JUDGMENT OF THE COURT

21 September 1999 *

In Case C-219/97,

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

Maatschappij Drijvende Bokken BV

and

Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven

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.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), J.C. Moitinho de Almeida (Rapporteur),

* Language of the case: Dutch.

C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Maatschappij Drijvende Bokken BV, by T.R. Ottervanger, of the Rotterdam Bar,

— Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven, by E. Lutjens, of the Amsterdam Bar, and O. Meulenbelt, of the Utrecht Bar,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same Ministry, acting as Agents,

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

— the Swedish Government, by L. Nordling, Rättschef in the Foreign Trade Department of the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by B.J. Drijber and W. Wils, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Maatschappij Drijvende Bokken BV, represented by T.R. Ottervanger; Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven, represented by E. Lutjens and O. Meulenbelt; the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by C. Chavance; the Swedish Government, represented by A. Kruse, Departementsråd in the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by W. Wils, at the hearing on 17 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 January 1999,

gives the following

Judgment

1 By judgment of 6 June 1997, received at the Court on 12 June 1997, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2 Those questions were raised in proceedings brought by Maatschappij Drijvende Bokken BV (hereinafter 'Drijvende Bokken') against Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven (Transport and Dock Industry Pension Fund, hereinafter 'the Fund') concerning Drijvende Bokken's refusal to pay into the Fund the contributions for the years 1991 to 1993 on the ground that compulsory membership of the Fund by virtue of which such contributions are claimed from it is contrary to Articles 85, 86 and 90 of the Treaty.

The national legislation

3 The pension system in the Netherlands is based on three pillars.

4 The first is a statutory basic pension, granted by the State under the Algemene Ouderdomswet (General law on old age pensions, 'the AOW') and the Algemene Nabestaandenwet (General law on survivors' benefits). That compulsory legal scheme entitles the whole population to receive a pension of a limited amount, regardless of the wage which they actually received previously, calculated by reference to of the statutory minimum wage.

5 The second pillar comprises supplementary pensions provided in the context of employment or self-employed activity, which are in most cases additional to the basic pension. Such supplementary pensions are normally managed within the framework of collective schemes covering a sector of the economy, a profession or the employees of an undertaking by funds to which affiliation has been made compulsory, as in the main proceedings, by the Wet van 17 maart 1949 houdende vaststelling van en regeling betreffende verplichte deelneming in een bedrijfspensioenfonds (Law of 17 March 1949 laying down rules for compulsory affiliation to a sectoral pension fund, hereinafter the 'BPW').

6 The third pillar comprises individual pension insurance or life assurance policies which can be concluded on a voluntary basis.

7 The Wet op de Loonbelasting (Wages Tax Law) provides that premiums used to build up a pension are deductible only if the pension does not exceed a 'reasonable' level. Premiums are not deductible in the case of a pension exceeding that level. That level is, for a 40-year career, 70% of an individual's final salary. The effect of this tax regime is that the current standard in the Netherlands for establishing a pension, including the State pension under the AOW, is a pension corresponding to 70% of an employee's final salary.

8 Article 1(1) of the BPW, as amended by the Law of 11 February 1988, provides:

'The following terms shall, for the purposes of this Law and of provisions based on it, have the following meanings:

...

(b) sectoral pension fund: a fund operating in a sector of activity for the purposes of which funds are collected either solely for the benefit of employees in the sector concerned or also for the benefit of persons engaged in an activity in another capacity in the said sector.

...

(f) our Minister: the Minister for Social Affairs and Employment.'

9 Article 3 of the BPW, as amended, provides:

'1. Our Minister may, at the request of a sectoral trade organisation which he regards as sufficiently representative of the business structure of a sector of activity, after consulting the head of the appropriate general administrative department whose area of responsibility includes the activities of the sector concerned, the Sociaal-Economische Raad (Social and Economic Council) and the Verzekeringskamer (Insurance Board), make affiliation to the sectoral pension fund compulsory for all workers or for certain categories of worker in the sector of activity concerned.

2. In the circumstances mentioned in the foregoing paragraph, all persons within the categories concerned by virtue of the provisions of that paragraph, and also, in the case of employees, their employers, shall be required to comply with the statutes and regulations of the sectoral pension fund and any provisions applicable to them by virtue thereof. Compliance therewith may be enforced by legal proceedings, in particular with regard to the payment of contributions.'

10 Article 5(2) of the BPW, as amended, lays down certain conditions to be fulfilled before the Minister for Social Affairs and Employment can approve a request for compulsory affiliation as provided for in Article 3(1). Thus, under Article 5(2)(III) and (IV) of the BPW, as amended, the statutes and regulations of the sectoral pension fund must adequately safeguard the interests of the members, and the representatives of the associations of employers and workers in the sector concerned must sit in equal numbers on the management board of the fund.

11 Article 5(2)(II)(1) of the BPW, as amended, also provides that the statutes and regulations of the sectoral pension fund must provide for cases in which, and the conditions under which, workers in the sector concerned are not required to be affiliated to the fund or may be exempted from certain obligations relating to the fund.

12 Article 5(3) of the BPW, as amended, states:

'Our Minister for Social Affairs and Employment, after hearing the views of the Insurance Board and the Social and Economic Council, shall adopt guidelines concerning the matters referred to in Article 5(2)(II)(1). Those guidelines should observe the principle that workers who were already affiliated to a pension fund of an undertaking or were insured with a life assurance company six months before the request referred to in Article 3(1) was lodged, shall not be required to be affiliated to that sectoral pension fund or shall be exempted, entirely or to a reasonable extent, from the obligation to contribute to it, provided that they can demonstrate that, in the course of the period for which they are under no obligation to be affiliated or are exempted from the obligation to pay contributions, in their entirety or as regards a reasonable proportion thereof, they will acquire pension rights which are at least equivalent to those which they would acquire if affiliated to the sectoral pension fund and for so long as they can so demonstrate. Our Minister may also adopt guidelines relating to other parts of paragraph 2.'

13 By the Beschikking van 29 december 1952 betreffende de vaststelling van de richtlijnen voor de vrijstelling van deelneming in een bedrijfspensioenfonds wegens een bijzondere pensioenvoorziening (Order of 29 December 1952 relating to the adoption of guidelines for the exemption from participation in a sectoral pension fund in case of special pension arrangements, as amended by the decision of 15 August 1988, hereinafter 'the Guidelines for exemption from affiliation') the Minister for Social Affairs and Employment adopted the guidelines referred to in Article 5(3) of the BPW, as amended.

14 Article 1 of the Guidelines for exemption from affiliation, as amended, provides:

'An exemption from the obligation to be affiliated to a sectoral pension fund or from the obligation to pay contributions thereto may be granted by that fund at the request of any interested party, provided that the worker in the sector concerned is covered by special pension arrangements meeting the following conditions:

(a) the arrangements must be applied under the auspices of a company pension fund, another sectoral fund or an insurer holding a certificate of the kind provided for by Article 10 of the Wet toezicht verzekeringsbedrijf (Law on supervision of the insurance industry, *Staatsblad* 1986, p. 638) or be based on the Algemene burgerlijke pensioenwet (General law on civil service pensions, *Staatsblad* 1986, p. 540), the Spoorwegenpensioenwet (Law on pensions for employees of the Netherlands Railways and their relatives, *Staatsblad* 1986, p. 541) or the Algemene militaire pensioenwet (General law on military pensions, *Staatsblad* 1979, p. 305);

(b) such rights as may arise under those arrangements must, in the aggregate, be at least equivalent to those accruing under the sectoral pension fund;

(c) the rights of the worker concerned and compliance with his obligations must be adequately safeguarded;

(d) if the exemption entails withdrawal from the fund, compensation considered reasonable by the Insurance Board must be offered for any loss suffered by the fund, from the actuarial point of view, as a result of the withdrawal.'

15 Article 5 of the Guidelines, as amended, provides:

'1. The exemption must be granted where the conditions mentioned in Article 1(a), (b) and (c) are fulfilled, the special pension arrangements applied six months before submission of the request on the basis of which affiliation to the sectoral pension fund was made compulsory and it has been shown that, in the course of the period for which the worker concerned is under no obligation to be affiliated or is exempted from the obligation to pay contributions in their entirety or as regards a reasonable proportion thereof, he will acquire pension rights which are at least equivalent to those which he would acquire if affiliated to the sectoral pension fund.

2. If, at the time referred to in paragraph 1, the special pension arrangements did not meet the condition laid down in Article 1(b), a sufficient period must be allowed to elapse to enable that condition to be met before any decision is taken on the request.

3. An exemption under this article shall enter into force when affiliation to the sectoral pension fund is made compulsory.'

16 Article 9 of the Guidelines, as amended, states:

'1. The decisions referred to in Article 8 may be the subject of complaints to the Insurance Board lodged within 30 days of receipt of the decision by the person concerned. The sectoral pension fund must, in writing, bring the foregoing sentence to the notice of the person concerned at the same time as the decision.

2. The Insurance Board shall notify its decision on the complaints to the sectoral pension fund and to the persons who lodged them.'

17 The appraisal made by the Insurance Board constitutes a proposal for conciliation. It is not a decision with binding force in the context of a dispute. The appraisal by the Insurance Board cannot be the subject of any complaint or appeal.

18 Sectoral pension funds to which affiliation has been made compulsory are subject not only to the BPW but also to the Wet van 15 mei 1962 houdende regelen betreffende pensioen- en spaarvoorzieningen (Law of 15 May 1962 on pension and savings funds, amended subsequently a number of times — hereinafter 'the PSW').

19 The PSW is intended to ensure as far as possible that pension commitments given to workers are actually fulfilled.

20 To that end, Article 2(1) of the PSW obliges employers to choose one of three sets of arrangements aimed at separating the funds collected for pension purposes from the remainder of the company's assets. The employer may either join a sectoral pension fund, set up a company pension fund, or arrange group or individual life assurance policies with an insurance company.

21 Article 1(6) of the PSW makes clear that it also applies to sectoral pension funds to which affiliation has been made compulsory under the BPW.

22 The PSW also lays down a number of conditions which must be met by the statutes and regulations of a sectoral pension fund. Thus, Article 4 of the PSW provides that the setting up of any such fund must be notified to the Minister for Social Affairs and Employment and to the Insurance Board. Article 6(1) of the PSW confirms that representatives of the employers' organisations and representatives of the workers' organisations of the sector concerned are to sit in equal numbers on the management board of a sectoral pension fund.

23 In addition, Articles 9 and 10 of the PSW lay down detailed arrangements for management of the funds collected. The general rule is set out in Article 9 which obliges pension funds to transfer the risk linked to their pension commitments or to reinsure it. By way of exception to that rule Article 10 allows pension funds to administer and invest the capital collected themselves at their own risk. Before it can be authorised to do so, a pension fund must submit to the competent authorities a management plan explaining in detail the way it proposes to handle the actuarial and financial risks. The plan must be approved by the Insurance Board. Furthermore the pension fund is subject to continuous supervision. The scheme's actuarial profit and loss accounts must be submitted regularly to the Insurance Board for approval.

24 Finally, Articles 13 to 16 of the PSW lay down rules for investment of the sums collected. By virtue of Article 13, the assets of the scheme together with expected income must be sufficient to cover pension liabilities. Under Article 14 investments must be made prudentially.

The main proceedings

25 The Fund was established under the BPW. By an order of 9 September 1959 (hereinafter 'the order making affiliation compulsory'), the Minister for Social Affairs and Employment made affiliation to the Fund compulsory for male

employees of 18 years of age or more habitually employed in dock undertakings in and around the Rotterdam port area. By an order of 17 December 1991, the scope of the order making affiliation compulsory was extended to workers habitually employed in any dock undertaking or business treated as such.

26 The pension scheme offered by the Fund is based on the present norm in the Netherlands, namely that every worker who has paid contributions for the maximum period of affiliation to that scheme receives a pension, including the State pension under the AOW, equal to 70% of his final salary.

27 Drijvende Bokken hires out floating derricks, which are operated by its own employees. The derricks, which are often hired out with tugs, are used in particular in the offshore industry and the chemical industry for construction and building activities.

28 Taking the view that it was not covered by the order making affiliation compulsory, Drijvende Bokken concluded arrangements with another pension fund. Following the extension of compulsory affiliation in 1991, on 20 October 1993 the Fund served on Drijvende Bokken a demand for payment of the capital sum of NLG 132 000 in respect of contributions for the years 1991 to 1993. Drijvende Bokken appealed against that demand to the Kantongerecht (Cantonal Court), Rotterdam.

29 By judgment of 2 May 1994, the Kantongerecht upheld the appeal on the ground that Drijvende Bokken's employees were not employed in a dock business within the meaning of the order making affiliation compulsory. The Fund appealed against that judgment to the Arrondissementsrechtbank (District Court), Rotterdam.

30 By judgment of 25 January 1996 that court amended the Kantongerecht's judgment on the basis that Drijvende Bokken's employees were employed principally in a dock business or a business treated as such and were therefore covered by the order making affiliation compulsory. The Arrondissementsrechtbank also rejected Drijvende Bokken's alternative contention that compulsory affiliation to the Fund was incompatible with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 5 of the EC Treaty (now Article 10 EC), and Articles 85, 86 and 90 of the Treaty, taking the view that the Fund could not be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty and was more in the nature of a social security organisation.

31 Drijvende Bokken appealed in cassation to the Hoge Raad (Supreme Court), contending that the Arrondissementsrechtbank had erred in considering compulsory membership of the Fund to be compatible with Community law.

32 The Hoge Raad found that that argument necessarily raised certain questions concerning the interpretation of Articles 85, 86 and 90 of the Treaty. It referred in particular to Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16. On the other hand, the Hoge Raad considered that in the present case there was no restriction of the freedom to provide services or of the right of establishment.

33 In its order for reference, the Hoge Raad set out a number of undisputed facts. The Fund was non-profit-making and non-commercial. It operated a pension fund for all employees in the sector concerned, involving a considerable degree of solidarity. In determining the contributions payable, the Fund took no account of the risks associated with individual employees. The contributions were established for all employees on the same basis, an average being calculated where appropriate. The Fund was under an obligation to accept employees and the latter were not required to undergo any prior medical examination. Finally, exemption was granted from the payment of contributions in the event of incapacity for work, so that pension rights accrued even during periods of incapacity for work.

34 In those circumstances, the Hoge Raad der Nederlanden stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Is a sectoral pension fund such as [the Fund], to which all or one or more specified groups of employees in the relevant sector are obliged to be affiliated by virtue of and in accordance with [the BPW], to be regarded as an undertaking within the meaning of Articles 85, 86 or 90 of the EC Treaty?

2. Where a number of organisations which the Minister subsequently regards as being sufficiently representative of the employers' associations and trade unions in a particular sector, within the meaning of the first paragraph of Article 3 of [the BPW], apply to the Minister pursuant to that provision for affiliation to a particular pension fund within the meaning of that Law to be made compulsory, is that joint action on the part of those organisations to be regarded as an agreement between undertakings, a decision by associations of undertakings or a concerted practice within the meaning of Article 85(1) of the EC Treaty which, within the meaning of that Treaty provision, (i) may affect trade between Member States and (ii) has as its object or effect the prevention, restriction or distortion of competition within the common market?

3. Is compulsory affiliation as described above to be regarded as a measure which may render ineffective the competition rules applicable to undertakings, or, at least, as a measure by which a Member State requires or favours the adoption of agreements contrary to Article 85 or reinforces their effects, or is that the case only in certain circumstances and, if so, in what circumstances?

4. If Question 3 is to be answered in the negative, are there other circumstances which may render such compulsory affiliation incompa-

tible with the provisions of Article 90 of the EC Treaty and, if so, what circumstances?

5. Can such compulsory affiliation be regarded as the grant to a sectoral pension fund of an exclusive right within the meaning of Article 90(1) of the EC Treaty, and is such pension fund placed as a result in a dominant position which it abuses merely by exercising that exclusive right, in particular on the ground that such compulsory affiliation may affect trade between Member States and the provision of services is limited, contrary to subparagraph (b) of the second paragraph of Article 86, to the detriment of compulsorily affiliated undertakings and/or employees?

Or, can such compulsory affiliation create a situation in which a pension fund is induced to commit such an abuse or is at least placed in a position which it itself could not take up without infringing Article 86, whilst, in any event, a system of undistorted competition is not guaranteed?

6. If such compulsory affiliation is contrary to Community law, does that mean that it is not legally valid?'

The second question

35 By its second question, which it is appropriate to consider first, the national court seeks essentially to ascertain whether a decision taken by the organisations 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 affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty.

36 Drijvende Bokken contends that the request by management and labour to make affiliation to a sectoral pension fund compulsory constitutes an agreement between the undertakings operating in the sector concerned, contrary to Article 85(1) of the Treaty.

37 Such an agreement, in its view, restricts competition in two ways. First, by entrusting the operation of a compulsory scheme to a single manager, it deprives the undertakings operating in the sector concerned of the possibility of affiliation to another pension scheme managed by other insurers. Second, that agreement excludes the latter insurers from a substantial part of the pension insurance market.

38 The repercussions of such an agreement for competition are 'appreciable' in that it affects the entire Netherlands dock sector. Those repercussions are aggravated by the cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy and for all undertakings in those sectors.

39 Finally, such an agreement affects trade between Member States in that it concerns undertakings which engage in cross-frontier business and it deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.

40 It must be noted, first, 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 the authors of the Treaty to provide expressly in Article 85(2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void.

41 Next, it 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'.

42 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 Commission 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.

43 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.

44 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 combatting of exclusion.

45 Under Article 4(1) and (2) of the agreement on social policy, 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.

46 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 in seeking jointly to adopt measures to improve conditions of work and employment.

47 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 not falling within the scope of Article 85(1) of the Treaty.

48 The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1) of the Treaty.

49 First, 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 constitutes the result of collective negotiations between organisations representing employers and workers.

50 Second, 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, as a whole, 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.

51 Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

52 The answer to be given to the second question must therefore be that a decision taken by organisations 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 affiliation to that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty.

The third question

53 By its third question, which it is appropriate to consider secondly, the national court seeks essentially to ascertain whether Articles 3(g), 5 and 85 of the Treaty prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

54 Drijvende Bokken considers that, by creating a legal framework for and acceding to a request from the two sides of industry to make affiliation to the sectoral pension fund compulsory, the public authorities favoured or furthered the implementation and operation of agreements between undertakings operating in the sectors concerned which are contrary to Article 85(1) of the Treaty, thereby infringing Articles 3(g), 5 and 85 of the Treaty.

55 As the Court has held, in particular in *Van Eycke,* cited above, paragraph 16, Article 85 of the Treaty is itself concerned only with the conduct of undertakings and not with legislation adopted by Member States. However, according to settled case-law of the Court of Justice, Article 85 of the Treaty, read in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings. Such is the case, according to the same case-law, where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere (see also Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 10; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraphs 53 and 54; and Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del Porto di Genova and Others* [1998] ECR I-3949, paragraphs 35, 36 and 49).

56 In that connection, the request made to the public authorities by the organisations representing employers and workers to make affiliation to the sectoral pension fund set up by them compulsory is part of a regime established under a number of national laws, designed to exercise regulatory authority in the social sphere. Since the agreement at issue in the main proceedings does not fall within the scope of Article 85(1) of the Treaty, as is clear from the answer given to the second question, the Member States are free to make it compulsory for persons who are not bound as parties to the agreement.

57 Moreover, Article 4(2) of the Agreement on social policy expressly provides that, at Community level, management and labour may apply jointly to the Council for the implementation of social agreements.

58 The decision of the public authorities to make affiliation to such a fund compulsory cannot therefore be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforcing their effects.

59 It follows from the foregoing considerations that the decision of the public authorities to make affiliation to a sectoral pension fund compulsory does not fall within the categories of legislative measures which, according to the case-law of the Court, undermine the effectiveness of Articles 3(g), 5 and 85 of the Treaty.

60 The answer to the third question must therefore be that Articles 3(g), 5 and 85 of the Treaty do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

The first question

61 By its first question, which it is appropriate to consider thirdly, the national court seeks essentially to ascertain whether a pension fund responsible for managing a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector and to which affiliation has been made compulsory by the public authorities for all workers in that sector is an undertaking within the meaning of Article 85 et seq. of the Treaty.

62 According to the Fund and the governments which have intervened, such a fund does not constitute an undertaking within the meaning of Article 85 et seq. of the Treaty. They describe the various characteristics of the sectoral pension fund and of the supplementary pension scheme which it manages.

63 First, compulsory affiliation of all workers in a given sector to a supplementary pension scheme pursues an essential social function within 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. Provided that a supplementary pension scheme has been established by a

collective agreement within a framework laid down by law and affiliation to that scheme has been made compulsory by the public authorities, it constitutes an element of the Netherlands system of social protection and the sectoral pension fund responsible for management of it must be regarded as contributing to the management of the public social security service.

64 Second, the sectoral pension fund is non-profit-making. It is managed jointly by both sides of the industry, who are equally represented on its management committee. The sectoral pension fund collects an average contribution fixed by that committee which strikes a balance, collectively, between the amount of the premiums, the value of the benefits and the extent of the risks. Moreover, the contributions may not fall below a certain level, so as to establish adequate reserves, and may not, in order to preserve its non-profit-making status, exceed an upper limit, observance of which is ensured by the social partners and the Insurance Board. Even though the contributions levied are invested on a capitalisation basis, the investments are made under the control of the Insurance Board and in accordance with the provisions of the PSW and the statutes of the sectoral pension fund.

65 Third, operation of the sectoral pension fund is based on the principle of solidarity. Such solidarity is reflected by the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of the latter's insolvency and by the indexing of the amount of pensions in order to maintain their value. The principle of solidarity is also apparent from the absence of any equivalence, for individuals, between the contribution paid, which is an average contribution not linked to risks, and pension rights, which are determined by reference to an average salary. Such solidarity makes compulsory affiliation to the supplementary pension scheme essential. Otherwise, if 'good' risks left the scheme, an ensuing negative spiral effect would jeopardise its financial equilibrium.

66 In view of the foregoing, the Fund and the intervening governments consider that the sectoral pension fund constitutes an organisation charged with the manage-

ment of social security schemes of the kind referred to in the judgment in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, and is unlike the organisation at issue in Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, which was regarded as an undertaking within the meaning of Article 85 et seq. of the Treaty.

67 It should be borne in mind that, in the context of competition law, 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 in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; *Poucet and Pistre,* cited above, paragraph 17; and *Fédération Française des Sociétés d'Assurance,* cited above, paragraph 14).

68 Moreover, in *Poucet and Pistre*, cited above, the Court held that that concept did not encompass organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity. Under the sickness and maternity scheme forming part of the system in question, the benefits were the same for all beneficiaries, even though contributions were proportional to income; under the old-age insurance scheme, retirement pensions were funded by workers in employment; furthermore, the pension entitlements determined by law were not proportional to the contributions paid into the old-age insurance scheme; finally, schemes which were in surplus contributed to the financing of those with structural financial difficulties. Such solidarity necessarily implied that the various schemes should be managed by a single organisation and that affiliation to the schemes should be compulsory.

69 In contrast, in *Fédération Française des Sociétés d'Assurance*, cited above, the Court held that a non-profit-making organisation which managed an old-age insurance 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 Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the

managing organisation implied that that organisation carried on an economic activity in competition with life assurance companies. Neither the pursuit of a social objective, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.

70 The question whether the concept of an undertaking, within the meaning of Article 85 et seq. of the Treaty, extends to a body such as the sectoral pension fund at issue in the main proceedings must be considered in the light of the foregoing considerations.

71 In that connection, it must be observed that the sectoral pension fund itself determines the amount of the contributions and benefits and that the Fund operates in accordance with the principle of capitalisation.

72 Accordingly, by contrast with the benefits provided by organisations charged with the management of compulsory social security schemes of the kind referred to in *Poucet and Pistre*, cited above, the amount of the benefits provided by the Fund depends on the financial results of the investments made by it, in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

73 In addition, as is apparent from Article 5 of the BPW and Articles 1 and 5 of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant an exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged, on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund. Moreover, under Article 1 of the abovementioned Guidelines, that fund is also entitled to grant an exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund,

compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

74 It follows that a sectoral pension fund of the kind at issue in the main proceedings engages in an economic activity in competition with insurance companies.

75 In those circumstances, the fact that the fund is non-profit-making and the manifestations of solidarity referred to by the fund and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty.

76 Undoubtedly, pursuit of a social objective, the abovementioned manifestations of solidarity and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered 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.

77 The answer to the first question must therefore be that a pension fund charged 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, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

The fifth question

78 By its fifth question, which it is appropriate to consider fourthly, the national court seeks essentially to ascertain whether Articles 86 and 90 of the Treaty preclude the public authorities from conferring on a pension fund an exclusive right to manage a supplementary pension scheme in a given sector.

79 The Netherlands Government contends that the order making affiliation compulsory has the sole effect of requiring workers in the sector concerned to be affiliated to the Fund. That order does not in its view confer on the Fund an exclusive right in the area of supplementary pensions. Nor does the Fund hold a dominant position within the meaning of Article 86 of the Treaty.

80 It must be observed at the outset that the decision of the public authorities, as in this case, to make affiliation to a sectoral pension fund compulsory necessarily implies granting to that fund an exclusive right to collect and deal with the contributions paid with a view to accruing pension rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights have been granted by the public authorities, of the kind referred to in Article 90(1) of the Treaty.

81 Next, it should be noted that, according to settled case-law, an undertaking which has a legal monopoly in a substantial part of the common market may 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).

82 A sectoral pension fund of the kind at issue in the main proceedings, which has an exclusive right to manage a supplementary pension scheme in an industrial sector

of 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.

83 It must also be pointed out, however, that merely creating a dominant position by granting 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 is in breach of the prohibitions contained in 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 when 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).

84 Drijvende Bokken contends in that connection that the system of compulsory affiliation to the supplementary pension scheme managed by the Fund is contrary to the combined provisions of Articles 86 and 90 of the Treaty. The pension benefits available from the Fund do not, or no longer, match the needs of the undertakings. Those benefits are too low, are not linked to salaries and, consequently, are inherently inadequate. Employers should therefore adopt other pension arrangements. The system of compulsory affiliation deprives those employers of any opportunity of arranging for comprehensive pension cover from an insurance company. Pension arrangements with a number of insurers would increase administrative expenses and reduce efficiency.

85 It should be remembered that, in *Höfner and Elser*, cited above, paragraph 34, the Court held that a Member State which conferred on a public employment agency an exclusive right of recruitment was in breach of Article 90(1) of the Treaty where it created a situation in which that office could not avoid infringing Article 86 of the Treaty, in particular because it was manifestly incapable of satisfying the demand prevailing on the market for such activities.

86 In the present case, it is important to note that the supplementary pension scheme offered by the Fund is based on the present norm in the Netherlands, namely that every worker who has paid contributions for the maximum period of affiliation to that scheme receives a pension, including the pension under the AOW, equal to 70% of his final salary.

87 Doubtless, some undertakings in the sector might wish to provide their workers with a pension scheme superior to the one offered by the Fund. However, the fact that such undertakings are unable to entrust the management of such a pension scheme to a single insurer and the resulting restriction of competition derive directly from the exclusive right conferred on the sectoral pension fund.

88 It is therefore necessary to consider whether, as contended by the Fund, the Netherlands Government and the Commission, the exclusive right of the sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article 90(2) of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been charged.

89 Drijvende Bokken contends that compulsory affiliation to the sectoral pension fund is not necessary to ensure an adequate level of pension for workers. That aim could be attained by minimum requirements for pensions, to be laid down either by the two sides of industry at the instigation of the public authorities or directly by the public authorities. Collective employment agreements frequently include an obligation on employers to provide a minimal pension scheme, whilst at the same time leaving them free to establish a pension fund specific to their undertaking, to affiliate themselves to a sectoral pension fund or to make arrangements with an insurance company.

90 According to Drijvende Bokken, the payment of an 'average premium' likewise does not justify compulsory affiliation. First, neither the BPW nor the order making affiliation compulsory requires a system based on a premium of that kind. Second, a number of sectoral pension funds to which affiliation is not compulsory operate perfectly well on the basis of 'average contributions'.

91 As regards acceptance of all workers in the same area of activity without a prior medical examination so that 'bad' risks cannot be refused, Drijvende Bokken observes that in practice the pension insurance contracts concluded with insurers require the employer to declare all his workers and an obligation on the insurer to accept any worker declared without prior medical examination.

92 It is important to bear in mind first of all that, under Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

93 In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article 90(2) of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12, and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39).

94 In view of the interest of the Member States thus defined they cannot be precluded, when determining what services of general economic interest to entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations

and constraints which they impose on such undertakings (*Commission* v *Netherlands*, cited above, paragraph 40).

95 The supplementary pension scheme at issue in the main proceedings fulfils an essential social function within the Netherlands pensions system by reason of the limited amount of the statutory pension, calculated on the basis of the minimum statutory wage.

96 Moreover, 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).

97 It must next be borne in mind that it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject (*Commission* v *Netherlands*, cited above, paragraph 52) or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16, and *Commission* v *Netherlands*, cited above, paragraph 53).

98 If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of 'good' risks would leave the sectoral pension fund with responsibility for an increasing share of 'bad' risks, thereby increasing the cost of pensions for workers,

particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost.

99 Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund is characterised by a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.

100 Such constraints, which render the service provided by the Fund less competitive than a comparable service provided by insurance companies, go towards justifying the exclusive right of the Fund to manage the supplementary pension scheme.

101 It follows that the removal of the exclusive right conferred on the Fund might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and endanger its financial equilibrium.

102 Referring to *GB-Inno-BM,* cited above, Drijvende Bokken considers, however, that the fact that the Fund fulfils a dual role, as manager of the pension scheme and as the authority vested with the power to grant exemptions, might give rise to unfair exercise of the power of exemption.

103 In paragraph 28 of *GB-Inno-BM*, cited above, the Court held that Articles 3(g), 86 and 90 of the Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.

104 In paragraph 25 of the last-mentioned judgment, the Court considered that the vesting in such a company of powers both to authorise or refuse the connection of telephones to the network and to lay down the technical standards to be met by such equipment and verify whether devices not manufactured by it conformed with the specifications adopted by it was tantamount to conferring upon it the power to determine at will which terminal equipment might be connected to the public network, thereby placing it at an obvious advantage over its competitors.

105 However, the situation in the main proceedings differs from that in *GB-Inno-BM*.

106 It should be noted, first, that under Article 5(1) of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant an exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged, on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund.

107 Provided that the abovementioned provision is binding on the sectoral pension fund regarding the exercise of its power of exemption, it cannot be regarded as likely to lead the fund to abuse that power. In such circumstances, the fund merely checks that the conditions laid down by the competent minister are complied with (see, to that effect, Joined Cases C-46/90 and C-93/91 *Lagauche and Others* [1993] ECR I-5267, paragraph 49).

108 It must then be remembered that, under Article 1 of the Guidelines for exemption from affiliation, a sectoral pension fund is entitled to grant an exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund, compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

109 The abovementioned provision thus enables a sectoral pension fund to exempt from the obligation of affiliation an undertaking which provides its workers with a pension scheme equivalent to the one managed by it if such an exemption does not endanger its financial equilibrium. Exercise of that power of exemption involves an evaluation of complex data relating to the pension schemes involved and the financial equilibrium of the fund, which necessarily implies a wide margin of appreciation.

110 In view of the complexity of such an evaluation and of the risks which exemptions involve for the financial equilibrium of a sectoral pension fund and, therefore, for performance of the social task entrusted to it, a Member State may consider that the power of exemption should not be attributed to a separate entity.

111 It should, however, be noted that national courts adjudicating, as in this case, on an objection to a requirement to pay contributions must subject to review the decision of the fund refusing an exemption from affiliation, which enables them at least to verify that the fund has not used its power to grant an exemption in an arbitrary manner and that the principle of non-discrimination and the other conditions for the legality of that decision have been complied with.

112 Finally, as regards Drijvende Bokken's argument that an adequate level of pension for workers could be assured by laying down minimal requirements to be met by

pensions offered by insurance companies, it must be emphasised that, in view of the social function of supplementary pension schemes and the margin of appreciation enjoyed, according to settled case-law, by the Member States in organising their social security systems (Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; *Poucet and Pistre*, cited above, paragraph 6; and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27), it is incumbent on each Member State to consider whether, in view of the particular features of its national pension system, the laying down of minimum requirements would still enable it to ensure the level of pension which it seeks to guarantee in a sector by compulsory affiliation to a pension fund.

113 The answer to the fifth 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 in a given sector.

The fourth and sixth questions

114 In view of the answer given to the fifth question, it is unnecessary to answer the fourth and sixth questions.

Costs

115 The costs incurred by the Netherlands, German, French and Swedish 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 proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 6 June 1997, hereby rules:

1. A decision taken by organisations 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 affiliation to that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the EC Treaty (now Article 81 EC).

2. Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of the Treaty do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

3. A pension fund charged 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, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

4. **Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.**

Rodríguez Iglesias Puissochet Hirsch

Jann Moitinho de Almeida Gulmann

Murray Edward Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President