JUDGMENT OF THE COURT

12 September 2000 *

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

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Kantongerecht te Nijmegen, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Pavel Pavlov and Others

and

Stichting Pensioenfonds Medische Specialisten,

on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet and M. Wathelet, Judges,

* Language of the case: Dutch.

Advocate General: F.G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Stichting Pensioenfonds Medische Specialisten, by E.H. Pijnacker Hordijk, of the Brussels Bar, and C.J.J.C. van Nispen, of the Hague Bar,

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

— the Greek Government, by V. Kyriazopoulos, legal administrator at the State Law Council, and G. Alexaki, Adviser in the Special Community Legal Service of the Ministry of Foreign Affairs, acting as Agents,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and C. Chavance, Foreign Affairs Secretary in that Directorate, acting as Agents,

— the Commission of the European Communities, by W. Wils and H. van Vliet, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Stichting Pensioenfonds Medische Specialisten, of the Netherlands Government, of the Greek Government, and of the Commission at the hearing on 11 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

1 By five orders dated 8 May 1998, received at the Court on 15 May 1998, the Kantongerecht te Nijmegen (Cantonal Court, Nijmegen) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Articles 85, 86 and 89 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2 The three questions have been raised in five actions brought by five medical specialists, Messrs Pavlov, Van der Schaaf, Kooyman, Weber and Slappendel against Stichting Pensioenfonds Medische Specialisten (Pension Fund for Medical Specialists, hereinafter 'the Fund') concerning the refusal of Mr Pavlov and the other applicants to pay contributions to the Fund on the ground, in particular, that compulsory membership of the Fund, by virtue of which the contributions were claimed from them, is contrary to Articles 85, 86 and 90 of the Treaty.

The national legislation

3 The pension system in the Netherlands has three elements.

4 The first consists of the statutory basic pension, granted by the State under the Algemene Ouderdomswet (General Law on Old-Age Pensions) and the Algemene Nabestaandenwet (General Law on Survivors' Benefits). This compulsory statutory scheme entitles every member of the population to receive a certain, albeit limited, pension, regardless of the wage actually received before retirement. The pension is calculated by reference to the statutory minimum wage.

5 The second part comprises supplementary pensions provided in connection with employed or self-employed activity, which, in most cases, top up the basic pension. Supplementary pensions are normally managed under collective schemes covering a particular sector of the economy, a profession or the employees of a given undertaking, by pension funds of which membership has been made compulsory, in particular, by the Wet van 29 juni 1972 betreffende verplichte deelneming in een beroepspensioenregeling (Netherlands Law of 29 June 1972 on Compulsory Membership of an Occupational Pension Scheme, hereinafter 'the BprW'). This is the case in the actions in the main proceedings.

6 The third element comprises individual pension insurance or life assurance policies arranged on a voluntary basis.

7 Article 1(1)(b) of the BprW defines a member of a profession as a person who carries on professional activities corresponding to the particular profession in question.

8 Under Article 2(1) of the BprW, the Minister for Social Affairs may, upon application by one or more professional organisations which he regards as being sufficiently representative of the profession concerned, make membership of an occupational pension scheme, set up by members of the profession in question, compulsory for all members of that profession or for certain groups of members. An application to the Minister by a professional organisation must be published in advance and interested third parties are entitled to submit observations. Before taking a decision, the Minister may consult the Sociaal-Economische Raad (Social and Economic Council) and the Verzekeringskamer (Insurance Board).

9 Under Article 2(2) of the BprW, an occupational pension scheme may take one of three forms:

(a) an occupational pension fund may be set up as the sole medium for implementation of the scheme;

(b) the members of the profession concerned may be required to satisfy occupational pension scheme requirements by individually purchasing insurance policies of their choice from an occupational pension fund as referred to at (a), where that is possible under the rules of the scheme, or from a licensed insurer;

(c) the pension scheme may be composed of a combination of (a) and (b).

10 Under Article 2(3) of the BprW, a professional organisation may apply for membership of an occupational pension scheme which it has set up to be made compulsory only if it creates a separate legal body which acts

(a) either as a pension fund implementing the pension scheme,

(b) or as a supervisory body which ensures that the members of the profession concerned satisfy the requirement to insure themselves individually under Article 2(2)(b) of the BprW,

(c) or partly as a pension fund and partly as a supervisory body.

11 Under Article 2(4) of the BprW, compulsory membership entails the obligation, for all persons concerned, to comply with all applicable provisions in the statutes and regulations of the competent legal body.

12 Article 2(6) of the BprW confers power on the competent Minister to end compulsory membership. Under Article 2(7) compulsory membership automatically ceases if the financial basis of the fund is changed or if the statutes and regulations of the legal body are modified, unless the Minister declares that he has no objection to the changes. Before adopting a decision, the Minister may consult the Economic and Social Council or the Insurance Board.

13 Under Article 5(1) of the BprW, a number of requirements must be satisfied before the Minister may approve an application to make membership compulsory. For example, the members of the profession concerned must have been informed of the professional organisation's intention to apply for a decision making membership of the scheme compulsory, the soundness of the financial basis of the scheme must be certified by reasoned actuarial memorandum, and the statutes and regulations of the pension fund must satisfy the requirements set out in the BprW and provide adequate protection of the interests of the members and other interested parties.

14 Article 8(1) of the BprW specifies several issues which must be dealt with in the statutes and regulations of the legal body, such as the definition of the profession to which the pension scheme applies, the governance of the legal person, the rights and obligations of the members, and the treatment of persons who object on moral grounds to any form of insurance.

15 Article 8(2) of the BprW sets out a number of further issues that must be dealt with in the statutes and regulations of the legal body where it acts as a pension fund implementing a pension scheme, such as income structure and fund investment.

16 Article 8(3) empowers the competent Minister to adopt guidelines as regards the points mentioned in Article 8(1) and (2). The Minister has adopted such guidelines on the treatment of persons who object on moral grounds to any form of insurance. Such persons may be exempted from membership of an occupational pension scheme if they can show that they do not have recourse to any kind of insurance.

17 Articles 9 and 10 of the BprW prescribe the manner in which occupational pension funds must administer the collected funds. Under Article 9, pension

funds must, in principle, transfer or reinsure the risks linked to their pension commitments by concluding agreements with insurance companies. However, by way of exception, under Article 10 of the BprW, pension funds may administer and invest collected funds at their own risk, provided that they present the supervisory authorities with a management plan and an actuarial memorandum setting out the way in which they propose to manage the financial and actuarial risk. The plan must also be approved by the Insurance Board.

18 Under Article 12 of the BprW, a pension fund which itself administers its assets must show in its accounts that it has sufficient assets to cover the pension commitments it has contracted. In accordance with Articles 9(2) and (3) and 10(2) of the BprW, occupational pension funds must at regular intervals submit reports to the Insurance Board giving a complete picture of their financial situation and evidencing their compliance with legal requirements. Those reports provide the basis upon which the Insurance Board carries out its supervisory duties with regard to pension funds.

19 Under Article 26 of the BprW, the Minister for Social and Economic Affairs may, in individual cases, grant derogations from certain provisions of the BprW. He may, for example, grant dispensation from compulsory membership, whether for a specified period or indefinitely, and either subject to certain conditions or unconditionally.

20 In its answers to written questions put to it by the Court, the Netherlands Government states that the Minister may grant exemption from compulsory membership only where, in the specific circumstances of the case, systematic application of the BprW would disproportionately prejudice individual interests and where the fund concerned has not provided for appropriate alternative solutions. The Minister's power to grant exemption is not intended to offer a remedy against decisions of the fund concerned refusing to dispense with compulsory membership.

21 Under Article 27 of the BprW, failure to take up membership of a compulsory scheme attracts penalties.

22 Article 31 of the BprW provides that occupational pension funds may issue binding enforcement orders for the purpose of recovering arrears of contributions.

23 According to the explanatory notes to the bill which became the BprW, the 'collective scheme' provided for thereunder is intended to 'allow retirement income to reflect the general rise in income levels', to enable 'younger members of the profession to contribute, by means of a system of standardised contributions or variations thereon, to the greater costs of providing benefits to older members of the profession' and to 'provide for the award of pension benefits in respect of years prior to the entry into force of the scheme'. Those objectives could only be achieved by means of a common set of rules 'if they apply, in principle, to all members of the profession concerned'.

24 In the parliamentary debate concerning the BprW, the Netherlands Government stated that:

'the aim of sectoral pension fund management is to create the best possible pension scheme, from a social point of view, for all members alike, young or old. In the Government's view, the position cannot conceivably be any different with regard to occupational pension funds. As in the case of a sectoral pension fund, an occupational pension fund will not be set up as a commercial venture but as an institution with a social purpose which will work in the best way possible for its members in their reciprocal social relations. Commercial considerations can therefore hardly form a starting point.

That being so, the size of the contributions made by members of the profession should not be determined by reference to whether "they could perhaps find better and cheaper on the market" but rather by reference to the degree of solidarity within the profession concerned.

...

The point of a draft framework law such as this is properly to serve the interests of the members of the profession concerned, taken as a whole. This means that all the members of the profession in question should in principle be required to become members of the pension fund. If, in certain specific cases, that obligation does not accord with the individual interests of one or more members of the profession, then that state of affairs must in principle be accepted, since every set of rules applying to a group of persons involves a restriction of the freedom of individuals.'

The statutes and pension rules of the Fund

25 In 1973, the medical specialists' profession, represented by the Landelijke Specialisten Vereniging der Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (National Association of Specialists of the Royal Netherlands Society for the Promotion of Medicine, hereinafter 'the LSV') set up an occupational pension scheme governed by statutes and pension rules.

26 In accordance with those statutes, the Fund was created in the form of a foundation. That foundation is a legal person, within the meaning of Article 2(3)(c) of the BprW, which acts partly as an insurer in its own right and partly as a supervisory body ensuring that the members of the profession obtain their own individual insurance.

27 By ministerial decree of 18 June 1973 (*Nederlandse Staatscourant* 1973, p. 121) issued pursuant to Article 2(1) of the BprW, membership of the scheme was made compulsory at the request of the LSV. On 31 January 1997, the Order van Medische Specialisten (Order of Medical Specialists, hereinafter 'the OMS') took over from the LSV as the profession's representative body. Some 8 000 of the 15 000 self-employed or salaried medical specialists in the Netherlands are members of the OMS.

28 Article 1(1) of the Fund's pension rules requires every medical specialist registered on the roll of medical specialists and admitted in accordance with the internal rules of the Royal Netherlands Society for the Promotion of Medicine who resides in the Netherlands, practises there as a medical specialist and is under the age of 65, to be a member of the scheme.

29 Under Article 1(2) of the pension rules, certain groups of medical specialist may apply for exemption from membership. They include specialists who:

— expect, in any given calendar year, to practise their profession solely as a salaried employee, and who, in their capacity as medical specialist, are covered by:

(a) a pension scheme governed by a law other than the Pensioen- en spaarfondsenwet (Law on Savings Banks and Retirement Funds), the Wet houdende vaststelling van een regeling betreffende verplichte deelneming in een bedrijfspensioenfonds (Law Establishing Rules on Compulsory

Membership of Sectoral Pension Funds, hereinafter 'the BPW') or the BprW, or pursuant to an administrative measure of general effect;

(b) a pension scheme of which membership is compulsory under the BPW;

(c) a pension scheme different from that in question in this case, membership of which is compulsory under the BprW, or

(d) a pension scheme which was adopted by the employer before 6 May 1972 and which is at least equivalent to the abovementioned occupational pension scheme, or

— earn, in self-employed practice, income not exceeding a certain threshold.

30 In their answers to the written questions put to them by the Court, the Netherlands Government and the Fund stated that the Fund is bound by the conditions laid down in Article 1(2) of the pension rules. That being so, exemption from membership may, in principle, only be granted on the grounds set out in that provision.

31 As regards the relationship between the powers of the competent Minister under Article 26 of the BprW and the Fund's powers under Article 1(2) of the pension rules to exempt medical specialists from compulsory membership, the Netherlands Government stated, in reply to a written question put to it by the Court, that the Minister's powers of exemption are subsidiary to the Fund's powers and

duties in this regard. The Minister may intervene only where the Fund has no power to grant exemption.

32 Under Article 44 of the pension rules, the Fund's managers may, in special circumstances, grant derogations from the pension rules in favour of certain members, provided that any such derogation does not prejudice the rights of other members. According to the Fund's answer to a written question put to it by the Court, Article 44 of the pension rules amounts to an exceptional clause to be applied in situations which are particularly inequitable, such as where a member would accrue pension rights only over a very short period.

33 In reply to a written question put to it by the Court, the Netherlands Government stated that, whilst the Fund was set up as a foundation governed by private law, any decisions it takes regarding compulsory membership and exemption therefrom may be challenged by way of an action in administrative law. Its decisions may therefore form the subject-matter of a claim addressed to the competent Minister, and may subsequently be contested in an action before the administrative courts.

The medical specialists' pension scheme

34 The medical specialists' pension scheme provides for:

(a) an old-age pension, to be paid when the member reaches 65 years of age;

(b) a survivors' pension, payable to either a widow or widower, amounting in principle to 70% of the old-age pension accrued during the couple's marriage, and paid to the survivor of the deceased member;

(c) an orphans' pension of 14% (or, where both parents are deceased, 28%) of the old-age pension, paid to the child or children of the deceased member until their 18th birthday, with the possibility of continued payment thereafter until the child's 27th birthday;

(d) indexation, linking the value of the pension to the general rise in the level of incomes;

(e) retroactive pension rights in respect of periods prior to the establishment of the Fund;

(f) in the event that the member is unable to continue practising his profession due to disability, the continued payment of contributions by the Fund in order to maintain the accrual of pension rights;

(g) additional survivors' benefits for widows, widowers and orphans of deceased members who die as members before reaching the age of 65, such benefits increasing in inverse proportion to the age of the deceased member.

35 The pension scheme is made up of two parts. The first, the 'basic pension', includes the old-age pension and the survivors' and orphans' pensions at their nominal value, that is to say without indexation of the benefits to reflect the

general increase in the level of incomes. As far as the basic pension is concerned, the medical specialists' profession chose the form described at Article 2(2)(b) of the BprW. Thus, the members of the profession are required to set up their basic pension by purchasing individual insurance policies from the Fund or from an authorised insurance company. The members may review their choice every five years, and the Fund ensures that members comply with their insurance obligations.

36 Insurance companies providing the basic pension insurance are required to enter into an agreement with the Fund. In many ways, the Fund acts as an intermediary between the medical specialist and the insurer. For example, the Fund collects contributions in respect of the basic pension and passes them on to the insurer. The Fund and the insurance company fix the premiums for the basic pension on an actuarial basis. Those premiums vary according to the age, sex and income of the member, the administrative costs of the Fund or the insurer, and the performance of the investments made by the Fund or the insurance company.

37 The second part of the pension scheme comprises the indexation mechanism, retroactive pension rights, the continuing accrual of pension rights without payment of contributions in the event of a member's disability, and additional survivors' benefits. By means of an adaptation coefficient determined on a yearly basis, the indexation system enables pensions and pension rights to be adjusted in line with rises in incomes. As far as this second part is concerned, the medical specialists' profession has opted for the form described in Article 2(2)(a) of the BprW. These aspects are thus managed by the Fund and may not be entrusted to an insurance company.

38 The components forming the second part of the pension scheme, with the exception of additional survivors' benefits, are funded by contributions calculated on an actuarial basis. However, no contributions are at present being allocated to members' accounts in respect of retroactive pension rights, the Fund's reserves being sufficient to finance those rights. Additional survivors' benefits are funded by way of a fixed average annual contribution.

39 The scheme does not seek to identify particular risks through the use of questionnaires or medical examinations.

40 The Fund is a non-profit-making body and any surpluses are distributed to pensioners and members in the form of increases in their pension rights.

41 On 31 December 1997 there were 5 951 members, 1 063 former members and 4 220 pensioners receiving pension payments. Of the pensioners, 1 238 were widows or widowers, 185 were orphans and 2 797 were in receipt of old-age pensions. At the end of 1997, invested capital amounted to NLG 6 600 million.

The main proceedings and the questions referred for a preliminary ruling

42 Mr Pavlov and the other applicants in the main proceedings are five medical specialists practising in a hospital in Nijmegen. It is common ground that they were obliged to be members of the Fund until the end of 1995.

43 However, Mr Pavlov and the other applicants take the view that, as from 1 January 1996, they ought to have been exempted from compulsory membership of the Fund by virtue of Article 1(2) of the Fund's rules. Since that date they have been practising as salaried employees and they submit that, as such, they are required to be members of the Bedrijfspensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (Pension Fund for the Health-Care and Psychological and Social Welfare Sector). On that ground, Mr Pavlov and the other applicants ceased paying contributions to the Fund.

44 The Fund does not accept that Mr Pavlov and the other applicants practise their profession under a contract of employment and has issued enforcement orders against them for the recovery of arrears of premiums.

45 Mr Pavlov and the other applicants have challenged those enforcement orders before the Cantonal Court, Nijmegen. By interlocutory judgments of 13 February 1998, that court held that, having regard to the nature of their contractual relationship with the hospital, Mr Pavlov and the other applicants could not rely on the exemption provided for in Article 1(2) of the Fund's rules.

46 Mr Pavlov and the other applicants submitted in the proceedings that compulsory membership of the Fund was contrary to a number of provisions of the EC Treaty.

47 The national court notes that, by judgments of 22 October 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has already referred to the Court a question concerning the compatibility with Community law of compulsory membership of an occupational pension scheme, but that the Court did not answer that question in its judgment (Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705).

48 It was in those circumstances that the Cantonal Court, Nijmegen, stayed proceedings and referred to the Court the following questions for a preliminary ruling:

'1. Given the aims of the BprW as described above..., is an occupational pension fund, membership of which has been made, pursuant to and in accordance with the BprW, compulsory for all, or for one or more specified groups of members of a profession, with that compulsory membership having the legal effects... entailed by that Law, to be regarded as an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty establishing the European Economic Community?

2. If so, is the fact of making membership of the occupational pension scheme for medical specialists... compulsory a measure adopted by a Member State which nullifies the useful effect of the competition rules applicable to undertakings, or is this the case only under certain conditions, and if so, under which?

3. If the last question must be answered in the negative, can other circumstances render compulsory membership incompatible with Article 90 of the Treaty, and if so, which?'

49 By order of 17 June 1998, the President of the Court joined Cases C-180/98 to C-184/98 for the purposes of the written procedure, the oral procedure and judgment.

Admissibility

50 The Greek Government queries the admissibility of the questions on the ground that, in its orders for reference, the national court has not sufficiently explained the factual and legal context of the main proceedings. It argues that, without a proper account by the national court of the legal and economic aspects of the supplementary pension scheme at issue in the main proceedings, it is unable to express its position on the questions referred, particularly in view of the complexity of the legal and factual issues in the field of competition law.

51 According to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is

asking or, at the very least, to explain the factual circumstances on which those questions are based. Those requirements are of particular importance in certain areas, such as competition, where the factual and legal issues are often complex (see, in particular, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7, Case C-284/95 *Safety High-Tech* v *S. & T.* [1998] ECR I-4301, paragraphs 69 and 70, Case C-341/95 *Bettati* [1998] ECR I-4355, paragraphs 67 and 68, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 39, and Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 38).

52 The information provided in orders for reference must not only be such as to enable the Court to provide a useful answer but must also give the governments of the Member States and other interested parties an opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity of submitting observations is safeguarded, bearing in mind that, under Article 20, only orders for reference are notified to the interested parties (see, in particular, the order of 30 April 1998 in Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 6, the order of 11 May 1999 in Case C-325/98 *Anssens* [1999] ECR I-2969, paragraph 8, and the judgments in *Albany*, paragraph 40, and *Brentjens'*, paragraph 39).

53 It is clear from the observations submitted under Article 20 of the EC Statute of the Court of Justice by the governments of the Member States and the other interested parties, and from the observations submitted by the Greek Government itself in the event that the Court held the reference from the national court to be admissible, that the information contained in the orders for reference did enable them to adopt a position on the questions referred to the Court.

54 Furthermore, even though the Greek Government may have taken the view in this case that the information provided by the national court was not sufficient to enable it to adopt a position on certain aspects of the questions submitted to the Court, that information was amplified by the case-file forwarded by the national court, by the written observations and by the answers given to the questions

asked by the Court. All that information, summarised in the Report for the Hearing, was made available to the governments of the Member States and the other interested parties for the purposes of the hearing, at which they had an opportunity, if needed, to amplify their observations (see *Albany*, paragraph 43, and *Brentjens'*, paragraph 42).

55 Thus, the information supplied by the national court, supplemented in so far as necessary by the other information mentioned in the previous paragraph, sufficiently apprises the Court of the facts and regulatory framework at issue in the main proceedings to enable it to interpret the Community competition rules in relation to the situation in question in those cases.

56 It follows that the questions referred for a preliminary ruling are admissible.

The second question

57 By its second question, which it is appropriate to consider first, the national court is asking essentially whether Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of that Treaty prohibit a Member State's public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

58 In order to answer the second question, it is necessary to consider first of all whether a decision taken by a liberal profession's representative body to set up, for the members of that profession, a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession is contrary to Article 85 of the Treaty.

59 It must be observed at the outset that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted those who drafted the Treaty to provide expressly in Article 85(2) of the Treaty that agreements or decisions prohibited under that provision are to be automatically void.

60 Next, it should be observed that, in the *Brentjens'* case and in Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, the Court held that a decision taken by an organisation representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty.

61 The Fund, the Netherlands Government and the Commission, the latter in alternative argument, submit that there is no significant difference between the national rules governing the sectoral pensions which were at issue in *Albany*, *Brentjens'* and *Drijvende Bokken* and those governing the occupational pension schemes at issue in the main proceedings. The reasons which led the Court in those earlier cases to hold that a decision by an organisation representing employers and workers to set up a sectoral pension fund and to request the public authorities to make membership of that fund compulsory did not fall within the scope of Article 85 of the Treaty also hold good with regard to a similar decision emanating, as in the present cases, from the members of a liberal profession, and take such a decision outside the scope of Article 85 of the Treaty, even if the members of the profession are not acting within the context of a collective agreement.

62 According to the Fund, the Netherlands Government and the Commission, several of the grounds stated in the judgments mentioned in the paragraph above are also applicable to the present cases.

63 First of all, the introduction of a compulsory supplementary pensions scheme for all the members of a liberal profession is, they submit, consistent with Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), according to which the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere', and with Article 2 of the EC Treaty (now, after amendment, Article 2 EC), which provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

64 Secondly, the supplementary occupational pension scheme at issue in the main proceedings was introduced at the request of the representative body of the members of the profession concerned, following collective bargaining.

65 Thirdly, a decision taken by the representative body of the members of a profession to implement such a supplementary pension scheme and to request that it be made compulsory is one which pursues the same social objective as the agreement at issue in *Albany*, *Brentjens'* and *Drijvende Bokken*, namely to guarantee all the members of a profession a certain level of pension.

66 The importance of the social function attributed to supplementary pensions has recently been recognised by the Community legislature's adoption of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community

(OJ 1998 L 209, p. 46). That Directive does not differentiate between the pensions of employed persons and those of self-employed persons.

67 It should be borne in mind that, at paragraphs 64, 61 and 51 respectively of the judgments in *Albany*, *Brentjens'* and *Drijvende Bokken*, the Court held that 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.

68 Such exclusion from the scope of Article 85(1) of the Treaty cannot be applied to an agreement which, whilst being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession 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.

69 On this point, it should be emphasised that the Treaty contains no provisions, like Articles 118 and 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) or Articles 1 and 4 of the Agreement on social policy (OJ 1992 C 191, p. 91), 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.

70 That being so, Article 85(1) of the Treaty must be interpreted as meaning that a decision taken by the members of a liberal profession to set up a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all the

members of that profession does not, by reason of its nature or purpose, fall outside the scope of that provision.

71 Therefore, it is necessary to ascertain whether the conditions for application of Article 85(1) of the Treaty are fulfilled and, first of all, whether or not the representative body in question in the main action, namely the LSV, is an association of undertakings.

72 In this connection, it should be pointed out that, on the date on which the LSV applied to the public authorities to make membership of the Fund compulsory, that organisation was made up solely of self-employed medical specialists.

73 Thus it is necessary to consider whether those independent medical specialists are undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

74 The Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17, Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013, paragraph 14, *Albany*, paragraph 77, *Brentjens'*, paragraph 77, and *Drijvende Bokken*, paragraph 67).

75 It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v

Italy [1987] ECR 2599, paragraph 7, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36).

76 In the present cases, the medical specialists who are members of the LSV provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.

77 The self-employed medical specialists who are members of the LSV therefore carry on an economic activity and are thus undertakings within the meaning of Articles 85, 96 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, Case C-35/96 *Commission* v *Italy*, cited above, paragraphs 37 and 38).

78 Nevertheless, the Commission contends that, when they are contributing to their own supplementary pension scheme, the medical specialists are not acting as undertakings within the meaning of Community competition law. A medical specialist who sets up a supplementary pension for himself is, the Commission submits, acting as an end user and the decision he takes in that context falls outside the scope of the competition rules. Such a decision can, it says, be compared to a decision to make investments on the financial markets or to purchase a holiday home.

79 It should be observed in response to that contention that the fact that a self-employed medical specialist pays contributions to a supplementary occupational pension scheme is closely linked to the practice of his profession. The medical specialist's membership of such a scheme stems from the practice of his profession. The supplementary occupational pension scheme at issue in the main proceedings, which covers all members of the profession, allows its members to

set aside part of their professional income in order to guarantee themselves, and on certain conditions, a surviving spouse or child, a certain level of income after they have ceased practising.

80 The link between the payment of contributions by every self-employed medical specialist to the same supplementary occupational pension scheme and professional practice is also especially close for the reason that the scheme is characterised by a high degree of solidarity between all medical practitioners. That is evidenced, in particular, by the fact that contributions are not linked to risk, the fact that all members of the profession must be accepted into the scheme without a prior medical examination, the fact that, in the event of disability, the fund assumes payment of contributions in order to maintain the accrual of pension rights, the fact that retroactive pension rights are granted to members who were already practising when the scheme came into effect and the fact that pension payments are index-linked so as to maintain their value.

81 In those circumstances, medical specialists cannot be regarded as acting as final consumers when they make contributions to their own supplementary pension scheme.

82 It must therefore be concluded that when they decided, through the LSV, to contribute collectively to a single occupational pension fund, medical specialists were acting as undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

83 The next question to be examined is, therefore, whether the LSV is to be regarded as an association of undertakings for the purposes of the provisions just mentioned.

84 The Fund argues that it would be discriminatory to treat the LSV as an association of undertakings and not other professional organisations, such as the

Netherlands Bar Association, which are governed by a public-law statute and which, as such, have regulatory powers.

85 Suffice it to say in this regard that the fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty. According to its wording, that provision 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 (Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17, and Case C-35/96 *Commission* v *Italy*, cited above, paragraph 40).

86 Nor, contrary to what the Fund maintains, can the LSV be taken outside the scope of Article 85 of the Treaty by the fact that its main task is to protect the interests of medical specialists, and in particular their income, which is made up in part by supplementary pensions, in negotiations with the Netherlands authorities concerning the cost of medical services.

87 Admittedly, a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 85 of the Treaty where that body is composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria (Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraphs 23 to 25, and Case C-35/96 *Commission* v *Italy*, cited above, paragraphs 41 to 44).

88 However, that is not the situation in the present cases, for at the time when the LSV decided to set up the Fund and to apply to the public authorities for a

decision making membership compulsory, it was composed exclusively of self-employed medical specialists, whose economic interests it defended.

89 That being so, the LSV must be regarded as an association of undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

90 It is therefore necessary to consider, secondly, whether a decision by the members of a liberal profession to set up a pension fund responsible for the management of a supplementary pension scheme and to apply to the public authorities for a decision making membership of the fund compulsory for all members of that profession has as its object or effect the prevention, restriction or distortion of competition within the common market.

91 It is settled case-law that, in defining the criteria for the application of Article 85(1) of the Treaty to a specific case, account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10).

92 In this respect, it must be borne in mind that a decision of the kind just mentioned means that all the members of a profession arrange their supplementary pension with one body and under the same conditions, except for their basic pension, which they may freely obtain from any authorised insurance company.

93 The conclusion must be that such a decision, which standardises in part the costs and supplementary pension benefits of medical specialists, restricts competition as far as concerns one cost factor of specialist medical services, inasmuch as one of its effects is that those medical practitioners do not compete with one another to obtain less costly insurance for that part of their pension.

94 However, as the Advocate General observes at paragraphs 138 to 143 of his Opinion, the restrictive effects of such a decision on the specialist medical services market are limited.

95 The decision in question produces restrictive effects only in relation to one cost factor of the services offered by self-employed medical specialists, namely the supplementary pension scheme, which is insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. The cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists.

96 Furthermore, it should be observed that the implementation of a supplementary pension scheme managed by a single fund allows self-employed medical specialists to share the risks insured against whilst achieving economies of scale in the management of contributions and payment of pensions and in the investment of assets.

97 It follows from the foregoing that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme does not appreciably restrict competition within the common market.

98 As for the request, made to the public authorities by an organisation representing the members of a profession, to make membership of the occupational pension fund it has set up compulsory, it 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 of the second type and include a number of safeguards whose observance the competent Minister must ensure, so that a request by the members of a profession for membership to be made compulsory cannot constitute an infringement of Article 85(1) of the Treaty.

99 That being so, it must be held that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession, is not contrary to Article 85(1) of the Treaty.

100 Thus, for the same reasons, a decision by the Member State in question to make membership of such a fund compulsory for all members of the profession is not contrary to Articles 5 and 85 of the Treaty either.

101 The answer to be given to the second question must therefore be that Articles 5 and 85 of the EC Treaty do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

The first question

102 By its first question, which it is appropriate to consider secondly, the national court asks essentially whether a pension fund responsible for managing a supplementary pension scheme set up by a profession's representative body and of which membership 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.

103 According to the Fund and the governments which have submitted observations pursuant to Article 20 of the EC Statute of the Court of Justice, such a fund does not constitute an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. In this connection, they set forth the various characteristics of the occupational pension fund and of the supplementary pension scheme which it manages.

104 First, compulsory membership, for all members of a profession, of a supplementary pension scheme, or at least of the most important part of that scheme, has an essential social function in the pension system applicable in the Netherlands because of the extremely limited amount of the statutory pension calculated on the basis of the minimum statutory wage. Where a supplementary pension scheme has been established by the members of a profession and membership of that scheme has been made compulsory by the public authorities, it constitutes an element of the Netherlands system of social protection and the occupational pension fund responsible for its management must be regarded as contributing to the management of the public social security service.

105 Secondly, the occupational pension fund is non-profit-making. The management costs of such a fund are lower than those of life-assurance companies and the surpluses it generates are redistributed to policyholders in the form of increases in their pension rights. The professional organisation on whose initiative such a

fund is created enjoys direct control over the implementation of the pension scheme by appointing and dismissing the members of the fund's management. Furthermore, the fund is subject to the supervision of the public authorities, in this case, the Insurance Board.

106 Thirdly, the occupational pension fund operates on the basis of the principle of solidarity. This is reflected by the obligation to accept all members of the profession in question without a prior medical examination, by the fund's assumption of the payment of contributions to maintain the accrual of pension rights in the event of disability, by the grant of retroactive pension rights to members already practising when the scheme came into effect and by the index-linking of pension payments so as to maintain their value. The principle of solidarity is also apparent from the fact that the level of contributions payable to the fund bears no relation to the age at which a member began practising or his state of health when he became a member. Such solidarity makes it essential that membership of the supplementary pension scheme is compulsory for all members of the profession. Otherwise, if 'good' risks did not participate in the scheme, the ensuing downward spiral would jeopardise its financial balance.

107 On that basis, the Fund and the governments who have submitted observations maintain that the Fund is a body entrusted with the management of a social security scheme, like that involved in *Poucet and Pistre*, cited above, but unlike the body at issue in *Fédération Française des Sociétés d'Assurance and Others* v *Ministère de l'Agriculture et de la Pêche*, cited above, which was held to be an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

108 As was pointed out in paragraph 74 of the present judgment, in the context of Community competition law, the Court has held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

109 The Court also held, at paragraph 19 of its judgment in *Poucet and Pistre*, cited above, that that concept did not include bodies entrusted with the management of certain compulsory social security schemes, based on the principle of solidarity. First of all, under the sickness and maternity scheme forming part of the system in question, benefits were the same for all beneficiaries, even though contributions were proportional to income. Next, under the old-age pension scheme, pensions were funded by those in employment. Furthermore, statutory pension entitlements were not proportional to the contributions paid into the old-age pension scheme. Finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single body and for membership of the schemes to be compulsory.

110 In contrast, in *Fédération Française des Sociétés d'Assurance and Others*, cited above, the Court held that a non-profit-making body which managed an old-age pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. Optional membership, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by beneficiaries and on the performance of the investments made by the managing body meant that that body carried on an economic activity in competition with life-assurance companies. Neither the social objective pursued, nor the fact that the body was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which it was subject in making investments altered the fact that the managing body was carrying on an economic activity.

111 Following the judgment in *Fédération Française des Sociétés d'Assurance and Others*, the Court held in *Albany*, *Brentjens'* and *Drijvende Bokken* that a pension fund entrusted with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing

employers and workers in a given sector, of which membership had been made compulsory by the public authorities for all workers in that sector, was an undertaking within the meaning of Article 85 et seq. of the Treaty.

112 In reaching that conclusion, the Court found that the sectoral pension funds in question in the cases mentioned in the paragraph above themselves determined the amount of the contributions and benefits, that they operated in accordance with the principle of capitalisation and that, by contrast with the benefits provided by bodies charged with the management of compulsory social security schemes of the kind in point in *Poucet and Pistre*, the amount of benefits provided by the funds depended on the performance of the investments which they made and in respect of which they were subject, like an insurance company, to supervision by the Insurance Board. Furthermore, the fact that a sectoral pension fund was in certain circumstances required or empowered to exempt undertakings from membership meant that it was carrying on an economic activity in competition with insurance companies (see *Albany*, paragraphs 81 to 84, *Brentjens'*, paragraphs 81 to 84, and *Drijvende Bokken*, paragraphs 71 to 74).

113 The same is true of the occupational pension fund at issue in the case in the main proceedings.

114 The Fund itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation. Thus, the level of benefits provided by the Fund depends on the performance of the investments which it makes and in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

115 Those characteristics, together with the fact that medical specialists may opt to purchase their basic pension either from the Fund or from an authorised insurance company and the fact that the Fund has power to grant certain categories of medical specialists exemption from membership as regards the other

components of the pension scheme, indicate that the Fund carries on an economic activity in competition with insurance companies.

116 It must therefore be concluded that a body such as the Fund is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

117 The fact that the Fund is non-profit-making and the solidarity aspects emphasised by the Fund and the governments which have submitted observations are not sufficient to relieve the Fund of its status as an undertaking within the meaning of the competition rules of the Treaty (see *Albany*, paragraph 85, *Brentjens'*, paragraph 85, and *Drijvende Bokken*, paragraph 75).

118 It is true that the pursuit of a social objective, the abovementioned solidarity aspects and the restrictions or controls on investments made by the Fund may render the service provided by the Fund less competitive than comparable services provided by insurance companies. Although such constraints do not prevent the activity engaged in by the Fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme (see *Albany*, paragraph 86, *Brentjens'*, paragraph 86, and *Drijvende Bokken*, paragraph 76).

119 The answer to the first question must therefore be that a pension fund, such as that in question in the main proceedings, which itself determines the amount of 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.

The third question

120 By its third question, the national court asks essentially whether Articles 86 and 90 of the Treaty 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.

121 It is clear from the answer given to the first question that, as far as the provision of the basic pension is concerned, the Fund constitutes an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty and operates in competition with insurance companies. As regards that part of the supplementary pension scheme, the Fund does not therefore enjoy any exclusive right within the meaning of Article 90(1) of the Treaty.

122 On the other hand, a decision by the public authorities to make membership of the Fund compulsory as far as it concerns the second part of the pension scheme, which includes the indexation mechanism, retroactive pension rights, the continuing accrual of pension rights in the event of a member's disability and additional survivors' benefits necessarily implies the grant to the Fund of an exclusive right to collect and administer the contributions paid with a view to creating those rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights of the kind referred to in Article 90(1) of the Treaty have been granted by the public authorities.

123 That being so, it is necessary to establish whether the Fund occupies a dominant position on a substantial part of the common market.

124 On this point the Fund and the Netherlands Government submit that the Fund does not occupy a dominant position within the meaning of Article 86 of the Treaty. The market for supplementary pensions for self-employed medical specialists in the Netherlands is not a market for services distinct from the market in the Netherlands for all supplementary pensions.

125 In this regard it is sufficient to note, as the Commission has quite rightly pointed out, that granting the Fund the exclusive right to manage the second part of the supplementary occupational pension scheme for medical specialists in the Netherlands means that those medical specialists are precluded from arranging that part of their pension scheme with another insurer.

126 The Fund therefore 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. In that respect it must be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (see Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 14, and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 17).

127 However, the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 90(1) of the Treaty 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 (*Höfner and Elser*, cited above, paragraph 29, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 37, *Merci Convenzionali Porto di Genova*, cited above, paragraphs 16 and 17, Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph 18, and Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 27). As is clear from paragraph 31 of the judgment in *Höfner and Elser*, 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.

128 There is no evidence in the case-file forwarded by the national court or in the written and oral observations made by the Fund, the governments which have submitted observations and the Commission, that the Fund, merely by exercising the exclusive rights granted to it, would be led to abuse its dominant position or that the pension services offered by the Fund might not meet the needs of medical specialists.

129 It should be observed in this regard that Mr Pavlov and the other applicants had not expressed any desire to arrange their supplementary pensions with an insurance company; they argue that they do not belong to the Fund, but instead belong to another occupational pension fund, membership of which had also been made compulsory.

130 The answer to be given to the third question must therefore be that Articles 86 and 90 of the Treaty 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.

Costs

131 The costs incurred by the Netherlands, Greek and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 Kantongerecht te Nijmegen by orders of 8 May 1998, hereby rules:

1. **Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.**

2. **A pension fund, such as that in question in the main proceedings, 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 of the Treaty and 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC).

3. Articles 86 and 90 of the Treaty 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.

Rodríguez Iglesias Moitinho de Almeida Edward

Sevón Schintgen Kapteyn Gulmann

Puissochet Wathelet

Delivered in open court in Luxembourg on 12 September 2000.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President