OPINION OF ADVOCATE GENERAL TESAURO
delivered on 29 September 1992 *

Mr President,
Members of the Court,

1. By two orders of 14 January and 11 March 1991 respectively the Tribunal des Affaires de Securité Social (Social Security Court), Hérault asks the Court whether an organization entrusted with the management of a special social security scheme is an undertaking for the purposes of Articles 85 and 86 of the EEC Treaty, and whether the dominant position accorded by the national law of a Member State to an organization entrusted with the management of a special social security scheme is compatible with the Common Market.

2. The facts of the present case are straightforward and can be summarized as follows:

In Case C-159/91, Mr Poucet challenged a demand for payment from the director of the Caisse Mutuelle Régionale du Languedoc-Roussillon ('Camulrac'), an organization charged with managing the sickness and maternity insurance scheme for self-employed persons working outside the agricultural sector.

Mr Poucet does not call question the principle of compulsory insurance; rather he maintains that it is possible to comply with that principle by taking out insurance with private insurance undertakings established in the Community. He therefore takes the view that Camulrac, and the body with which it has a contractual arrangement, Assurances Générales de France, may not seek payment of the sums demanded because their dominant position infringes the principles ensuring freedom of competition, laid down in the EEC Treaty.

In Case C-160/91, Mr Pistre uses similar arguments to contest a demand for payment from the director of the Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse de Clermont-Ferrand ('Cancava'), an organization whose task it is to manage the old-age pension scheme for people engaged in craft occupations.

3. Before I consider the question referred by the national Court, I must describe — albeit only in outline — the essential features of the social security schemes in question.

The French social security system comprises essentially a general scheme for persons employed in non-agricultural occupations, a scheme for persons employed in the agricultural sector and, finally, a number of autonomous schemes for self-employed persons in non-agricultural sectors.

* Original language: Italian.

In accordance with the applicable legislation, the autonomous schemes include, first, compulsory old-age insurance for people in craft occupations and, secondly, a sickness and maternity insurance scheme, which is likewise compulsory, for all self-employed persons in non-agricultural sectors.

4. The sickness and maternity insurance scheme is governed by Article 611 et seq. of the Social Security Code. Those articles provide for the establishment of a national fund and various regional mutual funds.

The Caisse Nationale d'Assurance Maladie et Maternité des Travailleurs Non-salariés, a private organization responsible for managing a public service, is required, *inter alia*, to ensure that the scheme is financed on a unitary basis, to foster, coordinate and oversee the activities of the regional mutual funds and of the organizations with which they have contractual arrangements, and to provide services in the public interest in health and social spheres.

The regional mutual funds, of which Camulrac is one, are in turn responsible for the management of the social security schemes in their own areas.

The national and regional funds are all managed by a governing board. At least two out of three of the members of such boards are elected directly by the persons insured in the case of the regional funds, or by board members of the regional funds in the case of the national fund. The membership of the governing board also includes persons appointed by inter-ministerial order (in the case of the national fund) or by prefectorial order (in the case of the regional funds).

The insurance scheme is financed by contributions from its members, by payments from other compulsory social security schemes and by small percentages of various taxes. In 1989 and 1990, the contributions from members represented, according to the French Government, 1.87% of revenue.

The rate of contributions and the method by which they are calculated are determined by order, on the basis of the earnings for the previous year of workers in active employment and of the pension income of pensioners. However, pensioners are exempted from social security contributions if their income is less than a specified amount.

The regional funds entrust the collection of contributions and the payment of benefits, under appropriate contracts, to insurance companies or to organizations governed by the Mutual Societies Code which have already been approved by the national fund.

Each year the organizations under contract receive a sum of money to offset the management costs they incur. That sum is in proportion to the number of members and is called a 'management fee'.

The activities of the various funds and organizations under contract are regulated by the

State, in particular by the Minister for Social Security and the Minister for the Budget.

5. The old-age pension scheme for craftsmen is governed by Article L 633 et seq. of the Social Security Code.

Pursuant to those provisions, the scheme is managed by 33 basic funds, which are administered by a board elected by the members of the scheme. Those funds act under the aegis of the Caisse Autonome Nationale de l'Assurance Vieillesse Artisanale (which is administered in the same way), whose task it is to determine the general policy of the scheme, ensure that it is financed on a unitary basis, and to foster, coordinate and oversee the activities of the basic funds.

The old-age insurance scheme comprises three forms of compulsory insurance: two types of old-age insurance, one of which is 'basic' and the other supplementary, and insurance providing for both invalidity and death benefits.

The 'basic' compulsory scheme is financed by the contributions of its members, by payments made by other compulsory insurance schemes under offseting arrangements, by a share of the employers' contributions to the solidarity fund, and finally, by a contribution from the State, the amount of which is fixed in the Finance Law.

In that scheme too, the activities of the various funds are regulated by the State, represented by the Minister for Social Security and the Minister for the Budget.

6. It is against the legislative background outlined above that it must be decided whether an organization whose task it is to manage a special social security scheme is to be regarded as an undertaking and, consequently, as falling within the scope of Articles 85 and 86 of the EEC Treaty.

Let me begin by saying that my observations do not concern the organizations under contract, such as Assurances Générales de France. Those organizations merely collect the contributions and pay the benefits and are remunerated by the funds by means of the management fee, which is proportional to the number of insured persons and which is paid in consideration of the service provided. Those organizations therefore perform an economic activity on behalf of the funds but I do not consider that fact to be of any relevance in the present case.

7. As the Court is aware, the EEC Treaty does not define the term 'undertaking' for the purposes of Articles 85 and 86.

The Court's first definition of an 'undertaking' was given in the context of the ECSC Treaty in the following terms: 'an undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long-term aim'. [1]

1 — Judgments in Joined Cases 17 and 20/61 *Klöckner* v *High Authority* [1962] ECR 325 and Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357.

Subsequently, in the judgment in *Sacchi*, [2] with reference to the Italian organization vested with exclusive rights to broadcast television programmes, the Court stated that: 'for the performance of their tasks these establishments remain subject to the prohibition against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights'. However, the Court has not yet defined 'activities of an economic nature'.

Recently, in its judgment in *Höfner*, [3] the Court had occasion to further clarify the term 'undertaking' in relation to Community competition law.

In that case, in which it had to decide whether the monopoly on finding employment for business executives enjoyed by a public employment office constituted an abuse of a dominant position, the Court stated that, in the context of competition law, the term undertaking embraced any organization engaged in an economic activity, regardless of its legal status and how it was financed, and went on to hold that placing job-seekers was an economic activity.

The Court stated that the fact that it was usually public employment exchanges that place job-seekers had no bearing on the nature of that activity, which was not always and need not necessarily be the task of public bodies, particularly when those seeking employment were business executives.

It followed that a body such as a public employment exchange, which placed job-seekers, could be viewed as an undertaking for the purposes of applying the Community rules on competition.

8. It is clear from the case-law cited above that while the legal status of an organization, the method by which it is financed and whether or not it is profit-making are not in themselves relevant for the purposes of determining whether an organization is an undertaking, the organization in question must in all cases be engaged in an economic activity which could, at least in principle, be carried on by a private undertaking in order to make a profit.

And the question on which the present case hinges is precisely whether or not the activities of organizations such as Calmurac and Cancava are economic activities.

9. In that connection, I would point out first of all that the statutory social security schemes described above share three fundamental characteristics: they are non profit-

2 — Judgment in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 14.

3 — Judgment in Case C-41/90 *Höfner* [1991] ECR I-1979.

-making, their purpose is of a social nature and they apply the principle of solidarity. In contrast, those three characteristics are clearly extraneous to insurance schemes of a commercial nature.

It should be observed, first, that it is the State and not the fund that fixes the amount both of the contributions and of the benefits. In doing so, the State makes an economic policy choice which, while intended to ensure that the schemes in question are financed, also has consequences for the distribution of wealth in so far as, where necessary, it redistributes funds among the members of society.

In public insurance schemes, by contrast with private insurance schemes, there is no direct link between the contributions made and the benefits paid.

10. In particular, under the sickness insurance scheme, the amount of the contributions depends on the earnings of the person insured and not on an assessment of the insurance risk, thereby guaranteeing insurance cover on favourable terms even for those who, given their state of health, would not be able to join a private scheme unless they paid extremely high premiums.

Moreover, under that scheme a number of categories of beneficiary, such as the recipients of invalidity pensions and pensioners on very low incomes, are exempted from payment of contributions.

11. The old-age pension insurance scheme for craftsmen is based, as are all similar old-age insurance schemes, on the principle of redistribution, whereby the contributions paid by the workers in active employment are directly used to finance the benefits paid to the pensioners.

Enduring solidarity is thus created between the different generations of workers, according to a rationale which is very different from that prevailing in private insurance schemes based on capitalization in which, by contrast, the insurance contributions are used for financial investments which later yield a life annuity or a capital sum.

A further indication that the old-age pension insurance scheme is based on the principle of solidarity is the fact that in some cases pension rights are recognized as having accrued, independently of the payment of contributions, during certain periods when the insured person did not work, for example during periods of illness, invalidity, unemployment and military service.

Nor is there a genuine direct link in the old-age pension insurance scheme between accrued pension rights and contributions paid. If, after 31 December 1972, a member has paid more than 10 years' insurance contributions, the annual earnings on which the calculation of the pension is based are those which correspond to the contributions paid during the 10-year period most favourable to the person concerned.

It should be added that the French social security system provides for wider financial solidarity between the various compulsory schemes in so far as there are offsetting arrangements between schemes that are in surplus and those schemes which are in deficit.

12. It is clear from the foregoing why the schemes described above, given that they are firmly based on the principle of solidarity, would be inconceivable without compulsory membership, for everyone, of a single organization, which alone can guarantee the counter balancing arrangements necessary for the payment of benefits to workers whose ability to pay contributions is limited.

More generally, whilst it is true that, as is clear from the case-law of the Court, the fact that an organization is non-profit-making does not in itself mean that the rules of the Treaty on competition are not applicable to it, the fact remains that, having regard to all the features of the French social security system, it would be difficult to regard organizations such as Calmurac and Cancava as being engaged in an economic activity.

The organizations in question seek to perform, for the common good, a task of a social nature, on the basis of the principle of solidarity. However, such a task, unlike the placing of job-seekers with which *Höfner* was concerned can only be performed by or on behalf of a public body, and is not comparable to the insurance business transacted by private undertakings.

13. In the light of the foregoing considerations, I propose that the Court should reply to the questions referred by the Tribunal des Affaires de Sécurité Sociale de l'Hérault as follows:

An organization such as the Caisse Mutuelle Régionale du Languedoc-Roussillon or the Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse, charged with managing a social security scheme of which membership is compulsory by law and which has been entrusted with social responsibilities based on the principle of solidarity — responsibilities which must be discharged by or on behalf of a public body — is not an undertaking for the purposes of Articles 85 and 86 of the EEC Treaty.