OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 11 May 2000 *

1. This preliminary reference concerns the question whether or not collectively negotiated agreements concerning contributions by employers in respect of voluntary supplementary health insurance for their employees fall within the scope of the Community competition rules. The Court held in its judgments last year in *Albany*, *Brentjens* and *Drijvende Bokken* that Article 85 of the EC Treaty (now Article 81 EC) does not apply to collective labour agreements, at least where they pursue genuine social objectives. [1]

I — The legal and factual background

2. Mr Van der Woude is employed as head of its technical service by Stichting Beatrixoord, a foundation which runs a healthcare institution. He is not a member of a trade union. However, his contract of employment was governed, at the material time, by, *inter alia*, the Collectieve Arbeidsovereenkomst (Collective Labour Agreement) relating to medical treatment for the hospital sector (hereinafter 'the CAO'). [2]

3. The Law of 24 December 1927 governing collective labour agreements ('CCT-Law'), [3] as amended, provides that representatives of employees and employers may collectively agree upon terms of employment. Article 14 of the CCT-Law provides that an employer which is bound by such an agreement must respect its provisions even in respect of employees who are themselves not bound by it.

* Original language: English.

1 — Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (hereinafter '*Albany*'), Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 and Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121. For convenience, these cases will, hereinafter, be referred to collectively as 'the *Albany* cases'.

2 — Although the national court refers to the agreement at issue in the present proceedings simply as the CAO, it would seem, from the written observations of the Commission, more precisely to be known as the CCT-H. To avoid confusion, I shall, however, employ the terminology used by the national court. The CAO remained in force at least until 31 March 1998.

3 — *Staatsblad* 415.

4. Article 32 of the CAO provides:

'IZZ Medical Expenses Scheme:

1. Employees ... may be members of the IZZ collective medical expenses scheme(s).

The conditions relating to their membership and that of any associate member(s) and the scope of the benefits provided thereunder shall be governed by the Reglement Ziektekostenregeling van de Stichting IZZ [Rules on the Medical Expenses Scheme of the IZZ Institute, hereinafter "the Rules"].

Those Rules shall also govern the premium payable. Following consultation with the parties to this CAO, the Rules shall be laid down and may be amended by the board of management of the institution referred to in paragraph 2.

The amount of any contribution(s) to be paid by the employer towards the premium in respect of the medical expenses scheme(s) concerned shall be fixed by the parties to this CAO ... .

2. The Rules referred to in paragraph 1 shall be implemented by the Stichting Instituut Ziektekostenvoorziening Ziekenhuiswezen (IZZ) [Institute for Assistance in the Payment of the Costs of Medical Treatment]. The parties to this CAO shall be represented on the board of management of the IZZ.

The IZZ may arrange for its activities to be carried out, wholly or in part, by one or more non-profit-making medical expenses insurance organisations.

3. Following consultation with the parties to this CAO, the total premium payable per member in relation to the (former) employee's membership of the IZZ Medical Expenses Scheme shall be fixed by the IZZ and shall, save as may be otherwise provided by the Rules, be paid into the Medical Expenses Fund managed by the IZZ.'

5. Articles 1(4) and 10(1) of the Rules effectively require the employer only to pay monthly contributions in respect of employees (or former employees) who are affiliated to the IZZ scheme.

6. Article II(G) of the CAO, which sets out its scope, provides:

'Save in so far as may be otherwise provided, the employer may not depart from the provisions of this CAO or agree with the employee any conditions of employment which are not regulated by this CAO.'

7. Under Article 32(1) of the CAO, Beatrixoord is obliged, whenever one of its employees opts to take out supplementary health-insurance cover with the IZZ Medical Expenses Scheme, to pay 50% of the premium due.

8. The provisions of compulsory labour agreements can, in the Netherlands, be rendered obligatory for a whole sector or part of the country by the Minister for Social Affairs acting pursuant to the Law of 25 May 1937 on declaring obligatory or non-obligatory certain provisions of collective labour agreements. [4] Although it is not stated in the order for reference whether such a declaration has been made in respect of the CAO, it would appear that the CAO is, none the less, binding, as the order specifies that 'Beatrixoord is in principle bound by the medical insurance provisions laid down in Article 32 of the CAO'.

9. The IZZ does not provide the insurance cover itself. It has contracted out its provision to Onderlinge Waarborgmaatschappij VGZ (hereinafter 'VGZ'), a mutual insurance company. As already noted the CAO permits the IZZ to have recourse to a non-profit-making medical expenses organisation. The total number of persons insured is approximately 750 000 (260 000 employees and their families), of whom it is estimated that 40% are insured on a private basis.

10. In the Netherlands, it appears that the Algemene Wet Bijzondere Ziekenkosten (General Law on Exceptional Medical Costs, hereinafter 'the AWBZ'), which applies to all residents, provides for free basic health care. The Ziekenfondswet (Health Fund Law) provides a right to benefit from health-care services in so far as they are not covered by the AWBZ. It would appear to be a compulsory health-insurance scheme that applies to employees earning less than NLG 62 200 per annum. [5] In general, the employer's contribution is fixed at 50%.

4 — *Staatsblad* 801.

5 — Those who earned more than NLG 62 200 were not at the material time bound by the Health Fund Law and could choose whether to insure themselves against the risks covered by that Law. It would appear that Mr Van der Woude's income did not exceed this threshold.

11. Mr Van der Woude (hereinafter 'the plaintiff'), who is at present affiliated to the IZZ scheme, wishes to take out supplementary health insurance with another medical expenses insurer, RZG. He pays a total monthly sum (including the contribution from Beatrixoord) of NLG 133 for basic insurance and NLG 33 for supplementary insurance but alleges that, if he were insured with RZG, those premiums would amount to NLG 128.50 and NLG 19.50 respectively. As he requires comprehensive dental treatment — six crowns costing approximately NLG 800 each — he wishes to switch to RZG. Whereas under the IZZ scheme he would be entitled only to a reimbursement of NLG 450 per tooth, under that operated by RZG the entire cost of the treatment would be reimbursed. The potential additional value of the cover would be NLG 2 100.00 (viz. six times NLG 350).

12. The plaintiff claimed before the Kantongerecht (Cantonal Court), Groningen (hereinafter 'the national court') that Beatrixoord should contribute to the cost of his supplementary medical insurance even if he switched from the IZZ to RZG. The parties to the CAO scheme may be regarded as being undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC). Article 32 of the CAO restricts competition between insurers offering medical expenses cover for individuals, or, at any rate, places a specified undertaking (IZZ/VGZ) at an advantage compared with its competitors. IZZ/VGZ's refusal to allow former members of its scheme who, at any time, have taken out insurance elsewhere to rejoin its scheme further restricts competition. The plaintiff also submitted that the creation of IZZ/VGZ resulted in its being placed in a dominant position, which it has abused by providing less extensive benefits and demanding higher premiums than other medical expenses insurers.

13. The national court is of the view that Beatrixoord can be required to pay the contribution to a different insurance company only if the relevant provisions of the CAO are void. According to the order for reference, the 'decisive question is therefore, whether ... Article II(G) ... and Article 32 thereof ... , read in conjunction with each other, are contrary to Articles 85 and 86 of the EC Treaty'. It has referred the following question to the Court:

'Are Article II(G) of the CAO (which prohibits any departure from the terms of that collective labour agreement) and Article 32 thereof (which lays down the medical expenses insurance rules), read in conjunction with each other, contrary to Articles 85 and 86 of the EC Treaty?'

14. Following the delivery, subsequent to the making of the order for reference, of the judgments in the *Albany* cases, the national

court, in response to an inquiry from the Court, has maintained its reference. It observes that, by contrast with those cases, the insurance activity in the present case was subcontracted to IZZ, which in turn called upon VGZ, which is described as 'a commercial insurer' ('een commerciële verzekeraar'), to provide the relevant insurance cover. The national court has not, however, suggested that VGZ is other than a mutual insurance organisation, which is how it is described by the Netherlands in its observations.

II — Observations

15. Written and oral observations have been submitted by the plaintiff, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Commission. They may briefly be summarised as follows.

16. The plaintiff alone submits that the CAO should be considered to be subject to Article 85 of the EC Treaty. In his view, the exception from the application of that article recognised by the Court in the *Albany* cases should be narrowly construed and does not apply to health insurance. While pensions form part of the direct remuneration for work, the provision of a contribution towards health insurance does not form part of the core of what is normally regulated by collective labour agreements. Moreover, it is not necessary to exclude the provision of such insurance, since, unlike the case of pensions, where it is necessary to maintain a large fund to meet future contingent liabilities, the future liabilities of health insurance providers and, thus, the premiums that they need to charge can be calculated with much greater certainty.

17. The Netherlands, supported by Sweden, the United Kingdom and the Commission, submits that collective agreements governing the provision of supplementary health insurance form part of the system of industrial democracy destined for the protection of the rights of workers and fall within the scope of what is normally covered by collective labour agreements. The adequacy of an employee's insurance against sickness constitutes a legitimate matter of concern for employers.

III — Analysis

18. The plaintiff complains, in essence, that the scheme of the CAO, as applied by the IZZ and VGZ, does not permit Beatrixoord to pay the employer's contributions to another insurance company of the plaintiff's choice. The latter is, of course, free to go to another insurer, but cannot then

benefit from the employer's contribution. What is more, an employee who has exercised this right is not accepted back into the IZZ scheme.

A — *Article 85 of the EC Treaty*

19. The central issue raised by this case is whether a provision such as Article 32 of the CAO is subject to Article 85 of the EC Treaty. It is therefore necessary to recall the Court's rulings in the *Albany* cases. I do not propose, however, to reconsider the important issues of principle decided by the Court in those cases. I intend to restrict myself to considering whether the present case is covered by those principles or can be distinguished from them. The *Albany* cases concerned compulsory affiliation of employers and employees to a sectoral pension scheme. Certain employers claimed the scheme to be anti-competitive because, firstly, it deprived undertakings in the sector concerned of the right to affiliate to another scheme and, secondly, it excluded insurers other than the fund, set up under the collective agreements in question, 'from a substantial part of the pension insurance market'. [6]

20. The Court's approach to this claim was first to consider whether a collective decision to establish a compulsory pension fund fell within the scope of Article 85 of the EC Treaty. Recalling the first two paragraphs of that article, the Court proceeded to enunciate a very important exception to the material scope of the agreements covered by those provisions. The reasoning of the Court proceeds from a broad schematic analysis of the Treaty as a whole. The core paragraphs of that reasoning merit full citation, as they are central to the decision in the present case: [7]

'54 ... [I]t is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), 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". Article 2 of the EC Treaty (now, after amendment, Article 2 EC) 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".

55 In that connection, Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides that the Commis-

6 — Paragraph 48 of the judgment in *Albany*. For convenience, all specific paragraph references will hereinafter only be to the *Albany* judgment.

7 — Paragraphs 54 to 60.

sion is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.

56 Article 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty having been replaced by Articles 136 EC to 143 EC) adds that the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

57 Moreover, Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91) states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

58 Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

59 It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60 It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.'

21. The conclusion reached in the last paragraph of this quotation is that where, firstly, 'agreements [are] concluded in the context of collective negotiations between management and labour', and, secondly, they pursue 'social policy objectives', they

do not 'fall within the scope of Article 85(1) of the EC Treaty'. The exception is thus manifestly not limited to agreements concerning compulsory affiliation to sectoral pension schemes.

22. The Court went on to consider 'whether the nature and purpose of the agreement at issue in the main proceedings justif[ied] its exclusion from the scope of Article 85(1) of the Treaty'. [8]

Firstly, it held that: [9]

'... like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.'

Thus, the agreement satisfied the first condition.

23. The Court proceeded to find that: [10]

'... as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.'

The agreement, therefore, also satisfied the second condition. Consequently, the Court was satisfied that '[it did] not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty'. [11]

24. It is common case that the CAO is a collective agreement; it is so described in the order for reference. [12] In form and nature, it therefore clearly satisfies the first requirement for the application of the exception. It is also necessary to verify that its purpose is such that it satisfies the second condition laid down by the Court in

8 — Paragraph 61.
9 — Paragraph 62.
10 — Paragraph 63.
11 — Paragraph 64.
12 — The Netherlands points out that the parties to the CAO are, on the one hand, six employer organisations and, on the other, 28 organisations representing workers.

the *Albany* cases, namely that it pursues social policy objectives of a kind that justify the exclusion of the competition rules. [13]

25. A pension may be more closely related to pay, in the sense of direct remuneration, than health insurance. That, however, does not suffice to deprive an agreement regarding health insurance of its character as one which relates to working conditions. The purpose of an agreement concluded between employers and employee representatives regarding the provision of health insurance is designed to improve the employees' working conditions. It does so both directly and indirectly by removing or alleviating anxiety as to how medical expenses will be met.

26. Employers too have a legitimate interest in ensuring that their employees can afford adequate medical care, so as to minimise the number of days lost through illness. As counsel for the United Kingdom submitted at the hearing, the benefits that may be attained by social bargaining include those that reduce expenditure that would otherwise have to be borne by an employee. The concession made by employers in the context of the CAO effectively increased the wages of employees like the plaintiff. It can be assumed that employers in the relevant sector would not have agreed to pay the relevant contribution, or at least the same level of contribution (50%), in the absence of a collective agreement.

27. The plaintiff relied at the hearing on the test propounded by Advocate General Jacobs in his Opinion in the *Albany* cases. I see no discrepancy between his approach and that adopted by the Court as regards the legitimate scope, *ratione materiae*, of collective agreements. Both were satisfied that collective bargaining agreements could legitimately concern 'working conditions' and that they were not limited merely to matters linked directly with pay. [14] I am satisfied that health insurance for employees constitutes one of the legitimate 'core subjects of collective bargaining'. [15] The contrary view is not, in my opinion, seriously arguable.

28. The plaintiff submits that the exception established in the *Albany* cases must be narrowly construed and, in particular, must respect the principle of proportionality.

13 — The United Kingdom asked the Court at the hearing to clarify whether the same exception to the application of Article 85 of the EC Treaty would apply in respect of agreements between management and labour concluded at enterprise, as opposed to sectoral, level. Although no such issue is raised in the present proceedings, I would, provisionally, see no reason, in principle, why such agreements, which the Court is informed are widespread in the United Kingdom, would not also benefit from the *Albany* exception, provided they result from genuine collective bargaining between employer and employee representatives and concern only working conditions.

14 — See, in particular, paragraph 182 of the Opinion.

15 — Ibid., paragraph 178.

This is clearly correct. However, he also claims that the funding contingencies affecting the provision of health insurance are significantly less difficult to calculate than those affecting the provision of supplementary pensions. The exclusion from the scope of Article 85 of the EC Treaty of even genuine collective agreements should, once the provision of an insurance service by third-party insurers is involved, be limited to the provision of pensions, or, at least, to situations where the insurance to be provided requires a large reserve fund to be built up and maintained. The plaintiff submits that this is not the case with supplementary health insurance.

29. I can see no basis in logic or experience for such a distinction. No doubt, different methods of calculation have to be applied to different underlying data when assessing the contributions to pension funds and health schemes respectively. None the less, both are aimed at providing protection for individuals in a group, which is the expression of a social need. The Netherlands has pointed to the important social role played by collective agreements in the Netherlands regarding the provision of supplementary health insurance. It refers to the relatively low level of compulsory cover provided under the AWBZ and to the fact that many higher earners are excluded from cover under the Ziekenfondswet.

30. In such circumstances, the agreement falls to be considered, in my opinion, within the ambit of the exception to the application of Article 85 of the EC Treaty enunciated by the Court in the *Albany* cases. Whether or not VGZ is a mutual insurance organisation is not crucial; the Court has held that 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed'.[16] An entirely non-profit-making organisation may be an undertaking when it arranges an optional supplementary-pension scheme.[17] Thus, while I would agree with the view recently expressed by Advocate General Jacobs in *Pavlov and Others*[18] that the 'special immunity for collective agreements between management and labour cannot be extended by analogy to other types of agreements or decisions', no such extension would arise in this case because the agreement falls squarely within the material scope of the exception from the application of Article 85 of the EC Treaty enunciated in the *Albany* cases. The discrete question raised in this case is, rather, whether the application of the exception depends on management and labour being responsible for implementing the terms of what in

16 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

17 — Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013, paragraph 22.

18 — See Joined Cases C-180/98 to C-189/98 *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* (judgment pending) (hereinafter '*Pavlov and Others*'); ECR I-6451, I-6456, paragraph 99 of the Opinion of 23 March 2000.

principle would be an agreement benefiting from the *Albany* exception.

31. It appears that the plaintiff's essential complaint (which was made clearly at the oral hearing) is not so much that the CAO required a fixed contribution of employers towards supplementary health insurance but, rather, of the obligation imposed on employers to pay that contribution to a specified insurer, to wit the IZZ or its nominee. The plaintiff is thus, in reality, seeking to enjoy both the benefit of the employers' collective commitment to make the 50% contribution and the freedom to determine to whom those contributions should be paid. This submission echoes the concern expressed by the national court in its response to the inquiry from the Court (see paragraph 14 above) as to whether the subcontracting of the relevant insurance activity to IZZ/VGZ affects the applicability of the principle enunciated in the *Albany* cases.

32. Such a broad limitation on the scope of the exclusion of collective bargaining from Article 85 of the EC Treaty would necessarily restrict the freedom of management and labour to pursue consensus on working conditions through such agreements. It would further undermine the solidarity inherent in collective bargaining. I am satisfied that the scope of the exception established in the *Albany* cases, which is based on the need to ensure the efficacy of genuine labour-related collective agreements, is broad enough to encompass agreements such as the CAO. In this respect, it is noteworthy that the Court, when defining in the *Albany* cases the scope of the exception from the scope of application of Article 85 of the EC Treaty, did not, at least not explicitly, accept the third condition suggested by Advocate General Jacobs, namely that the relevant collective agreement should not 'directly affect [...] relations between employers and third parties, such as clients, suppliers, competing employers or consumers'. [19] That is not to say that collective agreements which appreciably affect competition will be immune from 'antitrust scrutiny by the Commission or other competent authorities', [20] since, as an exception to the general field of application of Article 85 of the EC Treaty, the scope of the *Albany* exception must be narrowly construed. [21] Those allegedly harmed by such anti-competitive restrictions, such as the plaintiff, may always challenge them on the basis that the agreement does not pursue a genuine social objective because the restrictions resulting from it, or from its application, go beyond what is required by the pursuit of its objective.

33. However, it is, in my view, permissible for both sides of industry collectively to

19 — Paragraph 193 of the joint Opinion in the *Albany* cases.

20 — Ibid.

21 — See the similar view expressed by Advocate General Jacobs in *Pavlov and Others*, op. cit., footnote 18 above, at paragraph 101 in particular.

agree on a particular aspect of working conditions, such as the provision of pensions or health insurance, and for affiliation to that agreement to be rendered — directly as in the *Albany* cases or indirectly as would appear to be the case in the main proceedings — compulsory by a Member State. It follows, in my opinion, that the parties to such an agreement should be entitled to establish a separate entity, such as the IZZ, to give effect to the agreement. The fact that such an entity engages another insurer does not affect the exclusion from Article 85 of the EC Treaty of the underlying collective agreement. The general gain for employees that is achieved by a collective agreement would be put at risk if each individual were permitted to pursue his own interest by withdrawing his own and his employer's contributions from the scheme in pursuit of alternative competitive offers while claiming the right to return only when the scheme's terms were more attractive. Such 'à la carte' behaviour by employees would undermine the normal principles regulating mutual insurance.

34. To subject downstream agreements like that between the IZZ and VGZ to that provision, where they merely confer upon a third party the responsibility for providing the insurance cover required by the collective agreement, would operate to undermine the autonomy of the parties involved in the collective-agreement process. I do not, therefore, agree with the plaintiff that Community law requires that such contracts be submitted to tender. The scope of the exception from the application of Article 85 of the EC Treaty is not therefore limited to matters that the parties to the agreement are capable of carrying out themselves.

35. If, on the other hand, the terms of the delegation went beyond what was necessary to achieve the social objective of the agreement, such as, for example, if the commercial insurer were also retained to provide other insurance services for the sole benefit of the employers, there would be no reason for it not to fall within the scope of application of Article 85 of the EC Treaty. It has not been suggested in the present case-file that the contract granted to VGZ goes further than the provision of the insurance cover agreed in the CAO. The allegations made by the plaintiff that the level of service provided by the IZZ, through VGZ, is inferior to that which VGZ's competitors could have provided, even if upheld by the national court, could not render the retention of VGZ as the service provider subject to Article 85 of the EC Treaty. Apart from the possible application of Article 86 of the EC Treaty (now Article 82 EC) to IZZ/VGZ, consideration of the adequacy of the service provided by it is, in reality, a matter for the parties to the CAO, who are, of course, represented on the board of management of the IZZ.

B — *Article 86 of the EC Treaty*

36. The question referred by the national court also refers to Article 86 of the EC Treaty. It is noteworthy that the plaintiff, in his observations to the Court, bases his case exclusively on the alleged infringement of Article 85 of the EC Treaty and suggests that it is not necessary to reply to the question referred in so far as it concerns Article 86 of the EC Treaty. In light of the view that I have taken above regarding the non-applicability of Article 85 of the EC Treaty to a collective agreement such as the CAO, it would clearly be of assistance to the national court if its question regarding the possible application of Article 86 of the EC Treaty were also considered.

37. It is appropriate to observe initially that the exception from the scope of application of Article 85 of the EC Treaty established by the Court in the *Albany* cases does not extend to Article 86 of the EC Treaty. In answering the first question referred in *Albany*, the Court found that a sectoral pension fund engaged 'in an economic activity in competition with insurance companies' and that, consequently, '... the fact that [it was] non-profit-making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive [it] of its status as an undertaking within the meaning of the competition rules of the Treaty'.[22] While such constraints 'might justify the exclusive right of such a body to manage a supplementary pension scheme', they did not preclude the activity engaged in by the fund in question from being characterised as economic in nature.[23] It then proceeded to examine the issue raised by the third question referred, namely whether Article 86 of the EC Treaty, read in conjunction with Article 90 of the EC Treaty (now Article 86 EC), precluded such a pension fund from being granted the exclusive right to manage a supplementary pension scheme. It is, consequently, clear that, notwithstanding the social objective pursued by the scheme, the activities of the fund were subject to Article 86.

38. The Commission points out, in its written observations, that, as it is accepted that the results of genuine collective bargaining between the social partners regarding working conditions fall outside the scope of Article 85 of the EC Treaty, the Court should be slow to conclude that their activities infringe Article 86 of the EC Treaty. I agree with the concern underlying this submission. While, of course, there can never be any 'exemption' from the prohibition of an abuse of a dominant position, acts which are done solely in pursuit of a social objective by a body established under a collective labour agreement and enjoying a dominant position should not easily be characterised as an abuse. It is only if the impugned acts go beyond what is necessary for the attainment of that objective, and are

22 — *Albany*, loc. cit., paragraphs 84 and 85.

23 — *Albany*, loc. cit., paragraph 86. See also the Opinion of Advocate General Jacobs in *Pavlov and Others*, op. cit., footnote 18 above, paragraph 175.

otherwise not justifiable, that an abuse may be said to occur.

39. It is necessary in this case only to consider Article 86 of the EC Treaty, since no exclusive right has been conferred on the IZZ by the CAO and since no reference has been made to Article 90 of the EC Treaty by either the national court or the plaintiff. The national court has, apart from a reference to the number of persons insured with the IZZ, not furnished the Court with any precise information regarding the market upon which the IZZ is supposed to be dominant. Although it is clear, particularly in the light of the *Albany* cases, that the IZZ may be regarded as an undertaking for the purpose of Article 86, and even if, as the plaintiff reasonably suggests, it may be assumed that the provision of health care insurance to employees constitutes a distinct insurance sub-market whose geographical boundary is coterminous with the territory of the Netherlands, there is insufficient information in the case-file for the Court to be able to formulate any definite view as to the relative market power enjoyed by the IZZ, through its contract with VGZ, *vis-à-vis* competing providers of such insurance like RZG, the plaintiff's insurer of choice. This case may therefore be distinguished from *Albany* where the Court concluded that '[a] sectoral pension fund ... , which has an *exclusive right* to manage a supplementary pension scheme in an industrial sector in a Member State and, therefore, in a substantial part of the common market, may therefore be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty'. [24] It is therefore for the national court to determine whether, despite the competition faced by the IZZ from competing insurers such as RZG, it still enjoyed a position of such economic strength that it could be regarded as capable of acting independently of its competitors and, thus, as being in a dominant position for the purpose of Article 86 of the EC Treaty. [25] The market power, if any, enjoyed by IZZ/VGZ could only come from its 'exclusive' right to receive employer contributions in the event of the employee opting to take out supplementary health insurance with the IZZ. In the absence of any such market power, no possible abuse for the purpose of Article 86 of the EC Treaty could arise.

40. Moreover, as the Commission points out in its written observations, the theory of economic dependence, upon which the plaintiff would appear to rely in justifying his view that the IZZ enjoyed a dominant position, is not substantiated by the case-file. The mere fact that the premium charged by the IZZ would cost an employee such as the plaintiff NLG 69 less than that offered by RZG (without the benefit of the employer's contribution) does not, on its own, in itself, render such employees economically dependent on the IZZ for supplementary health insurance. In the case of the plaintiff, given that RZG would reimburse him NLG 2 100 more than the IZZ for his envisaged dental

24 — *Albany*, paragraph 92.

25 — This definition of dominance was given by the Court in Case 85/76 *Hoffmann-La-Roche* v *Commission* [1979] ECR 461, paragraph 38.

treatment, it is difficult to see how the additional NLG 69 he would have to pay monthly in premiums would suffice, unless, perhaps, he was on a very low salary, to make him economically dependent on the IZZ for supplementary health insurance. It certainly does not substantiate the assertion that the IZZ was placed by the CAO in a dominant position.

41. Even if the national court were satisfied that IZZ enjoyed a dominant position on the Netherlands health-insurance market, for the plaintiff to establish that a breach of Article 86 of the EC Treaty had occurred he would have to demonstrate that the IZZ had abused that dominant position. The mere fact that the premium charged by the IZZ might, taking into account the employer's contribution, have been higher than that charged by RZG, and that the cover provided by the former was seemingly less complete in certain respects than that of the latter, would not, in itself, establish that an abuse of a dominant position had occurred. This would particularly be the case if, as the Netherlands and the Commission submitted at the hearing, the IZZ system was founded upon the principle of solidarity or community charging whereby the 'premium' represented by the contributors payable by both the employer and employee remained fixed and was unrelated to the risk associated with the conditions of health and age of individual employees. In pursuit of such a policy, it may well be necessary for an insurer to limit the extent to which certain medical or dental expenses may be recovered.

42. Similarly, the rules preventing employees who opt to take out insurance with insurers other than the IZZ from returning to it might well be justified by the need to maintain solidarity. If employees were free to move at will or with few restrictions back and forth between insurers, it would clearly be easy for competing insurers like RZG to cream off the better risks.[26] However, assuming the national court is satisfied that the IZZ enjoys a dominant position whose benefit it assigned to VGZ, it would be for it to determine whether the IZZ's restrictive rules regarding the possibility of former members rejoining its scheme were justified. In this regard, it would need to pay particular attention to whether the scheme could function without the rules and whether the rules were applied in a uniform and consistent manner.[27]

43. In the circumstances, I am satisfied, at least on the basis of the information contained in the case-file, that no abuse of a dominant position has occurred in the present case.

26 — See, in this respect, particularly paragraph 108 of the judgment in *Albany*.

27 — See *Albany*, paragraph 121.

IV — Conclusion

44. I recommend that the Court answer the question referred by the Kantongerecht, Groningen as follows:

(1) A collective agreement that is concluded between the representatives of employers and employees as a result of collective bargaining and which is binding on employers by virtue of the law of the Member State concerned is not subject to Article 85 of the EC Treaty (now Article 81 EC), provided it is strictly limited to regulating working conditions;

(2) An agreement by employers to make a fixed financial contribution to the costs of supplementary health insurance taken out by employees constitutes an agreement regarding working conditions for the purpose of the above-mentioned exception to the normal application of Article 85 of the EC Treaty. The parties to a collective agreement are free to determine by whom the working-condition benefit(s) the subject of such an agreement are to be provided. An agreement providing for the subcontracting to a third party of the provision of such benefits will not, itself, fall within the scope of Article 85 of the EC Treaty unless it goes beyond what is necessary to achieve the social objective of the underlying collective agreement;

(3) A third-party subcontractor such as that mentioned above will be subject to Article 86 of the EC Treaty (now Article 82 EC) only if the right granted to it by the parties to the collective agreement suffices to place it in a dominant position on a distinct market and if it exercises its power on that market in a manner which goes beyond what is necessary for the attainment of the social objective underlying the collective agreement and which is not otherwise justifiable.