter alia* cooperation between its members and members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

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

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

9. If it follows from the answer to the previous question that one or both of the abovementioned restrictions exists, is the restriction in question justified on the ground that it constitutes merely a selling arrangement within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, and that therefore there is no discrimination, or on the ground that it satisfies the criteria that have been developed in that respect by the Court of Justice in other judgments, in particular Case C-55/94 *Gebhard* [1995] ECR I-4165?

*[Paragraphs 40 to 43 concern a request for reopening of the oral procedure.]*

## Question 1(a)

44. By Question 1(a) the national court is in substance asking whether a regulation concerning partnerships between members of the Bar and other professionals, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, is to be regarded as a decision taken by an association of undertakings within the meaning of Article 85(1) of the Treaty. It seeks in particular to ascertain whether the fact that power was conferred by statute on the Bar of the Netherlands to adopt rules universally binding both on registered members of the Bar in the Netherlands and lawyers who are authorised to practise in other Member States and come to the Netherlands in order to provide services there has any bearing on the application of Community competition law. It also asks whether the mere fact that the Bar of the Netherlands may act in the interests of its members is sufficient for it to be regarded as an association of undertakings in respect of all its activities or whether, for Article 85(1) of the

Treaty to be applicable, special treatment must be reserved for the Bar's public-interest activities.

45. To establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty, the first matter to be considered is whether members of the Bar are undertakings for the purposes of Community competition law.

46. According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90, *Höfner and Elser*, paragraph 21; Case C-244/94, *Fédération Française des Sociétés d'Assurances and Others*, paragraph 14; and Case C-55/96, *Job Centre*, paragraph 21).

47. It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (Case 118/85, *Commission* v *Italy*, paragraph 7; Case C-35/96, *Commission* v *Italy (CNSD)*, paragraph 36).

48. Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49. That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, Joined Cases C-180/98 to C-184/98, *Pavlov and Others*, paragraph 77).

50. The second point to be considered is the extent to which a professional body such as the Bar of the Netherlands is to be regarded as an association of undertakings, within the meaning of Article 85(1) of the Treaty, where it adopts a regulation such as the 1993 Regulation (see, to that effect, with regard to a professional body of customs agents, *CNSD*, paragraph 39).

51. The respondent in the main proceedings claims that, inasmuch as the Netherlands legislature created the Bar of the Netherlands as a body governed by public law and gave it regulatory powers in order to perform a task in the public interest, the Bar cannot be regarded as an association of undertakings within the meaning of Article 85 of the Treaty, particularly in connection with the exercise of its regulatory powers.

52. The intervener in the main proceedings and the German, Austrian and Portuguese Governments add that a body such as the Bar of the Netherlands

exercises public authority and cannot, in consequence, fall within the scope of Article 85(1) of the Treaty.

53. According to the intervener in the main proceedings, a body may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State. The Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.

54. The German Government, for its part, points out that it is for the competent legislative bodies of a Member State to decide, within the framework of national sovereignty, how they organise the exercise of their rights and powers. Delegation of the power to adopt universally binding rules to a body possessing democratic legitimacy, such as a professional body, falls within the limits of that principle of institutional autonomy.

55. According to the German Government, if bodies entrusted with such regulatory duties were to be treated as associations of undertakings within the meaning of Article 85 of the Treaty, this would frustrate the operation of that principle. The idea that national legislation is valid only if it is exempted by the Commission pursuant to Article 85(3) of the Treaty is a contradiction in terms. The consequence would be that the whole corpus of professional regulations would be called in question.

56. The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

57. According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity (see, to that effect, Joined Cases C-159/91, C-160/91, *Poucet and Pistre*, paragraphs 18 and 19, concerning the management of the public social security system), or which is connected with the exercise of the powers of a public authority (see, to that effect, Case C-364/92, *Sat Fluggesellschaft*, paragraph 30, concerning the control and supervision of air space, and Case C-343/95, *Diego Cali & Figli*, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).

58. When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (*Poucet and Pistre*, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (*Sat Fluggesellschaft*, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59. In that respect, the fact that Article 26 of the [Dutch Law on the Legal Profession] also entrusts the General Council with the task of protecting the rights

and interests of members of the Bar cannot *a priori* exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, *Pavlov*, cited above, paragraph 86).

60. Next, other indications support the conclusion that a professional organisation with regulatory powers, such as the Bar of the Netherlands, cannot escape the application of Article 85 of the Treaty.

61. First, it is clear from the [Dutch Law] that the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council (see, as regards a professional organisation of customs agents, *CNSD*, cited above, paragraph 42, and, as regards a professional organisation of medical practitioners, *Pavlov*, paragraph 88).

62. Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not, required to do so by reference to specified public-interest criteria. Article 28 of the[Dutch Law], which authorises it to adopt regulations, does no more than require that they should be in the interest of the proper practice of the profession (see, as regards a professional organisation of customs agents, *CNSD*, paragraph 43).

63. Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.

64. In the light of the foregoing considerations, it appears that a professional organisation such as the Bar of the Netherlands must be regarded as a an association of undertakings within the meaning of Article 85(1) of the Treaty where it adopts a regulation such as the 1993 Regulation. Such a regulation constitutes the expression of the intention of the representatives of the delegates of a profession that they should act in a particular manner in carrying on their economic activity.

65. It is, moreover, immaterial that the constitution of the Bar of the Netherlands is regulated by public law.

66. According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83, *BNIC* v *Clair*, paragraph 17, and *CNSD*, paragraph 40).

67. That interpretation of Article 85(1) of the Treaty does not entail any breach of the principle of institutional autonomy as argued by the German Government (see paragraphs 54 and 55 above). On this point a distinction must be drawn between two approaches.

68. The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

69. The second approach is that the rules adopted by the professional association are attributable to it alone. Certainly, in so far as Article 85(1) of the Treaty applies, the association must notify those rules to the Commission. That obligation is not, however, such as to paralyse unduly the regulatory activity of professional associations, as the German Government submits, since it is always open to the Commission *inter alia* to issue a block exemption regulation pursuant to Article 85(3) of the Treaty.

70. The fact that the two systems described in paragraphs 68 and 69 above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.

71. In the light of the foregoing considerations, the answer to be given to Question 1(a) must be that a regulation concerning partnerships between members of the Bar and other members of liberal professions, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

## Question 1(b) and (c)

72. Having regard to the answer given to Question 1(a), there is no need to consider Question 1(b) and (c).

## Question 2

73. By its second question the national court seeks, essentially, to ascertain whether a regulation such as the 1993 Regulation which, in order to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance in conjunction with members of other liberal professions, adopts universally binding rules governing the formation of multi-disciplinary partnerships, has the object or effect of restricting competition within the common market and is likely to affect trade between Member States.

74. By describing the successive versions of the rules on partnerships, the appellants in the main proceedings have set out to establish that the 1993 Regulation had the object of restricting competition.

75. Initially, [a Regulation adopted in 1972] authorised members of the Bar to enter into multi-disciplinary partnerships subject to three conditions. First, the partners had to be members of other liberal professions with a university education or education of an equivalent standard. Next, they had to belong to an association or group the members of which were subject to disciplinary rules comparable to those applicable to members of the Bar. Finally, the proportion of members of the Bar belonging to that professional partnership and the size of their contributions to it had to be at least equivalent to that of the partners belonging to otherprofessions, so far as both mutual relations between the partners and their relations with third parties were concerned.

76. In 1973 the General Council accredited the members of both the Netherlands association of patent agents and of the Netherlands association of tax consultants for the purposes of creating multi-disciplinary professional partnerships with members of the Bar. Subsequently, notaries were also accredited. According to the appellants in the main proceedings, although, at the material time, members of the Netherlands institute of accountants were not formally accredited by the General Council, there was in principle no objection to this.

77. In 1991, faced for the first time with a request for authorisation of a partnership with an accountant, the Bar of the Netherlands, following an expedited procedure, amended the 1972 Regulation for the sole purpose, according to the appellants, of having a legal basis on which to prohibit professional partnerships between members of the Bar and accountants. Members of the Bar were thenceforth authorised to enter into multi-disciplinary partnerships only where 'the free and independent exercise of their profession, including the defence of their clients' interests, and the corresponding relationship of trust between lawyer and client cannot be jeopardised.

78. The refusal to authorise partnerships between members of the Bar and accountants is, in the appellants' submission, based on the finding that firms of accountants had evolved and had in the meantime become gigantic organisations, so that a partnership of a law-firm with a firm of accountants would, as the then General Dean of the Bar expressed it, have more resembled the marriage of a mouse and an elephant than a union of partners of equal stature.

79. The Bar of the Netherlands then adopted the 1993 Regulation. That measure recapitulated the amendment made in 1991 and added a further requirement to the effect that members of the Bar were no longer authorised to form part of a professional partnership unless the primary purpose of each partner's respective profession is the practice of the law (Article 3 of the 1993 Regulation), which, in the appellants' submission, demonstrates the anti-competitive object of the national rules at issue in the main proceedings.

80. In the alternative, the appellants in the main proceedings claim that, irrespective of its object, the 1993 Regulation produces effects that are restrictive of competition.

81. They maintain that multi-disciplinary partnerships of members of the Bar and accountants would make it possible to respond better to the needs of clients operating in an ever more complex and international economic environment.

82. Members of the Bar, having a reputation as experts in many fields, would be best placed to offer their clients a wide range of legal services and would, as partners in a multi-disciplinary partnership, be especially attractive to other persons active on the market in legal services.

83. Conversely, accountants would be attractive partners for members of the Bar in a professional partnership. They are experts in fields such as legislation on company accounts, the tax system, the organisation and restructuring of undertakings, and management consultancy. There would be many clients interested in an integrated service, supplied by a single provider and covering the legal as well as financial, tax and accountancy aspects of a particular matter.

84. The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

85. By contrast, the Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.

86. It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87. As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the 'one-stop shop advantage).

88. Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89. Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90. A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.

91. It is true that the accountancy market is highly concentrated, to the extent that the firms dominating it are at present known as the big five and the proposed merger between two of them, Price Waterhouse and Coopers & Lybrand, gave rise to Commission Decision 1999/152/EC of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand*), adopted pursuant to Council Regulation EEC/4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended by Council Regulation EC/1310/97 of 30 June 1997.

92. On the other hand, the prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law-firms and so reduce their opportunities of benefiting from economies of scale or of entering into structural associations with practitioners of highly concentrated professions.

93. In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.

94. Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

95. As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72, *Vereeniging van Cementhandelaren* v *Commission*, paragraph 29; Case 42/84, *Remia and Others* v *Commission*, paragraph 22, and *CNSD*, paragraph 48).

96. That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and

more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States.

97. However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95, *Reisebüro Broede*, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98. Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

99. As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83, *Klopp*, paragraph 17, and *Reisebüro*, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100. The current approach of the Netherlands, where Article 28 of the [Law on the Legal Profession] entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.

101. Those obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102. Thus, they require of members of the Bar that they should be in a situation of independence *vis-à-vis* the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103. By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

104. As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant. The written observations submitted by the respondent in the main proceedings show that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective examination and audit of their clients' accounts, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under German law, for example.

105. The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.

106. Moreover, the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser, also raises questions within the accountancy profession itself, as may be seen from the Commission Green Paper in 1996, "The role, the position and the liability of the statutory auditor within the European Union"; see, in particular, paragraphs 4.12 to 4.14.

107. A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

108. Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96, *MacQueen and Others*, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, *Reisebüro*, paragraph 41).

109. In the light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92, *DLG*, paragraph 35).

110. Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

## Question 3

111. By its third question the national court is asking, essentially, whether a body such as the Bar of the Netherlands is to be treated as an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

112. First, since it does not carry on any economic activity, the Bar of the Netherlands is not an undertaking within the meaning of Article 86 of the Treaty.

113. Second, it cannot be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of the Netherlands are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated (Case C-96/94, *Centro Servizi Spediporto*, paragraphs 33 and 34).

114. The legal profession is not concentrated to any significant degree. It is highly heterogeneous and is characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant position for the purposes of Article 86 of the Treaty (see, to that effect, Joined Cases C-68/94 and C-30/95, *France and Others* v *Commission*, paragraph 227, and Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others* v *Commission*, paragraphs 36 and 42). Furthermore, as is clear from the documents before the Court, members of the Bar account for only 60% of turnover in the legal services sector in the Netherlands, a market share which, having regard to the large number of law-firms, cannot of itself constitute conclusive evidence of the existence of a collective dominant position on the part of those undertakings (see, to that effect, *France and Others* v *Commission*, paragraph 226, and *Compagnie Maritime Belge*, paragraph 42).

115. In the light of the foregoing considerations, the answer to be given to the third question must be that a body such as the Bar of the Netherlands does not constitute either an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

## Questions 4, 5 and 6

*[The judgment points out in paragraphs 116-118 that, in view of the answers to the second and third questions, there is no need to consider the fourth, fifth and sixth questions.]*

## Questions 7, 8 and 9

119. By its seventh question, the national court seeks, essentially, to ascertain whether the compatibility with Community law of a prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, must be assessed in light of both the Treaty provisions relating to the right of establishment and those relating to freedom to provide services. By its eighth and ninth questions, that court is asking, essentially, whether such a prohibition constitutes a restriction of the right of establishment and/or freedom to provide services and, if so, whether that restriction is justified.

*[Paragraphs 120 to 123 discuss the matters raised in paragraph 119.]*

## Costs

124. The costs incurred by the Netherlands, Danish, German, French, Luxembourg, Austrian, Portuguese and Swedish Governments, by the Government of the Principality of Liechtenstein and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

## Court's Ruling

On those grounds, the Court, in answer to the questions referred to it by the by the Dutch Council of State of 10 August 1999, hereby rules:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the 1993 regulation on joint professional activity, adopted by a body such as the the Bar of the Netherlands, is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty (now Article 81 EC).

2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the Treaty (now Article 82).

4. It is not contrary to Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 and 49) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned. ■

**Arduino et al v Compagnia Assicuratrice RAS SpA**

In a parallel case, the Court considered a challenge to the tariff of fixed fees for legal work. Here the state played a decisive role; and the Court held, in paragraph 40, that it did not appear that the Italian State had waived its power to make decisions of last resort or to review implementation of the tariff. It went on:

41. First, the CNF [the Italian National Bar Council] is responsible only for producing a draft tariff which, as such, is not compulsory. Without the Minister's approval, the draft tariff does not enter into force and the earlier approved tariff remains applicable. Accordingly, the Minister has the power to have the draft amended by the CNF. Furthermore, the Minister is assisted by two public bodies, ..., whose opinions he must obtain before the tariff can be approved.

42. Second, Article 60 of the Royal Decree-Law provides that fees are to be settled by the courts on the basis of the criteria referred to in Article 57 of that decree-law, having regard to the seriousness and number of the issues dealt with. Moreover, in certain exceptional circumstances and by duly reasoned decision, the court may depart from the maximum and minimum limits fixed pursuant to Article 58 of the Royal Decree-Law.

43. In those circumstances, the Italian State cannot be said to have delegated to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation. Nor, for the reasons set out in paragraphs 41 and 42 above, is the Italian State open to the criticism that it requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforces their effects.

44. The answer to the questions referred for a preliminary ruling must therefore be that Articles 5 and 85 of the Treaty do not preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in the Italian legislation.

Source: Judgment of the Court, dated 19 February 2002, in Case C-35/99