

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 6 March 2008¹

I — Introduction

1. In this case, the Court of Justice is once again faced with the question of what requirements under European competition law are applicable in the field of sport. The focus of interest here is the dual role performed by the Greek automobile and touring club ELPA² in connection with motor sports events.

2. ELPA's dual role may be described as follows: on the one hand, ELPA is responsible in Greece for the organisation of motor sports competitions; for this purpose ELPA has created a National Motorcycle-Racing Committee (ETHEAM³) and entrusted it with supervising and organising motorcycling events. On the other hand, ELPA also participates in the authorisation by a public body of motorcycling events, which, under Greek law, can be issued only with ELPA's consent.

3. MOTOE,⁴ an independent Greek motorcycling association, came to feel the effects of ELPA's dual role. When MOTOE sought to

organise on its own responsibility a number of motorcycling events in Greece in 2000, it obtained no authorisation for them because ELPA did not declare its consent to the competent authority.

4. From the point of view of competition, this raises the question whether a dual role such as that performed by ELPA is compatible with Article 82 EC and Article 86 EC. However, it must first be asked whether and to what extent the activity of a non-profit-making organisation such as ELPA in the field of sport is covered by Community competition law at all.

II — Legal framework

A — Community law

5. The relevant Community legislation in this case is made up of the competition rules contained in Articles 82 EC and 86 EC.

1 — Original language: German.

2 — Elliniki Leschi Aftokinitou kai Periigiseon.

3 — Ethniki Epitropi Agonon Motosikletas.

4 — Motosykletistiki Omospondia Ellados.

6. Article 82 EC reads as follows:

which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

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

7. Article 86 EC provides as follows:

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations

‘(1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

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

...’

B — *National Law*

(International Historic Vehicle Federation) (FIVA) ...'

8. Article 49 of Greek Law No 2696/1999⁵ (the 'Road Traffic Code'), in the version of 2000, reads as follows:

'(1) Competitions involving vehicles drawn by animals, animals, bicycles, cars, three-wheeled vehicles, motorcycles or mopeds on public or private roads or spaces are allowed to take place only after authorisation has been granted.

(2) Authorisation under the previous paragraph is given:

...

(c) for all competitions involving cars, three-wheeled vehicles, motorcycles or mopeds, by the Minister for Public Order or the authorities empowered by him, following the consent of the legal person which officially represents in Greece the Fédération Internationale de l'Automobile (International Automobile Federation) (FIA), the Fédération Internationale de Motocyclisme (International Motorcycling Federation) (FIM) or, in the case of competitions involving historic vehicles, the Fédération Internationale des Véhicules Anciens

9. Also, Article 134(8) of Greek Law No 2725/1999⁶ provides as follows:

'Competitions involving mechanically-operated vehicles and related sporting disciplines (car, formula, kart, bike and so forth) constitute a sporting activity which is governed by the provisions of this Law ...'

C — *Association rules*

10. ELPA's yearbook of motorcycling events (2000), which was issued by ETHEAM, contains its circulars for 2000. They provide, inter alia, information on the supporting documents to be produced when applying for authorisation to hold an event and the competition conditions which must be submitted, as well as on fees and other financial matters. Also published in the yearbook are the national rules governing the sport of motorcycling, known as the EAKM,⁷ which contain the following provisions:

5 — FEK A' 57.

6 — FEK A' 121.

7 — Ethnikos Athlitikos Kanonismos Motosikletas.

‘10.7. Every sports meeting which includes events in respect of ETHEAM/ELPA championships, cups or prizes may be combined with the commercial promotion of a sponsor referred to in the event’s title or secondary title only after ETHEAM/ELPA has given its consent.

must ensure that for the sports meeting insurance is in place that covers his own liability and that of manufacturers, riders, passengers ... in the event of accidents and of loss or injury to third parties during the event and during practice.’

...

III — Facts and main proceedings

60.6. During sports meetings, advertising on riders and motorcycles is permitted. Advertising is allowed on the helmet to the extent that it is feasible without affecting the helmet’s technical characteristics. In speed events and motocross within the framework of ETHEAM/ELPA championships, cups and prizes, the organisers do not have the right to require a rider, passenger or motorcycle to advertise any product, unless they obtain the competitor’s consent. When an ETHEAM/ELPA sponsorship agreement is in force, riders, passengers and motorcycles are obliged to observe the terms of that agreement.

11. ELPA, the Greek automobile and touring club, is the official representative of the FIM in Greece. According to the information from the referring court, ELPA is a non-profit-making association which, inter alia, organises motor sports competitions and, in this connection, also concludes sponsorship, advertising and insurance agreements.

12. ELPA has entrusted the supervision of national racing events and the issue of motorcycling sports licences throughout Greece to the National Motorcycle-Racing Committee (ETHEAM) established by it.

...

110.1. The organiser, either directly or through the supervisory authority,

13. MOTOE is a non-profit-making motor sports association independent of ELPA, whose activity likewise includes the organisation of motorcycling events in Greece. A number of regional motorcycling clubs are members of it.

14. On 13 February 2000, MOTOE applied to the Greek Ministry of Public Order for authorisation to hold a number of motorcycling events. A programme of the planned events was enclosed with the application, according to which a total of 28 events of various motorcycling clubs, all of them MOTOE members, were to be held between 26 March 2000 and 3 December 2000. On 8 February 2000, the programme was sent to ELPA so that it could give the consent required for authorisation of the events.

15. By letter of 16 March 2000, ELPA asked MOTOE to submit specific rules for each planned event at least two months before it was due to take place, so as to allow scrutiny of the race officials, the route or track for the race, the safety measures that would be taken and, generally, all the conditions for the safe running of the event. The organising clubs were also asked to lodge with ETHEAM a copy of their statutes.

16. Subsequently, by letter of 5 May 2000, MOTOE applied to the Ministry of Public Order for authorisation to hold six races in the period from 9 July to 26 November 2000 and enclosed with that application the rules relating to the planned conduct of the events and copies of the organising clubs' statutes. By letter of 20 May 2000, that application, together with its enclosures, was in turn forwarded to ELPA for a declaration of consent.

17. On 6 July 2000, ETHEAM/ELPA sent a letter to MOTOE which was worded as follows:

'1. In accordance with the legislation in force, championships, cups and prizes are organised by ETHEAM, on the authorisation of ELPA, the only legal representative of the FIM.

2. If an entity or club which satisfies the necessary requirements for the organising and holding of events wishes a specific cup or prize to be announced, it must approach ETHEAM and submit the announcement to it. ETHEAM, after assessing the terms of the proposed announcement, makes a decision, and defines the conditions for holding the event, always in accordance with the international and national rules.

3. A cup or prize must involve events of a similar kind, for example scramble only or enduro only. Other isolated activities which are not included in the championships, cups and prizes already announced can be classified only as friendly events.

4. In order for it to be possible to grant the consent for the organisation of an event, even within the framework of a cup or prize, each organiser who has taken on one of the events which will be included in the particular cup or prize must satisfy the requirements laid down in the National Motorcycle Competition Code and ETHEAM's circulars. Finally, it must be understood that, when the announcement of additional events is requested in the course of the sporting year, the dates requested must not affect the dates already scheduled, and this must be in the interests of both the racers and the organisers. In light of the foregoing, ETHEAM is at your service for discussion of the possibility of announcing a cup or prize in accordance with this year's national rules for motorcycling events, and awaits your programme of events for 2001 so that those events may also be included in the annual programme. Your programme must be lodged with ETHEAM/ELPA no later than 15 September 2000.'

18. On 26 July 2000, MOTOE asked the Ministry of Public Order for information on the progress of its application for authorisation. On 7 August 2000, the Ministry of Public Order informed MOTOE that the necessary consent from ETHEAM/ELPA had not yet been given.

19. MOTOE subsequently brought an action before the Diikitiko Protodikio Athinon⁸ for damages in the amount of GRD 5 million.⁹

It claimed that the (in its opinion, unlawful) tacit rejection of its application for authorisation to hold motorcycling events had caused it non-material harm because its reputation and credibility in the eyes of its members, Greek motorcyclists and the general public had been damaged. MOTOE submitted that Article 49 of the Road Traffic Code infringes the principle of impartiality on the part of the administrative authorities contained in the Greek constitution as well as Articles 82 EC and 86 EC. ELPA intervened in those proceedings in support of the Greek State.

20. MOTOE's action was dismissed at first instance, on the grounds that authorisation could not be given without the necessary consent under Article 49 of the Road Traffic Code. It was also held that Article 49 of the Road Traffic Code was neither unconstitutional nor contrary to Community law.

21. MOTOE lodged an appeal with the Diikitiko Efetio Athinon,¹⁰ the referring court, against the judgment given at first instance.

8 — Administrative Court, Athens.

9 — According to the official euro exchange rate (EUR 1 = GRD 340.750), this corresponds to an amount of EUR 14 673.51.

10 — Administrative Appeal Court, Athens.

IV — Reference for a preliminary ruling

22. By order of 21 November 2006, which was received at the Court on 5 February 2007, the Diikitiko Efetio Athinon stayed proceedings and referred the following two questions to the Court for a preliminary ruling:

(1) Can Articles 82 and 86 EC be interpreted so as also to include within their scope the activity of a legal person which has the status of national representative of the International Motorcycling Federation and engages in economic activity as described above by entering into sponsorship, advertising and insurance contracts, in the context of the organisation of motor sport events by it?

(2) Should the answer [to the first question] be in the affirmative, is Article 49 of Law 2696/1999, which, in relation to issue by the competent national public authority (in the present case, the Ministry of Public Order) of permission to organise a motor-vehicle competition, gives the abovementioned legal person the power to provide a concurring opinion as to the holding of the competition without that power being made subject to restrictions, obligations and review, compatible with those provisions of the Treaty?

23. In the proceedings before the Court, the Greek Government and the Commission of the European Communities have submitted written observations and presented oral argument. MOTOE has merely presented oral argument.

V — Assessment

A — Preliminary remark

24. Sport is not generally removed from the scope of the EC Treaty. This is recognised both at political level and in the case-law of the Community courts.

25. For example, *at political level*, the Intergovernmental Conference on the Treaty of Amsterdam (1997), in a ‘Declaration on Sport’,¹¹ called on the bodies of the European Union 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. A similar declaration is attached to the Presidency Conclusions of the Nice European

¹¹ — Declaration No 29 in the Final Act of the Intergovernmental Conference on the Treaty of Amsterdam signed on 2 October 1997 (OJ 1997 C 340, p. 136).

Council (2000).¹² Last year, the Commission also presented a 'White Paper on Sport', in which it addresses the effects of Community law on sport and confirms the application of the *acquis communautaire* to sport.¹³

26. Such declarations and initiatives emphasise the fact that sport is not entirely excluded from the field of activity of the European Union and/or the European Community. Indeed, on the entry into force of the Treaty of Lisbon,¹⁴ sport will be expressly mentioned in Community primary law.¹⁵

27. The *Community judicature* recognises in its settled case-law¹⁶ that sport is in any event subject to Community law in so far as it constitutes an economic activity within

the meaning of Article 2 EC.¹⁷ Whereas, initially, that case-law was largely concerned with the effects of the fundamental freedoms on sport,¹⁸ the competition rules of the EC Treaty have featured more prominently recently.¹⁹ This is also true of the present case, in which the Court is called upon to interpret Articles 82 EC and 86 EC.

28. Whereas the first question concerns the applicability of Articles 82 EC and 86 EC to a non-profit-making organisation such as ELPA, by its second question, the referring court focuses on ELPA's dual role as an organisation which, on the one hand,

12 — 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies', Nice European Council (7, 8 and 9 December 2000), Presidency Conclusions (paragraph 52 and Annex IV, see in particular paragraphs 1, 7 and 17 of the declaration printed there).

13 — COM(2007) 391 final; see in particular there the introduction (p. 2) and section 4.1 (p. 14 et seq.); see also section 3.4 and section 4 of the Commission Working Document published with the White Paper on Sport, 'Commission Staff Working Document — The EU and Sport: Background and Context' of 11 July 2007, SEC(2007) 935. The White Paper and Working Document can be downloaded from http://ec.europa.eu/sport/index_en.html (last visited on 10 January 2008).

14 — Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007 (OJ 2007 C 306, p. 1).

15 — See in particular Article 6(e) and Article 165 of the future Treaty on the Functioning of the European Union; see to the same effect the existing Article I-17(e) and Article III-282 of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004 (OJ 2004 C 310, p. 1).

16 — Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, paragraph 22 and the case-law cited there.

17 — That case-law has so far lost none of its relevance when it comes to defining the scope of the traditional fundamental freedoms of the EC Treaty or — as here — defining the scope of its competition rules. More generally, however, it should be remembered that the beginnings of that case-law date back to a time when the Community was essentially an economic community. As a result of the introduction of Union citizenship and many new policies, in particular in the areas of education and youth, the EC Treaty now also has non-economic links to sport. It is certainly the case that, on the entry into force of the Treaty of Lisbon, there will no longer be any doubt that the relevance of sport to Community law extends beyond its economic aspects; this is emphasised by the fact that sport is mentioned in Title XII, 'Education, vocational training, youth and sport', of the future Treaty on the Functioning of the European Union.

18 — On the fundamental freedoms of the EC Treaty, see Case 36/74 *Walrave and Koch* [1974] ECR 1405; Case 13/76 *Donà* [1976] ECR 1333; Case C-415/93 *Bosman* [1995] ECR I-4921; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681; on corresponding provisions in the Association Agreements, see also Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, and Case C-265/03 *Simutenkov* [2005] ECR I-2579.

19 — See *Meca-Medina*, cited in footnote 16, and Case T-193/02 *Piau v Commission* [2005] ECR II-209, upheld in Case C-171/05 P *Piau v Commission* [2006] ECR I-37. Some Advocates General had addressed these issues at an even earlier date; see in particular the Opinions of Advocate General Lenz in *Bosman* (points 253 to 286), Advocate General Cosmas in *Deliège* (points 103 to 114) and Advocate General Alber in *Lehtonen and Castors Braine* (points 101 to 114), each cited in footnote 18.

participates in decisions on the State authorisation of motorcycling events and, on the other hand, organises such events itself.

special or exclusive rights to the association (see in this regard section 3 below).

B — *Applicability of Articles 82 EC and 86 EC (first question)*

29. By its first question, the referring court wishes, in essence, to ascertain whether the activity of a non-profit-making association falls within the scope of Articles 82 EC and 86 EC, where that association not only has an exclusive right of co-decision in the authorisation by a public body of motorcycling events, but also organises such events itself and, in that connection, concludes sponsorship, advertising and insurance agreements.

30. Community competition law concerns the activities of undertakings.²⁰ It is therefore a fundamental requirement for the application of Articles 82 EC and 86 EC that the association in question should be an undertaking within the meaning of the provisions on competition in the EC Treaty (see in this regard section 1 immediately below). The application of Article 82 EC also requires that the association should hold a dominant position on the market and that there should be a possibility that trade between Member States will be adversely affected (see in this regard section 2 below). Finally, with regard to the application of Article 86(1) EC, it must also be examined whether the State has granted

1. The concept of undertaking in Community competition law

31. ‘Undertaking’ within the meaning of Community competition law must be understood in functional terms and encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.²¹ An organisation that does not carry on an economic activity is not an undertaking within the meaning of competition law.²²

32. Any activity consisting in offering goods and services on a given market is an economic activity (activity ‘as an undertaking’).²³ Although it is for the referring court to make the final assessment of ELPA’s activity, the Court can, in preliminary ruling proceedings,

20 — Case C-280/06 *Ente Tabacchi Italiani and Others* [2007] ECR I-10893, paragraph 38.

21 — See, inter alia, Case C-41/90 *Höfnér and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 107; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 28; and *Ente Tabacchi Italiani and Others* (cited in footnote 20, paragraph 38).

22 — Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 112.

23 — Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 19; *Cassa di Risparmio di Firenze* (cited in footnote 21, paragraph 108); and *Enirisorse* (cited in footnote 21, paragraph 29).

provide it with all the guidance it needs to facilitate its decision.²⁴

33. An association such as ELPA provides services in two ways: first, ELPA, assisted by the ETHEAM committee created by it for this purpose,²⁵ *organises* motorcycling events in Greece. Second, ELPA *markets* those motorcycling events, according to the information from the referring court, by concluding, or in any event arranging, sponsorship, advertising and insurance agreements.

34. There is a market for both activities — the organisation and the marketing of motorcycling events — irrespective of whether ELPA alone provides the respective services, as a form of monopoly holder, or whether they are provided by other organisations, such as MOTOE. The services supplied by ELPA in connection with the *organisation* of motorcycling events are thus requested and paid for by the participating motorcyclists or their clubs. As regards *marketing*, ELPA's services are used by the respective sponsors, advertising partners and insurers. In addition, as became clear at the hearing, motorcycling events can also be marketed through the sale of tickets for admission to the venue

and, where appropriate, through the sale of television broadcasting rights.

35. The Greek Government disputes the assertion that ELPA still *organises* motorcycling events nowadays. However, it is sufficient to point out in this regard that the Court must proceed on the basis of the findings of the referring court in relation to the factual and legislative context in which a request for a preliminary ruling is made.²⁶ The order for reference expressly assumes that ELPA itself organises motorcycling events. Moreover, as became clear at the hearing, ELPA certainly appears to assist certain motorcycling clubs with the organisation of their motorcycling events and, on occasion, to co-organise such events. Without prejudice to the findings to be made by the referring court in this regard, this indicates that ELPA continues to be active in the organisation of motorcycling events. Moreover, ELPA's activities in the *marketing* of motorcycling events have not been disputed in the proceedings before the Court.

36. All the foregoing points to the economic nature of the activity of an association such as ELPA and therefore its status as an undertaking.

37. As I shall show below, ELPA's status as an undertaking is not precluded by the fact that the services provided by it relate to sport, that ELPA is a non-profit-making

24 — See to this effect *Enirisorse* (cited in footnote 21, paragraph 30).

25 — As ELPA itself created ETHEAM for this purpose, ETHEAM's activity must be attributed to ELPA (see in this regard *Cassa di Risparmio di Firenze*, cited in footnote 21, paragraph 110 et seq.).

26 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; Case C-28/04 *Tod's* [2005] ECR I-5781, paragraph 14; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 21.

association and operates without seeking to make a profit, or that it participates in the public body's authorisation of motorcycling events.

an association such as ELPA has the status of undertaking is the activity which it itself carries on.

— Services relating to sport

38. The fact that the aforementioned services relate to sport does not preclude their classification as an economic activity and the concomitant application of the competition rules in the EC Treaty.²⁷ For, aside from its considerable social importance,²⁸ sport nowadays has a not insignificant economic dimension. Consequently, when it comes to the application of the competition rules, each individual activity that exhibits a connection with sport must on each occasion be examined to ascertain whether it is economic in nature or not.²⁹

40. Where sports events are organised in such a way that payments are made by the participants or at any rate by the spectators, the organisation of those events is an economic activity. Furthermore, where sponsorship, advertising and insurance agreements are concluded in connection with a sports event, such marketing of the event in question is also an economic activity. In this respect, the status of the organiser of a sports event must not be assessed any differently from that of the manufacturer or vendor of the sports clothing and equipment used by the sportspersons; he too is pursuing an economic activity, irrespective of whether the sportspersons in question are professionals or amateurs.

39. In this connection, the organiser of a sports event may be pursuing an economic activity irrespective of whether the sportspersons participating in that event themselves practise the sport professionally or merely as amateurs, that is to say whether they are economically active or not. Contrary to the Greek Government's assertion, the activity of the sportspersons taking part in motorcycling events does not matter. The only decisive factor in assessing whether

— Absence of a profit-making aim

41. The fact that an organisation such as ELPA has the status of a non-profit-making association and operates without seeking to make a profit does not preclude the assumption that it pursues an economic activity and has the associated status of undertaking. Such organisations can also market their services in competition with other economic agents,³⁰ irrespective of whether the other economic agents themselves operate without seeking to make a profit or on a commercial basis.

27 — See also points 24 to 27 of this Opinion, above.

28 — *Bosman* (paragraph 106), *Deliège* (paragraph 41) and *Lehtonen and Castors Braine* (paragraph 32), each cited in footnote 18; see also the White Paper on Sport (cited in footnote 13), section 2 of which looks at the social role of sport.

29 — The fact that each individual activity must be examined is also shown by *Meca-Medina* (cited in footnote 16, paragraphs 28 to 31).

30 — Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I-4013, paragraphs 17 and 18; Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 84 to 87; and *Cassa di Risparmio di Firenze* (cited in footnote 21, paragraph 123).

42. This is particularly clear in the present case, where two Greek non-profit making associations — ELPA and MOTOE — have set themselves the aim of organising and marketing motorcycling events in Greece. The success of such organisations depends ultimately on their being able, through each of the services which they provide, to hold their own against other providers and to ensure the financing of their activities.

43. It is true that an organisation cannot be classified as an undertaking where it confines itself to an exclusively *social or public-interest activity* which is not pursued on the market in competition with other economic agents.³¹ The rules on competition in the EC Treaty do not apply to an activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity.³²

44. However, where the organisation concerned begins to *market* its services,³³ it moves away from the sphere of exclusively social or public-interest activity; the mere fact that it continues at the same time to pursue an aim in the general interest (in ELPA's case, the promotion of sport) and does not seek to make a profit is no longer sufficient for it to be denied the status of

undertaking within the meaning of competition law.³⁴

45. The Greek Government raises the objection that ELPA's revenue was sufficient only to cover costs. However, this does not preclude the assumption that ELPA pursues an economic activity. The status of undertaking is not dependent on the size of an organisation or on the extent of its economic success.³⁵

46. Considered in its entirety, therefore, an association such as ELPA, which *markets* its services in the field of motorcycle racing, must, despite the fact that it does not seek to make a profit, be regarded as an undertaking.

47. It should be noted merely in passing that an association such as ELPA is in no way similar to the statutory social security institutions to which the Court has in some judgments³⁶ denied the status of undertaking. Their activities, aside from the fact that they pursued social objectives and did not seek to make a profit, were subject to State regulation giving rise to certain solidarity obligations, the institution in question being left

31 — *Cassa di Risparmio di Firenze* (cited in footnote 21, paragraphs 120 and 121).

32 — *Wouters* (cited in footnote 22, paragraph 57).

33 — On the meaning of marketing, see points 33 and 34 of this Opinion, above.

34 — On the pursuit of a social objective, see *Pavlov* (cited in footnote 23, paragraph 118); Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 37; and *Cassa di Risparmio di Firenze* (cited in footnote 21, paragraph 124); as well as, similarly, *Enirisorse* (cited in footnote 21, paragraph 34); on the absence of a profit-making aim see Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 88; *Fédération française des sociétés d'assurance and Others* (cited in footnote 30, paragraph 21); *Albany* (cited in footnote 30, paragraph 85); *Pavlov* (cited in footnote 23, paragraph 117); *Cassa di Risparmio di Firenze* (cited in footnote 21, paragraph 123); and Case C-119/06 *Commission v Italy*, paragraph 37.

35 — Opinion of Advocate General Lenz in *Bosman* (cited in footnote 18, point 255).

36 — Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637; *Cisal* (cited in footnote 34); and *AOK Bundesverband* (cited in footnote 21).

with no significant influence on the extent of the services which it was required to provide or the amount of the contributions that it received.³⁷ According to the information available to the Court, ELPA is not subject to comparable State regulation; nor is there anything in the documents before the Court to indicate that the State imposes any limit on ELPA's discretion to determine its services and the remuneration, if any, payable for them.

— Participation in a public body's authorisation of motorcycling events

48. Finally, the assumption that ELPA pursues an economic activity is not precluded by the fact that, in addition to organising and marketing motorcycling events, as mentioned above, it also participates in the authorisation by a public body of such events under Article 49 of the Road Traffic Code.

49. It is true that the exercise of public powers does not fall within the scope of the competition rules in the EC Treaty, and an organisation which exercises public powers is not an undertaking within the meaning of competition law.³⁸ However, the distinction

between public and economic activities must be drawn separately in relation to each activity carried on by an organisation.³⁹ The organisation in question may therefore operate in part as a public body and in part as an economic agent.

50. This is precisely the case with an organisation such as ELPA, which, on the one hand, participates in the authorisation by a public body of motorcycling events while, on the other, itself organises and markets such events. Even though ELPA's participation in the public body's authorisation of motorcycling events may be classified, as such, within the sphere of public activity, this none the less in no way alters that association's status as an undertaking in other respects, that is to say in so far as it itself organises and markets motorcycling events.

— Interim finding

51. In the light of all the foregoing, an association such as ELPA must be regarded as an undertaking within the meaning of the provisions on competition in the EC Treaty.

37 — *Poucet and Pistre* (cited in footnote 36, paragraphs 18 and 19); *Cisal* (cited in footnote 34, paragraph 45); and *AOK Bundesverband* (cited in footnote 21, in particular paragraphs 47 and 49).

38 — Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraphs 30 and 31; Case C-343/95 *Calí* [1997] ECR I-1547, paragraphs 22 and 23; and *Wouters* (cited in footnote 22, paragraph 57).

39 — See to this effect Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; *Calí* (cited in footnote 38, paragraphs 16 and 18); and Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, paragraphs 74 and 75, second sentence; see also my Opinion in Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, point 72.

2. Dominant position on the market and effect on trade between Member States within the meaning of Article 82 EC

52. The application of Article 82 EC to an association such as ELPA requires — apart from its status as an undertaking, which has just been discussed — that that association should hold a dominant position on the market and that there should be a possibility that trade between Member States will be affected.

53. Although it is not for the Court to assess the facts of the dispute in the main proceedings, it can none the less provide the referring court with any useful guidance on the specific characteristics of those facts that will make it easier for the latter to resolve the dispute in the main proceedings. To that end, the following points should be made.

(a) Definition of the relevant markets, substantial part of the common market

54. The relevant markets must be defined first before the existence of a dominant position on the market can be examined.

55. With regard to the materially relevant markets, it must be remembered that ELPA provides services in the field of motorcycling in two ways: first, ELPA, assisted by ETHEAM, *organises* motorcycling events in Greece. Second, ELPA *markets* those

motorcycling events, according to the information from the referring court, by concluding sponsorship, advertising and insurance agreements. There is not necessarily a connection between the two kinds of service and they are not interchangeable. Consequently, the organisation and the marketing of sports events must be regarded as being two separate materially relevant markets.

56. However, the referring court will have to examine whether the relevant markets are confined to the organisation and marketing of *motorcycling events* alone or whether they also cover other motorsports events, and even each type of sports events.

57. From a geographical point of view, it should be noted that ELPA provides the aforementioned services within Greece. The territory of that Member State constitutes the geographically relevant market and can also be regarded as a substantial part of the common market.⁴⁰

⁴⁰ — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31; see to the same effect Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 60; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 79; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 99. Even component territories of Member States may constitute a substantial part of the common market; see *Ambulanz Glöckner* (cited in footnote 23, paragraph 38).

(b) Dominant position on the market

58. A dominant position on the market relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.⁴¹

59. Should it turn out that ELPA (co-)organises all or at any rate the vast majority of all motorcycling events in Greece — it is for the referring court to make the necessary findings in this regard — it would have to be assumed that ELPA holds a dominant position on the market. The same applies to the marketing of such motorcycling events.

60. All of this presupposes that the materially relevant market is confined in each case to *motorcycling events* and does not also cover the organisation or marketing of other sports events.⁴² The more individual sports events are covered by the materially relevant markets, the less likely it is that ELPA will hold a dominant position on them.

41 — Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 30; and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v Commission* [2000] ECR I-1365, paragraph 34.

42 — See in this regard point 56 of this Opinion, above.

61. The following arguments assume that ELPA holds a dominant position on each of the two markets concerned.

(c) Effect on trade between Member States

62. Article 82 EC prohibits the abuse of a dominant position only ‘in so far as it may affect trade between Member States’. This so-called *intra-Community clause* defines the boundary between the areas covered by national competition law and by Community competition law.⁴³

63. Such an effect on trade between Member States can be assumed only if it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective legal and factual elements, that the behaviour in question may have an influence, direct or indirect, actual or potential, on trade between Member States in such a way as might hinder

43 — Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 341; Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, paragraph 31; and *Ambulanz Glöckner* (cited in footnote 23, paragraph 47).

the attainment of a single market between Member States.⁴⁴

64. It is sufficient for this purpose that the behaviour of the undertaking in a dominant position *is capable* of affecting trade between Member States;⁴⁵ purely hypothetical or speculative effects are, however, not sufficient for establishing the applicability of Article 82 EC.⁴⁶

65. It is for the referring court to make the necessary findings in this regard, taking into account the guidance from the Court.⁴⁷ Three points in particular must be borne in mind here.

66. Firstly, as the Commission has stated, the business of sport is becoming international. Consequently, it does not necessarily seem out of the question that foreign undertakings might have an interest in entering the Greek market and in organising and marketing motorcycling events there.

67. Secondly, it should be taken into account that an association such as ELPA, on account of its right of co-decision in the authorisation by a public body of motorcycling events (Article 49 of the Road Traffic Code), is capable of effectively preventing other service providers from entering the Greek market. The fact that MOTOE, as a domestic competitor, was not allowed to organise its planned motorcycling events in the year 2000, in the absence of a declaration of consent from ELPA, may also have a deterrent effect on foreign service providers.

68. Thirdly, ELPA provides in its association rules that commercial advertising at motorcycling events can take place only with its consent or the consent of the ETHEAM committee acting under its charge.⁴⁸ That obstacle to the marketing of motorcycling events may likewise deter foreign service providers from entering the Greek market. Furthermore, foreign sponsors, advertising partners and insurance undertakings may in this way be put off engaging in the Greek motorcycle-racing business.

69. All in all, it is not inconceivable in these circumstances that any abuse by ELPA in connection with the authorisation of the motorcycling events of other service providers or in connection with the marketing of those events would be capable of affecting trade between Member States.

44 — *Ambulanz Glöckner* (cited in footnote 23, paragraph 48), as well as — in relation to Article 81 EC — Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 18; Case C-295/04 *Manfredi* [2006] ECR I-6619, paragraph 42; Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 34; and Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 90.

45 — *Michelin v Commission* (cited in footnote 41, paragraph 104), *Höfner and Elser* (cited in footnote 21, paragraph 32) and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 36.

46 — Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' (OJ 2004 C 101, p. 81, the 'Commission Guidelines'), paragraph 43.

47 — See, for example, *Manfredi* (paragraphs 47 and 48) and *Asnef-Equifax* (paragraphs 39 and 40), cited in footnote 44.

48 — Article 10.7 of the EAKM rules governing the sport of motorcycling (see point 10 of this Opinion).

70. The Greek Government argues that, in view of the small number of motorcycling events with international participation organised in Greece, the possible effects of any anti-competitive behaviour by ELPA on trade between Member States are completely insignificant.

71. It is true that, for the purposes of the application of Article 82 EC, and also Article 81 EC, there must be an *appreciable* effect on trade between Member States; in other words, the effect must *not* be *insignificant*.⁴⁹ However, the assessment of whether the effect is appreciable or insignificant depends not only on quantitative but also qualitative factors; nor can it be confined to a single aspect such as, for example, the size of the market, but is normally the result of a combination of several factors each of which, taken separately, may not necessarily be decisive.⁵⁰

72. From a *quantitative point of view*, it is not sufficient merely to consider the overall volume of the materially and geographically relevant market. The overall volume may take on a certain significance for the question

whether a substantial part of the common market is affected.⁵¹ However, for the question whether trade between Member States has been appreciably affected, the volume of the goods or services *affected* by the alleged abuse must also be considered; that volume must then be viewed in relation to the overall volume of the materially and geographically relevant market.⁵²

73. Even if, as the Greek Government submits, only comparatively few international motorcycling events are organised in Greece, hindering the organisation or marketing of one or a few additional motorcycling events can still have appreciable effects in relation to the overall volume of the market. It can ultimately impede the development of a larger market with greater turnover potential.

74. From a *qualitative point of view*, the assessment of whether the effect is appreciable depends not least on the way in which

49 — Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 60; *Ambulanz Glöckner* (cited in footnote 23, paragraph 48), as well as — in relation to Article 81 EC — Case 22/71 *Béguelin Import* [1971] ECR 949, paragraph 16; Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16; *Manfredi* (cited in footnote 44, paragraph 42); *Asnef-Equifax* (cited in footnote 44, paragraph 34); and *Dalmine v Commission* (cited in footnote 44, paragraph 90).

50 — *Bagnasco* (cited in footnote 49, paragraph 47), *Manfredi* (cited in footnote 44, paragraph 43) and *Asnef-Equifax* (cited in footnote 44, paragraph 35).

51 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 371; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 15, second sentence; and Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 26, second sentence. The overall volume of the market, considered in isolation, is likewise by no means decisive in determining whether a substantial part of the common market is affected. In the present case, as has been said, it follows not least from the geographical extent of the markets concerned, that is to say the territory of a Member State, that a substantial part of the common market is affected (see also in this regard point 57 of this Opinion and the case-law cited there).

52 — See to this effect *Javico* (cited in footnote 49, paragraph 26). See also the Commission Guidelines, in paragraph 52 of which — concerning Article 81 EC — the decisive factors are said to be the market share and annual turnover of the undertakings concerned in relation to the markets and/or goods affected by an agreement.

the undertaking in a dominant position behaves.⁵³ Article 82 EC covers any practice 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, in particular by partitioning the national markets or by affecting the structure of competition within the common market.⁵⁴

75. Any abuse of ELPA's rights of co-decision with regard to the organisation and marketing of motorcycling events may contribute towards the partitioning of the markets and thus undermine the aim of achieving the single market. Aside from that, as the Commission rightly points out, the mere existence of a dominant market position which extends over the entire territory of a Member State may have the effect of reinforcing the partitioning of markets on a national basis by holding up the economic interpenetration which the Treaty was designed to bring about.⁵⁵

76. There are therefore both quantitative and qualitative aspects pointing to an appreciable effect on trade between Member States.

53 — See also in this regard the Commission Guidelines, paragraph 45.

54 — Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17; *Ambulanz Glöckner* (cited in footnote 23, paragraphs 47 and 49); *Manfredi* (cited in footnote 44, paragraph 41); *Asnef-Equifax* (cited in footnote 44, paragraph 33); and *Dalmine v Commission* (cited in footnote 44, paragraphs 89 and 91); see to the same effect Case 30/87 *Bodson* [1988] ECR 2479, paragraph 24; and Case 247/86 *Alsattel* [1988] ECR 5987, paragraph 11.

55 — See to the same effect — although in relation to cartels extending over the entire territory of a Member State — Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 29; *Manfredi* (cited in footnote 44, paragraph 45); and *Asnef-Equifax* (cited in footnote 44, paragraph 37); see, similarly, Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 45.

3. Special or exclusive rights (Article 86(1) EC)

77. Since an organisation such as ELPA is indisputably not a public undertaking but a private association, Article 86(1) EC would be applicable only in so far as the Greek State has granted special or exclusive rights to that association.

78. The characteristic feature of such special or exclusive rights is that they give rise to a special relationship between the State authority in question and the favoured undertaking⁵⁶ and accord more favourable treatment to the undertaking than to its competitors.

79. Through the rules on consent in Article 49 of the Road Traffic Code, the Greek State accords to ELPA, as the official representative of the FIM in Greece, a right of co-decision in the authorisation of motorcycling events and thus allows it to participate in the exercise of public authority. ELPA is thus given preference over other possible organisers of motorcycling events in Greece. The association therefore enjoys a *special right*. Because ELPA alone has that right of co-decision under Article 49 of the Road Traffic Code, it can also be said to have an *exclusive right*.⁵⁷

56 — Case C-202/88 *France v Commission* ('Telecommunications Terminals Equipment') [1991] ECR I-1223, paragraph 24.

57 — For the sake of simplicity, I shall henceforth use only the term *exclusive right*.

80. Therefore, ELPA's activity falls within the scope not only of Article 82 EC but also of Article 86(1) EC.

C — Compatibility of ELPA's dual role with Article 86(1) in conjunction with Article 82 EC (second question)

4. Interim finding

81. In summary, it can be concluded that:

82. If, as I have proposed, the first question is to be answered in the affirmative, the second question also requires discussion. By the second question, the referring court wishes, in essence, to ascertain whether Articles 82 EC and 86 EC preclude a provision such as Article 49 of the Greek Road Traffic Code, under which a non-profit-making association that itself organises and markets motorcycling events is at the same time accorded an exclusive right of co-decision in the authorisation by a public body of such events, in which capacity it can refuse to give its consent without being subject to any restrictions, obligations or controls.

A non-profit-making association that not only has an exclusive right of co-decision in the authorisation by a public body of motorcycling events but also itself organises such events and, in this connection, concludes sponsorship, advertising and insurance agreements, is an undertaking within the meaning of Articles 82 EC and 86 EC.

83. Essentially, the dual role, as referred to above, of an association such as ELPA must be measured against the criterion of Community law, in particular Article 86(1) EC in conjunction with Article 82 EC.

It is for the national court, having regard to the case-law of the Court of Justice concerning Article 82 EC, to examine whether that association holds a dominant position on the market and whether the abuse of that position would be capable of appreciably affecting trade between Member States.

1. The requirements of Article 86(1) EC in conjunction with Article 82 EC

84. Under Article 86(1) EC, with regard to undertakings to which Member States grant special or exclusive rights, Member States

must neither enact nor maintain in force any measure contrary to the rules of competition law.

85. The term ‘measure’ must be interpreted broadly in this connection. Even a legal provision such as Article 49 of the Greek Road Traffic Code is covered by it.⁵⁸

86. Through the rules on consent laid down in that article, the Greek State accords to ELPA, as the official representative of the FIM in Greece, the exclusive right of co-decision in the authorisation of motorcycling events.

87. Such a provision infringes Article 86(1) EC in conjunction with Article 82 EC where the undertaking in question, merely by exercising the exclusive right granted to it, abuses its dominant position or where that right is liable to create a situation in which that undertaking commits such an abuse.⁵⁹

58 — See to this effect, for example, *Job Centre* (cited in footnote 45, paragraph 29).

59 — *Höfner and Elser* (cited in footnote 21, paragraph 29); *ERT* (cited in footnote 40, paragraph 37); *Merci convenzionali porto di Genova* (cited in footnote 51, paragraph 17); Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 18; *Raso and Others* (cited in footnote 51, paragraph 27 and 28); *Albany* (cited in footnote 30, paragraph 93); *Pavlov* (cited in footnote 23, paragraph 127); *Ambulanz Glöckner* (cited in footnote 23, paragraph 39); and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 60; see, similarly, *Connect Austria* (cited in footnote 40, paragraph 80).

Whether any abuse actually occurs is immaterial.⁶⁰

88. As I shall show below, not every exercise of ELPA’s right of co-decision in the authorisation of motorcycling events necessarily leads to an abuse of its dominant position, particularly if due account is taken of objective considerations such as the interests of sport (see in this regard subsection (a) below). However, a provision such as Article 49 of the Greek Road Traffic Code invites abuse because of the way in which it in fact operates (see subsection (b) below).

(a) Not every exercise of the right of co-decision is abuse *per se*

89. Certainly, not every exercise of the right of co-decision conferred on ELPA by Article 49 of the Road Traffic Code can automatically be regarded as abuse. If the behaviour of an undertaking in a dominant position can be objectively justified, it is not abuse.⁶¹ In fact, in a case such as this, there may be objective reasons why an association such as ELPA refuses to give its consent to the authorisation of a motorcycling event.

60 — *Job Centre* (cited in footnote 45, paragraph 36) and *Raso and Others* (cited in footnote 51, paragraph 31).

61 — See to this effect Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 84 and 85; see to the same effect — in relation to Article 81 EC — *Wouters* (cited in footnote 22, paragraph 97).

90. The existence of such an objective reason is particularly evident where, at a planned motorcycling event, the safety of the racers and spectators would not be guaranteed because the organiser did not take the appropriate precautions.

91. However, in addition to the purely technical safety requirements, there may be other objective reasons for refusing consent which relate to the particular characteristics of the sport.⁶² In a case such as this, it is worth bearing in mind the following considerations.

92. Firstly, it is in the interests of the sportspersons concerned, but also of the spectators and the public in general, that, for each sport, rules that are as uniform as possible apply and are observed so as to ensure that competitions are conducted in a regulated and fair manner. This applies not only to the frequently discussed anti-doping rules, but also to the ordinary rules of sport. If rules varied greatly from one organiser to another, it would be more difficult for sportspersons to participate in competitions and to compare their respective performances; the public's interest in and recognition of the sport in question might also suffer.

93. Consequently, the fact that an organisation such as ELPA makes the grant of its

consent to the authorisation of a motorcycling event subject to compliance with certain internationally recognised rules cannot automatically be regarded as abuse.⁶³ This is without prejudice, of course, to the substantive examination of each of those rules from the point of view of their compatibility with Community law, in particular its rules on competition.⁶⁴

94. Secondly, it is in the interests of the sportspersons participating in the event, but also of the spectators and the public in general, that the individual competitions in a particular sport are incorporated into an overarching framework so that, for example, a specific timetable can be followed. It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.

95. Consequently, the fact that an organisation such as ELPA makes the grant of consent to the authorisation of a motorcycling event subject to the requirement that the event must not clash with other events that have already been planned and authorised cannot automatically be regarded as an abuse.⁶⁵ However, it goes without saying in this regard that, when establishing a national Greek annual programme for motorcycling events, ELPA must not give preference to the events (co-)organised or marketed by it over those of other, independent organisers.

62 — On the question of taking into account the particular characteristics of sport in the application of Community law, see the two Declarations on Sport and the White Paper on Sport (cited in footnotes 11 to 13).

63 — See in this regard paragraphs 2 to 4 of ELPA/ETHEAM's letter to MOTOE, reproduced in point 17 of this Opinion.

64 — *Meca-Medina* (cited in footnote 16, paragraphs 28, 31 and 42 to 55).

65 — See also in this regard paragraph 4 of ELPA/ETHEAM's letter to MOTOE, reproduced in point 17 of this Opinion.

96. The *pyramid structure*⁶⁶ that has developed in most sports⁶⁷ helps to ensure that the special requirements of sport, such as uniform rules and a uniform timetable for competitions, are taken into account. An organisation such as ELPA, which is the official representative of the FIM in Greece, is part of that pyramid structure. Under its right of co-decision in the authorisation by a public body of motorcycling events, it may legitimately assert the interests of sport and, if necessary, refuse to give its consent. However, a refusal to grant consent becomes an abuse where it has no objective justification in the interests of sport, but is used arbitrarily to promote the organisation's own economic interests, to the detriment of other service providers that would like to organise, and above all market, motorcycling events on their own responsibility.

(b) Legislation such as that in force in Greece invites abuse

97. Irrespective of whether any abuse actually exists, it is sufficient, for the purposes of establishing an infringement of Article 86(1) EC in conjunction with Article 82 EC, that a State measure merely creates a risk of abuse.⁶⁸ In the present case, the risk that ELPA will abuse its dominant position⁶⁹ in exercising its right of co-decision under

66 — See in this regard the White Paper on Sport (cited in footnote 13, section 4.1).

67 — Pyramid structure does not necessarily mean a single association structure: in boxing, for example, a number of international associations co-exist.

68 — See in this regard point 87 of this Opinion, above, and the case-law cited in footnote 59.

69 — On ELPA's dominant position, see points 59 and 61 of this Opinion, above.

Article 49 of the Greek Road Traffic Code is particularly high, for two reasons.

98. Firstly, rules on consent such as those in question here lead to a conflict of interest:⁷⁰ ELPA, which itself organises and markets motorcycling events, receives from the Greek State a right of co-decision in the authorisation of motorcycling events of other, independent service providers. ELPA thus not only has the legal means that allow it effectively to prevent other service providers from entering the Greek market, but also an economic interest in limiting access to the market by its competitors to its own advantage.

99. Secondly, ELPA is not subject, under those rules on consent, to any restrictions, obligations or controls in relation to the grant or refusal of its consent to the authorisation of motorcycling events. This makes it particularly easy for ELPA to refuse to give consent to the authorisation of the motorcycling events of other, independent service providers. As the present case clearly shows, the mere fact that ELPA omitted to act was sufficient to thwart the plans of another service provider — in this instance, MOTOE — in the year 2000.

70 — See in this regard *Raso and Others* (cited in footnote 51, paragraph 28).

100. However, a system of undistorted competition as provided for by the EC Treaty⁷¹ can be guaranteed only if *equality of opportunity* is secured as between the various economic operators.⁷² This is not the case where an undertaking such as ELPA, which itself organises and markets motorcycling events, receives from the State the power to determine at its discretion which motorcycling events may take place in Greece, since this gives it a distinct advantage over its competitors, as regards both the organisation of motorcycling events and their marketing.⁷³

101. From the point of view of Community law, there can be no objection if the national legislature provides in certain cases that the relevant authorities should obtain expert advice before granting authorisation for an activity. Generally, it may therefore be appropriate to involve the sports associations concerned in decisions relating to sport. The particular characteristics of sport and of the sport in question can best be taken into account in this way.⁷⁴

102. However, the maintenance of effective competition and the ensuring of transparency require a clear separation between the

entity that participates in the authorisation by a public body of motorcycling events and, where appropriate, monitors them, on the one hand, and the undertakings that organise and market such events, on the other.⁷⁵ That principle of separation is breached where, in circumstances such as those in this case, one and the same entity, namely ELPA and the ETHEAM committee set up by it, not only participates in the public body's authorisation of motorcycling events and is entrusted with monitoring their safety, but is also itself active — in competition with other, independent service providers — in organising and marketing such events.

103. It must also be ensured that the authorisation by a public body of a motorcycling event may be refused only in accordance with objective, non-discriminatory criteria. It must be possible, where appropriate, to obtain that authorisation for a motorcycling event without the consent of an entity called upon to participate, such as ELPA, where that entity arbitrarily refuses to give its consent. Moreover, the applicant must have an effective legal remedy against an adverse official decision;⁷⁶ this includes the adoption of interim measures.⁷⁷

71 — The concept of undistorted competition is expressly referred to in Article 3(1)(g) EC, but also underlies the rules on competition contained in Articles 81 EC to 89 EC.

72 — *France v Commission* ('Telecommunications Terminals Equipment', cited in footnote 56, paragraph 51), and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 25; see to the same effect *ERT* (cited in footnote 40, paragraph 37) and *Raso and Others* (cited in footnote 51, paragraphs 29 to 31).

73 — See to the same effect *France v Commission* ('Telecommunications Terminals Equipment', cited in footnote 56, paragraph 51) and *GB-Inno-BM* (cited in footnote 72, paragraph 25).

74 — See in this regard points 90 to 95 of this Opinion, above.

75 — See to this effect *France v Commission* ('Telecommunications Terminals Equipment', cited in footnote 56, paragraph 52) and *GB-Inno-BM* (cited in footnote 72, paragraph 26).

76 — See to this effect *Albany* (cited in footnote 30, paragraphs 117 and 121); on an effective legal remedy, see also Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraphs 37 and 38. However, Community law does not require an individual legal remedy against *acts* which are merely *preparatory* to an official authorisation, for example, against the grant or refusal of consent by an association such as ELPA (see to this effect *Heylens*, paragraph 16).

77 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21; Case C-226/99 *Sipiles* [2001] ECR I-277, paragraph 19; and *Unibet* (cited in footnote 76, paragraph 67).

104. It is true that the Greek Government submits in this regard that — contrary to what is stated in the order for reference — ELPA is obliged to give its consent to the authorisation of a motorcycling event where that authorisation has been duly applied for and all the conditions applicable under the relevant national rules have been fulfilled. Moreover, the express or implicit non-grant of consent by ELPA is subject to judicial review by the *Simvoulio tis Epikratias*.⁷⁸

105. However, it is not for the Court of Justice to adopt a position on the interpretation of the national law in this dispute. In accordance with the division of competences between the Community judicature and the courts of the Member States, the Court of Justice must proceed from the findings of the referring court in relation to the factual and legal context in which a request for a preliminary ruling is made.⁷⁹ The order for reference expressly assumes that, when granting consent, ELPA is not subject to any restrictions, obligations or controls.

106. All in all, therefore, it must be assumed that a provision such as Article 49 of the Greek Road Traffic Code is not in conformity with the requirements of Article 86(1) in conjunction with Article 82 EC, because it invites abuse.

2. The exceptions under Article 86(2) EC

107. Finally, it remains to be examined whether a provision such as Article 49 of the Road Traffic Code may be covered by the exceptions in Article 86(2) EC. Under that provision, undertakings entrusted with the operation of services of general economic interest⁸⁰ are to be subject to the rules contained in the EC Treaty, in particular the rules on competition, only to a limited extent; such undertakings are subject to the rules on competition only in so far as their application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

108. In this regard, two categories of tasks must be distinguished within the activity of an association such as ELPA: the organisation and marketing of motorcycling events, on the one hand, and the participation in the official authorisation of such events under Article 49 of the Road Traffic Code, on the other.

109. As regards, firstly, the *organisation and marketing of motorcycling events* by an association such as ELPA, the question whether they constitute a service of general economic interest within the meaning of Article 86(2) EC, as the social significance

⁷⁸ — Greek Council of State.

⁷⁹ — See in this regard the case-law cited in footnote 26.

⁸⁰ — The revenue-producing monopolies also referred to in Article 86(2) EC are not relevant in a case such as this.

of sport might perhaps suggest, can be left unanswered here. In any event, there is no evidence in this case that the Greek State has ‘entrusted’ ELPA with the organisation and marketing of sports events by means of an act of public authority.⁸¹ Nor is it clear to what extent a preferential right such as that conferred by Article 49 of the Road Traffic Code, which enables it to keep other service providers out of the market, is necessary in order for ELPA to perform such a task.⁸² In any event, the way in which that preferential right in fact operates,⁸³ which entitles ELPA to refuse to give its consent to the authorisation of motorcycling events of other service providers without restrictions, obligations or controls, is disproportionate.

110. As regards, finally, ELPA’s *participation in the public body’s authorisation of motorcycling events*, the association does not provide any service of general economic interest in this connection, but is involved in the exercise of public authority. Article 86(2) EC is not applicable here, since the precondition for the application of that provision

is the existence of a service, that is to say an economic activity as an undertaking.⁸⁴

111. In the light of the foregoing, Article 86(2) EC cannot be relied on in order to justify a provision such as Article 49 of the Road Traffic Code.

3. Interim finding

112. In summary, the following conclusion can be drawn:

Articles 82 EC and 86 EC preclude a provision such as Article 49 of the Greek Road Traffic Code, under which a non-profit-making association which itself organises and markets motorcycling events is at the same time granted an exclusive right of co-decision in a public body’s authorisation of such events, in which capacity it may refuse to give its consent without being subject in this regard to any restrictions, obligations or controls.

81 — See in this regard Case 127/73 *BRT and Société belge des auteurs, compositeurs et éditeurs*, ‘BRT II’, [1974] ECR 313, paragraph 20; Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 55; and Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraph 65.

82 — On the criterion of the necessity of the preferential right, see Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 13 and 14; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 53; Case C-209/98 *Sydhavns Sten & Grus* [2000] ECR I-3743, paragraph 77; and *Ambulanz Glöckner* (cited in footnote 23, paragraph 57).

83 — Article 16 EC also refers to the concrete operation of services of general economic interest; it provides that the Commission and the Member States must ‘take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions’.

84 — On the distinction between economic and public activities, see *SAT Fluggesellschaft* (paragraphs 30 and 31), *Cali* (paragraphs 22 and 23) and point 49 of this Opinion.

VI — Conclusion

113. For the foregoing reasons, I propose that the Court's answer to the questions referred by the Diikitiko Efetio Athinon should be as follows:

- (1) A non-profit-making association that not only has an exclusive right of co-decision in the authorisation by a public body of motorcycling events but also itself organises such events and, in this connection, concludes sponsorship, advertising and insurance agreements, is an undertaking within the meaning of Articles 82 EC and 86 EC.

It is for the national court, having regard to the case-law of the Court of Justice on Article 82 EC, to examine whether that association holds a dominant position on the market and whether the abuse of that position would be capable of appreciably affecting trade between Member States.

- (2) Articles 82 EC and 86 EC preclude a provision such as Article 49 of the Greek Road Traffic Code, under which a non-profit-making association which itself organises and markets motorcycling events is at the same time granted an exclusive right of co-decision in the public body's authorisation of such events, in which capacity it may refuse to give its consent without being subject in this regard to any restrictions, obligations or controls.