JUDGMENT OF THE COURT
17 June 1997 *

In Case C-70/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Amministrativo Regionale per la Lombardia (Italy) for a preliminary ruling in the proceedings pending before that court between

Sodemare SA,

Anni Azzurri Holding SpA,

Anni Azzurri Rezzato Srl,

supported by

Fédération des Maisons de Repos Privées de Belgique (Femarbel) ASBL,

and

Regione Lombardia,

on the interpretation of Articles 3(g), 5, 52, 58, 59, 85, 86, 90 and 190 of the EC Treaty,

* Language of the case: Italian.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn (Rapporteur), C. Gulmann, P. Jann, H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl, by G. Conte and G. Giacomini, of the Genoa Bar, and G. Tanzella, of the Milan Bar,

— Fédération des Maisons de Repos Privées de Belgique (Femarbel) ASBL, by V. Tavormina, of the Milan Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Service of the Ministry of Foreign Affairs, acting as Agent, assisted by D. Del Gaizo, Avvocato dello Stato,

— the Netherlands Government, by J. G. Lammers, acting Legal Adviser, acting as Agent,

— the Commission of the European Communities, by E. Traversa, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl, the Italian Government and the Commission at the hearing on 4 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

Judgment

1 By order of 2 March 1995, received at the Court Registry on 10 March 1995, the Tribunale Amministrativo Regionale per la Lombardia (Administrative Court for the Lombardy Region) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Articles 3(g), 5, 52, 58, 59, 85, 86, 90 and 190 of the EC Treaty.

2 Those questions were raised in proceedings brought by the Luxembourg company Sodemare SA (hereinafter 'Sodemare') and two Italian companies, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl, for the annulment, first, of Article 18(3)(a) of Legge Regionale Lombardia (Lombardy Regional Law) No 39 of 11 April 1980 concerning the organization and functioning of local health and welfare centres (*Bollettino Ufficiale della Regione Lombardia* No 15 of 11 April 1980, 3rd supplement, hereinafter 'the 1980 Law'), second, of Order No 2157 of 3 December 1993 of the Regione Lombardia (Lombardy Region) rejecting their request for approval to enter into contractual arrangements under which they would be reimbursed for providing social insurance services of a health-care nature and, finally, of Opinion No 41 of 7 September 1993 issued by the local health and welfare centre. The Fédération des Maisons de Repos Privées de Belgique (Femarbel) intervened in support of those three companies.

3 The Italian Decree of 8 August 1985 (GURI No 191 of 14 August 1985, p. 5727), laying down guidelines and coordinating measures for the autonomous regions and provinces regarding activities of a health-care nature linked with social welfare, draws a distinction between direct social welfare as such and social welfare of a health-care nature. The former includes, in particular, hospitalization in non-hospital sheltered accommodation which fully takes the place, even temporarily, of family care. Social welfare of a health-care nature, for its part, is directly and primarily intended to protect the health of citizens through prevention, care and physical and psychological therapy.

4 Under Article 6 of that decree, the concept of social welfare of a health-care nature may apply in particular to hospitalization in sheltered accommodation used mainly or solely for the provision of care for elderly and infirm people who cannot be cared for in the home. Where health care cannot be dissociated from social welfare services, the regional authorites may, depending on the financial resources available to the Fondo Sanitario Nazionale (National Health Fund), conclude contracts with public bodies and, in their absence, with private bodies.

5 Legge Regionale Lombardia No 1 of 7 January 1986 on the reorganization and planning of social welfare services (*Bollettino Ufficiale della Regione Lombardia* No 2, of 8 January 1986, 1st supplement, hereinafter 'the 1986 Law') governs the system of social welfare services in the Lombardy Region. Under that Law, the running of the system is entrusted to establishments directly managed by the municipalities and by the bodies responsible for local services and to those operating under the auspices of other public bodies which have contractual arrangements within the meaning of the 1980 Law. Similarly, private operators which manage establishments meeting the requirements of Article 18(3) of the 1980 Law participate in the running of the social welfare system.

6 The 1980 Law governs the conclusion in Lombardy of contractual arrangements with the bodies managing the Unità Socio-Sanitarie Locali (local health and

welfare centres, hereinafter 'USSLs') for the provision of social welfare services, including services of a health-care nature. Article 18(2) of the 1980 Law provides that private operators wishing to participate in the planning and organization of USSL services must apply for and obtain from the regional authorities a certificate of suitability to enter into contractual arrangements with the bodies managing the USSLs.

7 Pursuant to Article 18(3) of the 1980 Law, a condition for such suitability is that the body in question must be non-profit-making.

8 Under Article 18(5) of the 1980 Law, possession of a certificate of suitability entitles the holder to conclude contracts with USSLs. Article 18(10) provides that the contracts are to govern financial relations between the relevant public contracting authority and the private operator and also provides for the form of reimbursement for each service on the basis of predetermined tariffs within the limits set by the regional social welfare plans, under which, in any event, the actual costs are reimbursable.

9 In addition, Article 50 of the 1986 Law makes management of a home for old people or for people who are partially or entirely unable to live independently subject to the grant of an operating permit issued by the authorities of the province where the home is situated.

10 According to the documents before the Court, the regional social welfare plan in force at the material time, as approved by the Lombardy Regional Council, imposes for old people's homes which have been permitted to enter into contractual arrangements stricter requirements regarding staff than those applicable to homes which have no such arrangements. The regional authorities finance the costs of social welfare services of a health-care nature provided in homes with contractual arrangements up to a specified reimbursement ceiling per day for each resident who is not capable of living independently, regardless of the extent of the latter's needs.

11 Sodemare set up a capital company governed by Italian law, named Anni Azzurri Holding SpA. That company, which Sodemare controls entirely, owns all the capital of various companies running old people's homes, including the company named Residenze Anni Azzurri Rezzato Srl.

12 On 3 December 1992, the latter company was authorized to run an old people's home by decree of the President of the Province of Brescia, under Article 50 of the 1986 Law. On 29 April 1993, it applied to the Lombardy Regional Council for approval to enter into contractual arrangements with the USSLs, which would have enabled it to be reimbursed for services of a health-care nature which it is required to provide for elderly residents not capable of living independently.

13 By Order No 2157 of 3 December 1993, the Lombardy Region rejected that application for approval to enter into contractual arrangements, on the basis of a negative opinion from the USSL, on the ground that the requirement that it should be non-profit-making, imposed by Article 18(3)(a) of the 1980 Law, was not satisfied.

14 The national court found that the plaintiffs in the main proceedings, although operational and solvent, were not using their capacity to the full since the number of beds occupied by elderly persons was considerably lower than the number of places available in their homes.

15 It also observed that the effect of the article at issue was that the provision of social welfare services of a health-care nature was essentially reserved to non-profit-making companies. The result of reserving public financing to such companies was to make users of the services provided by profit-making companies bear a financial burden to which they would not be subject if they sought the same service from a non-profit-making company.

16 In those circumstances, the Tribunale Amministrativo Regionale decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Under Article 190 of the EEC Treaty, must a national provision which, although dealing with a matter falling "within the field of application" of the Community Treaties, nevertheless contains no statement whatsoever of the reasons on which it is based be regarded as contrary to Community law with the result that that provision, lacking a statement of reasons, cannot be applied by the national court: that result being limited to those cases — of which the present case appears to be one — where the national provision creates an ambiguous state of affairs, in that it keeps the persons concerned in a state of uncertainty regarding the possibilities available to them of relying on Community law?

[Such cases being those in which the Member State has an "obligation" (which, for the Italian Constitutional Court, is a "precise obligation": see judgment of the Constitutional Court (4 July), 11 July 1989, No 389, last subparagraph of paragraph 4 of the grounds of the judgment) to remove from its legal order those provisions which are incompatible with Community law: judgment of the Court of Justice in Case 104/86 [1988] ECR 1799. This obligation has been mentioned by the Court "on several occasions".]

2. Is a national provision which (without stating reasons) reserves to non-profit-making "companies and firms" the provision of an entire category of services, which are important *inter alia* from the financial point of view, contrary to Article 58 of the EEC Treaty, in so far as that article makes a clear distinction between "profit-making companies and firms" and "non-profit-making companies and firms"?

3. Do Articles 52, 58 and 59 of the Treaty prohibit national legislation which hampers the pursuit of a business activity by imposing on an undertaking established in a particular Member State, which wishes to establish itself in another Member State within the meaning of the Treaty, the alternative of either carrying on that activity on a non-economic basis — in that case adopting one of the legal forms which are listed exhaustively but do not coincide

with those that facilitate establishment — or — if it intends carrying on the activity on an economic basis — accepting the burden of services which should be provided at the expense of the public health service?

4. Does Article 59 of the Treaty prohibit national legislation which, by virtue of the procedures laid down by domestic law, directs the users of welfare services — who are allowed by the said domestic law to choose who is to provide them — solely towards undertakings to which, exclusively by reference to their legal structure, the State reimburses the costs of the health services which all the authorized undertakings are required to provide, thereby, first, channelling the demand for services towards certain providers and, secondly, depriving the user of real freedom of choice?

5. Do Articles 3(f), 5, 85 and 86, possibly in conjunction with Article 90, of the Treaty, prohibit the legislation at issue which, under the machinery provided by national law,

   (a) allows only companies with a particular legal structure to provide, without charges to be borne by the undertaking, services which are ancillary to the services provided by it against payment;

   (b) allows them to present themselves on the market as a category of undertakings which, having similar qualitative and quantitative characteristics, are described to users as a largely unitary organization;

   (c) makes it possible to channel towards the undertakings referred to in paragraph (b) the demand for welfare services provided to old people;

   (d) allows imposition on undertakings of the obligation to provide, at their own expense, services ancillary to those provided by them in return for payment;

(e) gives rise to arrangements whose effect is to impose on non-participating undertakings the obligation to provide at their own expense services ancillary to the service offered, passing the cost thereof on to users;

(f) thus creates the necessity of transferring to users the economic burden of such services, which are otherwise, where users avail themselves of the services of the undertakings participating in the arrangement, free of charge?'

The first question

17 It is apparent from the order for reference that the first question concerns the obligation to state the reasons for national rules of general scope which, like those at issue in this case, prohibit profit-making companies from participating in a social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

18 The national court thus seeks essentially to ascertain whether Community law, and in particular Article 190 of the Treaty, lays down conditions concerning the statement of reasons for national rules of general scope which come within the field of application of Community law, where such rules leave the persons to whom they apply in a state of uncertainty as to the possibilities open to them under Community law.

19 The obligation to state reasons laid down in Article 190 of the Treaty concerns only acts of the institutions. It is true that Community law imposes the obligation to state reasons for national decisions affecting the exercise of a fundamental right conferred on individuals by the Treaty (see, in particular, Case 222/86 *UNECTEF* v *Heylens and Others* [1987] ECR 4097, paragraphs 14 to 17). However, in view of its purpose, such an obligation concerns only individual decisions adversely affecting individuals against which the latter must have some remedy of a judicial nature, and not national measures of general scope.

20 The answer to the first question must therefore be that Community law, and Article 190 of the Treaty in particular, does not lay down conditions concerning the statement of reasons for national rules of general scope which fall within the sphere of Community law.

The second, third, fourth and fifth questions

21 By these questions, the national court seeks essentially to ascertain whether Articles 3(g), 5, 52, 58, 59, 85, 86 and 90 of the Treaty preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

22 Since the participation of private operators in the running of the social welfare system by means of such contracts is subject to the condition that they are non-profit-making, it is necessary to examine that condition (hereinafter 'the non-profit condition') in relation to the provisions of the Treaty mentioned by the national court.

Articles 52 and 58 of the Treaty (second and third questions)

23 The second and third questions concern the situation of a profit-making company established in Luxembourg which has set up one or more profit-making companies in Italy in order to run old people's homes in that country.

24 Since the Luxembourg company is involved on a stable and continuous basis in the economic life of Italy, that situation falls within the provisions of the chapter of the Treaty on freedom of establishment, namely Articles 52 to 58, and not those of the chapter concerning services (see, to that effect, Case 2/74 *Reyners* v *Belgium* [1974] ECR 631, paragraph 21, and Case C-55/94 *Gebhard* v *Consiglio degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 25).

25 As regards Article 58 of the Treaty, taken in isolation (second question), it must be borne in mind that the effect of that provision is to assimilate, for the purpose of giving effect to the chapter relating to the right of establishment, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to natural persons who are nationals of one of the Member States, although non-profit-making companies are excluded from the benefit of that chapter (see Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677, paragraph 8). Since that provision does no more than define the class of persons to whom the provisions on the right of establishment apply, it cannot preclude, as such, national rules of the kind at issue in the main proceedings.

26 As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that the right of establishment with which those provisions are concerned is granted both to natural persons who are nationals of a Member State of the Community and to legal persons within the

meaning of Article 58. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up (*Gebhard*, cited above, paragraph 23).

27 In assessing the compatibility of the non-profit condition with those provisions of the Treaty, it must first be borne in mind that, as the Court has already held in Case 238/82 *Duphar and Others* v *Netherlands State* [1984] ECR 523, paragraph 16, and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *AGF and Cancava* [1993] ECR I-637, paragraph 6, Community law does not detract from the powers of the Member States to organize their social security systems.

28 It should be noted that the non-profit condition mentioned in Article 18(3)(a) of the 1980 Law forms part of the social welfare system established by the 1986 Law, which seeks in particular to promote and protect the health of the population through social welfare and health services and to operate in the interests of dependent persons who have no family or whose family is not in a position to look after them, by bringing about or encouraging their reintegration into suitable families or environments within the Community.

29 It is clear from the documents before the Court that that system of social welfare, whose implementation is in principle entrusted to the public authorities, is based on the principle of solidarity, as reflected by the fact that it is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income.

30 Under the 1986 Law, private organizations which meet the requirements laid down by Article 18(3) of the 1980 Law, in particular the non-profit condition, and are

allowed to conclude contractual arrangements contribute to the running of the social welfare system as described, which determines the quality of the services to be provided to welfare recipients and the extent to which the costs of the services provided by those organizations are to be reimbursed.

31 According to the Italian Government, application of the non-profit condition has been found to represent the most logical approach, having regard to the exclusively social aims of the system at issue in this case. The choices made in terms of organization and provision of assistance by non-profit-making private operators are not influenced by the need to derive profit from the provision of services so as to enable them to pursue social aims as a matter of priority.

32 In that regard, it must be stated that, as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making.

33 Moreover, the fact that it is impossible for profit-making companies automatically to participate in the running of a statutory social welfare system of a Member State by concluding a contract which entitles them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature is not liable to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established.

34 In view of the foregoing, the non-profit condition cannot be regarded as contrary to Articles 52 and 58 of the Treaty.

35 The answer to the second and third questions must therefore be that Articles 52 and 58 of the Treaty do not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

Article 59 of the Treaty (fourth question)

36 The plaintiffs in the main proceedings claim that, having established themselves in Italy, they provide from that State, in their old people's homes, services comprising mainly accommodation for beneficiaries established in other Member States. Because of the cross-frontier nature of those services, they claim, they are entitled to rely on the provisions of the Treaty concerning freedom to provide services in order to challenge the rules at issue.

37 In that regard it must be borne in mind that the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 30; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 40; and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 30).

38 On the other hand, those same provisions do not cover the situation where a national of a Member State goes to the territory of another Member State and establishes his principal residence there in order to receive services there for an indefinite period (Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 17). Those provisions cannot be applied to activities which are

confined in all respects within a single Member State (Case 52/79 *Procureur du Roi* v *Debauve and Others* [1980] ECR 833, paragraph 9, and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37).

39 In this case, the nationals from other Member States who go to Italy to stay in the plaintiffs' homes do so in order to enjoy permanently or for an indefinite period the services provided in those homes. As is clear from the documents before the Court, it is essentially on that basis that the plaintiffs offer to take in residents.

40 The answer to the fourth question must therefore be that Article 59 of the Treaty does not cover the situation of a company which, having established itself in a Member State in order to run old people's homes there, provides services to residents who, for that purpose, reside in those homes permanently or for an indefinite period.

Articles 3(g), 5, 85, 86 and 90 of the Treaty (fifth question)

41 It must be borne in mind that, in themselves, Articles 85 and 86 of the Treaty are concerned solely with the conduct of undertakings and not with laws or regulations adopted by Member States. However, it is settled case-law that Articles 85 and 86, read in conjunction with Article 5 of the Treaty, require the Member States to refrain from introducing or maintaining in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see, in particular, Case C-96/94 *Centro Servizi Spediporto* v *Spedizione Marittima del Golfo* [1995] ECR I-2883, paragraph 20, and Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257, paragraph 14).

42 The Court of Justice has already held that Articles 5 and 85 are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or where it deprives its own rules of the character of legislation by delegating to private economic operators the responsibility for taking decisions affecting the economic sphere (*Centro Servizi Spediporto*, cited above, paragraph 21, and *DIP and Others*, cited above, paragraph 15).

43 In this case, there is nothing in the documents before the Court to support the conclusion that the rules at issue required or favoured the adoption of such agreements, decisions or concerted practices by the undertakings permitted to enter into contractual arrangements with the USSLs or reinforced their effects. Moreover, there is nothing to indicate that, as far as those rules are concerned, the public authorities have delegated their powers to private economic operators.

44 As regards Articles 3(g), 5 and 86 of the Treaty, they could only apply to rules of the kind at issue in the main proceedings if it were proved that such rules placed an undertaking in a position of economic strength enabling it to prevent effective competition from being maintained on the relevant market by placing it in a position to behave to an appreciable extent independently of its competitors, of its customers and ultimately of consumers (*Centro Servizi Spediporto*, cited above, paragraph 31, and *DIP and Others*, cited above, paragraph 24).

45 The Court has held that Article 86 of the Treaty prohibits abusive practices resulting from the exploitation by one or more undertakings of a dominant position on the common market or in a substantial part of it in so far as those practices may affect trade between Member States (Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraph 40).

46 For a collective dominant position to exist, the undertakings in the group must be sufficiently linked to each other to adopt the same conduct on the market (*Almelo*, paragraph 42).

47 In this case, there is no reason to infer that national rules of the kind at issue in the main proceedings, which make the conclusion of contracts with the USSLs conferring entitlement to be reimbursed for the costs of providing social welfare services of a health-care nature conditional on the private operator being non-profit-making, place individual undertakings permitted to enter into such contractual arrangements in a dominant position or result in the creation of sufficiently strong links between them as to give rise to a collective dominant position.

48 In those circumstances, Article 86, read in conjunction with Article 90 of the Treaty, likewise cannot apply.

49 It follows from the foregoing that Articles 85 and 86, read in conjunction with Articles 3(g), 5 and 90 of the Treaty, do not apply to national rules which allow only non-profit-making private operators to participate in the running of a social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

Costs

50 The costs incurred by the Italian and Netherlands Governments 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale Amministrativo Regionale per la Lombardia by order of 2 March 1995, hereby rules:

1. **Community law, and Article 190 of the EC Treaty in particular, does not lay down conditions concerning the statement of reasons for national rules of general scope which fall within the sphere of Community law.**

2. **Articles 52 and 58 of the EC Treaty do not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.**

3. **Article 59 of the EC Treaty does not cover the situation of a company which, having established itself in a Member State in order to run old people's homes there, provides services to residents who, for that purpose, reside in those homes permanently or for an indefinite period.**

4. **Articles 85 and 86, read in conjunction with Articles 3(g), 5 and 90 of the EC Treaty, do not apply to national rules which allow only non-profit-making**

private operators to participate in the running of a social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

Rodríguez Iglesias Mancini Moitinho de Almeida

Sevón Kakouris Kapteyn

Gulmann Jann Ragnemalm

Wathelet Schintgen

Delivered in open court in Luxembourg on 17 June 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President