

Joined Cases C-180/98 to C-184/98

Pavel Pavlov and Others

v

Stichting Pensioenfonds Medische Specialisten

(Reference for a preliminary ruling
from the Kantongerecht te Nijmegen)

(Compulsory membership of an occupational pension scheme —
Compatibility with competition rules — Classification of
an occupational pension fund as an undertaking)

Opinion of Advocate General Jacobs delivered on 23 March 2000 I-6456
Judgment of the Court, 12 September 2000 I-6497

Summary of the Judgment

1. *Competition — Community rules — Matters covered — Collective agreements in pursuit of social policy objectives — Decision of the members of a profession to set up a supplementary pension scheme and to request the public authorities to make membership of the fund compulsory — Covered — Agreement of the members of a profession not subject to the same rules as a collective agreement between employers and employees*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC) and Arts 118 and 118b (Arts 117 to 120 of the EC Treaty have been replaced by Arts 136 EC to 143 EC); Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom, Arts 1 and 4)

2. *Competition — Community rules — Undertaking — Definition — Self-employed medical specialists — Covered — Contribution to a single occupational pension fund — Medical practitioners acting as undertakings*
(EC Treaty, Arts 85, 86 and 90 (now Arts 81 EC, 82 EC and 86 EC))
3. *Competition — Community rules — Undertaking — Definition — Professional organisation governed by a public-law statute — Covered — Association of medical specialists*
(EC Treaty, Art. 85 (now Art. 81 EC))
4. *Competition — Agreements, decisions and concerted practices — Setting up of an occupational pension fund by the members of a liberal profession — Whether permissible — Decision of the public authorities to make membership of the fund compulsory — Lawfulness*
(EC Treaty, Arts 5 and 85 (now Arts 10 EC and 81 EC))
5. *Competition — Community rules — Undertaking — Definition — Pension fund — Covered — Non-profit-making body — Solidarity aspects — Social objective — Irrelevant*
(EC Treaty, Art. 85 et seq. (now Art. 81 EC et seq.))
6. *Competition — Public undertakings and undertakings to which Member States grant special or exclusive rights — Pension fund responsible for managing certain insurance services in a professional sector — Dominant position — Abuse — Criteria for assessment — Not covered*
(EC Treaty, Arts 86 and 90 (now Arts 82 EC and 86 EC))
7. *Competition — Public undertakings and undertakings to which Member States grant special or exclusive rights — Undertakings responsible for managing services of general economic interest — Pension fund responsible for managing the supplementary pension scheme of the members of a liberal profession*
(EC Treaty, Arts 86 and 90 (now Arts 82 EC and 86 EC))

1. Whilst agreements concluded in the context of collective bargaining between employers and employees and aimed at improving employment conditions are not, by reason of their nature and purpose, to be regarded as falling within the scope of Article 85(1) of the Treaty (now Article 81(1) EC), such exclusion from the scope of Article 85(1) cannot be applied to an agreement which, whilst being intended to guarantee a certain level of pension to all the members of a profes-

sion and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees.

The Treaty contains no provisions, comparable to Articles 118 and 118b

of the Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC) or Articles 1 and 4 of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom, encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question.

Moreover, where such practitioners decide, through their national association, to contribute collectively to a single occupational pension fund, they are acting as undertakings within the meaning of Articles 85, 86 and 90 of the Treaty and not as final consumers.

(see paras 76-77, 82)

(see paras 67-69)

2. Self-employed medical specialists who provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services, and who are paid by their patients for those services and assume the financial risks attached to the pursuit of that activity carry on an economic activity and are thus undertakings within the meaning of Articles 85, 86 and 90 of the Treaty (now Articles 81 EC, 82 EC and 86 EC). The complexity and technical nature of their services and the fact that the practice of their profession is regulated cannot alter that conclusion.

3. The fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty (now Article 81 EC), which, according to its wording, applies to agreements between undertakings and decisions by associations of undertakings. So, the legal framework within which an association decision is taken and the legal definition given to that framework by the national legal system are irrelevant as far as the applicability of the Community rules on competition and, in particular, Article 85 of the Treaty, are concerned.

Nor can an association of medical specialists be taken outside the scope of Article 85 of the Treaty by the fact that its main task is to protect the interests of its members, and in particular their income, which is made up in

part by supplementary pensions, in negotiations with national authorities concerning the cost of medical services.

rities from making membership of such funds compulsory.

(see paras 95, 97-101 and operative part 1)

(see paras 85-86)

4. A decision by the members of a profession to set up an occupational pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory is not contrary to Article 85(1) of the Treaty. The decision to set up the fund does not appreciably restrict competition within the common market in that the cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by the members of that profession. Furthermore, the request made to the public authorities to make membership compulsory is made under a scheme identical to those existing under the national law of a number of countries concerning the exercise of regulatory authority in the social domain. Such regimes are designed to promote the creation of supplementary pensions provided in connection with employed or self-employed activity and include a number of safeguards. Thus Articles 5 (now Article 10 EC) and 85 of the EC Treaty do not preclude public authorities from making membership of such funds compulsory.
5. A pension fund which itself determines the amount of the contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

Neither the fact that such a fund is non-profit-making nor the aspects of solidarity in the way in which it operates is sufficient to relieve it of its status as an undertaking within the meaning of the competition rules of the Treaty. Conditions, such as the pursuit of a social objective, the presence of the said solidarity aspects and of restrictions or controls on investments made by the fund do not prevent the activity

engaged in by such a fund from being regarded as an economic activity.

(see paras 117-119 and operative part 2)

6. A pension fund which has a legal monopoly in the supply of certain insurance services in a professional sector of a Member State and thus on a substantial part of the common market must, in that respect, be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty.

However, the mere creation of a dominant position by a Member State through the grant of exclusive rights within the meaning of Article 90(1) of the Treaty (now Article 86(1) EC) is not in itself incompatible with Article 86 of the Treaty. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights

are liable to create a situation in which that undertaking is led to commit such abuses.

There is an abusive practice contrary to Article 90(1) of the Treaty, in particular, where a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which the undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind.

(see paras 126-127)

7. Articles 86 and 90 of the Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

(see para. 130 and operative part 3)