# OPINION OF ADVOCATE GENERAL JACOBS

## delivered on 28 January 1999 *

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## I — Introduction

1. In the present cases, referred to the Court by the Netherlands Hoge Raad, the Kantongerecht (Cantonal Court) Roermond and the Kantongerecht Arnhem, the Court is asked to give a ruling on a number of questions concerning the compatibility of a system of compulsory affiliation to sectoral pension funds with the competition rules of the Treaty. Those questions arise in the context of proceedings brought by three undertakings challenging orders issued by sectoral pension funds demanding payment of the contributions to their respective schemes.

2. The cases raise several issues of general importance which have to be addressed before the more specific substantive questions can be considered. At issue in all three cases is whether a national system in which, at the request of the representatives of employers and employees in a particular sector of the economy, affiliation to a sectoral pension fund is made compulsory for all undertakings in that sector infringes either Article 5 of the Treaty in conjunction with Article 85 or Article 90(1) of the Treaty in conjunction with Article 86. The

cases also raise the issue, in the context of Articles 5 and 85 of the Treaty, whether a collective agreement between employers and employees within a particular sector setting up a sectoral pension scheme falls under Article 85(1) of the Treaty. The Court is thus called upon for the first time to give a ruling on the relationship between the competition rules of the Treaty and agreements reached by collective bargaining between the two sides of industry. A further issue, relevant to the application of Articles 90(1) and 86 of the Treaty, is whether the Netherlands sectoral pension funds operating in the framework of the rules requiring compulsory affiliation to a sectoral pension fund constitute undertakings for the purposes of the competition rules of the Treaty.

## II — The national law background

3. It appears that the system of pensions in the Netherlands is based on three pillars:

— First a statutory basic pension, granted by the State under the Algemene Ouderdomswet [1] (General law on old age pensions, 'the AOW') and the Algemene Nabestaandenwet (General law on survivors' benefits), provides the whole population with a flat-rate benefit which is a certain percentage of the minimum wage. The benefit is reduced for any year in which an individual has not been insured. Participation is compulsory.

— Secondly, in most cases the basic pension is topped up by supplementary pensions provided in the context of employment or self-employed activity. Those supplementary pensions are normally managed by collective schemes covering a sector of industry, a profession or the employees of an undertaking.

— Finally, there is the possibility of concluding individual pension or life insurance contracts on a voluntary basis.

4. The present cases are all concerned with second pillar sectoral pension schemes granting supplementary pensions to employees. In that respect they are different from the supplementary pension scheme at issue in *Van Schijndel* [2] which granted pensions to members of a profession.

1 — Stb. 1956, 281.

2 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705.

5. Under Netherlands law employers are in principle free to decide whether or not to offer supplementary pensions to their employees. If they want to do so they can set up a company pension scheme either in the form of a company pension fund or through a group pension insurance contract with an insurance company. They can also set up a sectoral pension scheme together with other employers or join an existing sectoral scheme.

6. However, in practice employers are often obliged to affiliate their employees to a compulsory sectoral pension fund. Those funds are set up by collective agreement between management and labour in a particular sector of industry. The State then makes affiliation to the scheme offered by those funds compulsory.

7. The first set of rules applicable to such schemes is the Wet betreffende verplichte deelneming in een bedrijfspensioenfonds of 17 March 1949[3] (Law on compulsory affiliation to a sectoral pension fund, the 'BPW', as amended on several occasions).

8. The central rule is Article 3(1). It empowers the Minister for Social Affairs, at the request of a group of employers' associations and trade unions deemed by him to be sufficiently representative, to issue a decree requiring all groups of persons belonging to a given sector of the economy to be affiliated to a sectoral pension fund. In the absence of a specific request the Minister has no such power. Before taking his decision the competent Minister has to consult *inter alia* the Sociaal-Economische Raad (Social and Economic Council) and the Verzekeringskamer (Insurance Board), which supervises insurance and pension funds.

9. By virtue of Article 3(2) of the BPW all persons falling under the decree, together with their employers, have to abide by the rules of the relevant sectoral pension fund. The obligations resulting from those rules, including the obligation to pay the contributions, are legally enforceable. Article 18 empowers the pension fund to issue an enforceable order for recovery of unpaid premiums.

10. In the parliamentary proceedings leading to the adoption of the BPW the Government gave the following explana-

3 — Stb. 1949, J 121.

tion of the objectives of the rules on compulsory affiliation: [4]

'... The present Bill is intended to lay down rules in the field of pension arrangements for individuals which are similar to those contained in the Wet op het Algemeen Verbindend Verklaren van Bepalingen van Collectieve Arbeidsovereenkomsten (Law on declaring provisions of collective employment agreements generally binding) with regard to conditions of employment. It seeks therefore to avoid the possibility of some employers in the sector gaining an advantage over other employers in the same sector by not granting pensions...'

The then Minister for Social Affairs stated: [5]

'... occupational pension insurance of the type aimed at by this Bill is particularly expedient since it is based on the concept of collective insurance, that is to say, the notion that the members of an industrial sector, primarily employers and employees..., should collectively assume responsibility for collecting the necessary funds with a view to ensuring that all persons who have completed a sufficient number of years of employment in that sector and have attained a certain age can obtain the benefits which they need. Where this is done on an individual basis — as it is in certain cases — and matters are left at that, the consequence is that those finding themselves in the most favourable circumstances are able to provide for themselves with relative ease, by contrast with those who are less favourably placed.'

11. According to Article 5(2) of the BPW a number of requirements must be fulfilled before the Minister can make affiliation compulsory. For example under Article 5(2), subparagraph IV, the representatives of the employers and the workers have to sit in equal numbers on the management board and under subparagraph V the pension fund must have legal personality.

12. Article 5(2), subparagraph II, specifies a number of issues that have to be dealt with by the statutes and regulations of the pension fund. More specifically, by virtue of Article 5(2), subparagraph II, letter l), the statutes and regulations of the fund have to provide for the possibility of exemption from compulsory affiliation in certain circumstances or at least from certain obligations resulting from affiliation.

13. Article 5(3) empowers the Minister for Social Affairs to adopt 'richtlijnen' (guidelines) concerning exemption from compul-

4 — Kamerstukken II 1948-1949, 785, No 5, p. 2.
5 — Hand. II, 1 February 1949, p. 1101.

sory affiliation. Pursuant to that provision the competent Minister issued the Beschikking van 29 december 1952 betreffende de vaststelling van de richtlijnen voor de vrijstelling van deelneming in een bedrijfspensioenfonds wegen een bijzondere pensionsvoorziening (Decree of 29 December 1952 relating to the adoption of the guidelines on the exemption from participation in a sectoral pension fund in case of special pension arrangements, 'the exemption guidelines' or 'the guidelines', since amended on several occasions). [6]

14. By virtue of Article 1 of those guidelines, in the version applicable to the facts of the main proceedings, it is the sectoral pension fund itself which grants exemptions. Exemptions have to be requested either by an employee on an individual basis or, as in the main proceedings, by an employer for all his employees.

15. Under Article 1 the fund has a discretion to grant an exemption from the obligation to participate where the participant firm has its own pension arrangements and where the conditions specified in Article 1(a) to (d) of the guidelines are met. Article 1(a) enumerates the kinds of alternative pension arrangements which are accepted, namely a company pension fund, a different sectoral pension fund or a group insurance agreement with a private insurer.

6 — *Staatscourant* 1953, 1.

Article 1(b) states that the benefits granted by the special pension arrangements of the firm have to be at least equivalent to the ones granted by the sectoral fund. Article 1(c) requires that the alternative scheme provides sufficient guarantees for the fulfilment of its pension obligations. Article 1(d) states that if the exemption leads to the withdrawal of employees from the fund then reasonable compensation must be paid for the actuarial loss incurred.

16. By virtue of Article 5 of the guidelines the fund must grant an exemption where the special pension arrangements of the firm concerned meet the first three of the abovementioned conditions and were in force six months before the submission of the request as a result of which participation in the pension fund was made compulsory.

17. According to Article 8 of the guidelines every decision on a request for exemption must be reasoned and a copy must be sent to the Insurance Board.

18. Article 9 of the guidelines provides for the possibility of a complaint ('bezwaar') against a pension fund's refusal of exemption. That complaint is heard by the Insurance Board. According to the Netherlands Government the Insurance Board's

decision is merely a proposal for conciliation and has no legal authority. There is no appeal against the Board's decision.

19. According to the Netherlands Government an exemption may in the past have been granted where an undertaking forming part of a group of undertakings had its own policy on working conditions, or where an employer came only temporarily under the obligation to affiliate. By contrast, the plaintiff undertakings maintained at the hearing that in practice exemptions have never or only very rarely been granted. I will consider below recent amendments concerning the exemptions.

20. Article 3(4) of the BPW empowers the competent Minister to end compulsory affiliation for the whole sector. By virtue of Article 3(5) of the BPW, wherever the rules governing the pension fund are modified, the competent Minister must end compulsory affiliation, unless he declares that he has no objections to the modifications.

21. The second set of rules applicable to sectoral pension funds is contained in the Wet van 15 mei 1962 houdende regelen betreffende pensioen- en spaarvoorzieningen (Law on pension and savings funds, the 'PSW', as amended on several occasions). The law lays down a general framework for all categories of pension and savings funds. Its aim is to protect insured persons, where an employer does make such arrangements, by seeking to ensure that the funds intended for pensions are actually used for that purpose.

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

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

24. Under Article 6a and 6b of the PSW, which were introduced in 1990, the management board of each fund has to set up at the request of a certain number of affiliated persons a 'deelnemersrad' (council of affiliated persons) with consultative tasks regarding the management of the fund.

25. In the interest of the members of the scheme Articles 9 and 10 of the PSW determine the manner in which the col-

lected funds have to be administered. The general rule is Article 9 which obliges pension funds to transfer the risk linked to the pension commitments or to reinsure it. Thus, in order to eliminate the risk of maladministration or bad investments by the fund, the latter may use the collected capital solely for the purpose of entering into agreements with insurance companies.

26. By way of exception to that rule Article 10 empowers the funds to administer and invest the collected capital themselves at their own risk. Before it can do so the fund must present to the competent authorities a management plan explaining in detail the way it proposes to handle the actuarial and financial risk. The plan must be approved by the Insurance Board. Furthermore the fund is subject to continuous supervision. The scheme's actuarial profit and loss accounts must be submitted regularly to the Insurance Board for approval. It seems that in practice all existing sectoral pension funds administer the collected pension contributions themselves at their own risk and that the exception has therefore become the rule. [7]

27. Articles 13 to 16 of the PSW lay down rules on the investment of the collected capital. 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 have to be made 'op solide wijze' (in a prudent way).

28. The Netherlands tax rules are also of a certain relevance for the present cases. According to the Commission, under the Netherlands legislation tax advantages with respect to pensions are limited to cases where the total pension does not exceed a 'reasonable' level. In practice that level is set at 70% of an individual's final salary over a 40-year career. Thus in practice the rules limit the levels of benefit which may be provided by pension schemes.

29. According to the Netherlands Government, there are now 81 sectoral pension funds in the Netherlands, affiliation being compulsory in the case of 66. According to the defendant funds, 91.6% of the persons affiliated to a sectoral pension fund participate in a fund in which participation is compulsory. 80% of the employed workforce in the Netherlands is compulsorily affiliated to a sectoral pension fund.

30. Of the 15 sectoral pension funds where affiliation has not been made compulsory by the State, the Government says that such intervention of the State is not necessary in most cases either because there are collec-

7 — E. Lutjens, *Pensioenvoorzieningen voor werknemers: juridische beschouwingen over ouderdomspensioen*, Zwolle 1989, p. 364.

tive agreements obliging *de facto* all employers of the sector to affiliate their employees or because there is only a limited number of big employers in the sector which in any event have opted for affiliation of their employees to the relevant sectoral fund. The Netherlands Government says that the remaining voluntary sectoral funds cover only a limited number of small sectors or sectors where there is no longer any significant industrial activity.

## III — The facts in the main proceedings

### A — *Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*

31. The defendant in the main proceedings, Stichting Bedrijfspensioenfonds Textielindustrie ('the Textile Industry Fund' or 'the Fund'), is a sectoral pension fund within the meaning of the BPW covering the textile industry. The plaintiff in the main proceedings, Albany International BV ('Albany'), is an undertaking operating *inter alia* in that industry.

32. According to the parties to the main proceedings and the Netherlands Government, affiliation to several pension funds each covering a different part of the textile industry was made compulsory at the request of the representatives of employers and employees by a decree issued in 1952. A number of mergers took place and in 1975 the merger of the last two remaining funds in the textile industry and the setting up of a single fund for the whole industry made it necessary to issue a new decree making affiliation to the defendant Fund compulsory. Since 1975 Albany has complied with its obligation to participate in the scheme.

33. From 1975 onwards the Fund operated on the basis of a so-called fixed-sum plan. The pension benefits were not related to salary but consisted of a fixed sum per year of service. According to Albany the maximum pension a worker could expect after 50 years of service was merely NLG 200 per month.

34. In 1981 Albany therefore set up a supplementary pension plan managed by an insurance company. The plan provided its workers with benefits which, when combined with the basic pension under the AOW and the supplementary pension granted by the Fund, resulted after 40 years of service in a total pension of 70% of final salary.

35. As from 1 January 1989, after negotiations between the two sides of industry, the

Fund modified the rules governing its complementary pension scheme and introduced a salary-related pension plan. The objective of the plan is similar to Albany's supplementary plan: workers should enjoy total pension benefits of 70% of their final salary if they have worked for 40 years.

36. Albany considered that its own pension arrangement was still more generous than the new scheme and that the changes to its own plan which became necessary after the modification of the compulsory sectoral scheme were too burdensome and disproportionate. It therefore asked the Fund to exempt it from participation.

37. The Fund refused that request by decision of 28 December 1990. It argued *inter alia* that under the exemption guidelines it was not obliged to grant an exemption because Albany's special pension arrangements had not been in force for six months before the submission of the request to make participation in the pension scheme compulsory. Albany would therefore have been entitled to an exemption only if it had established its own scheme before 1975.

38. Albany lodged an objection against that decision with the Insurance Board. By letter to the parties of 18 March 1992 the Insurance Board stated that under the exemption guidelines the Fund had been right not to consider itself under an obligation to grant exemption.

39. However, it went on:

'Since at the time of the introduction of this amendment (1 January 1989), the complainant had for several years provided for its staff a supplementary pension plan which is at least comparable to the one introduced on that date by the Fund, the Board considers it reasonable to request the Fund to make use of its power to grant exemption or, if it can demonstrate to the Board — which it has not yet done — that there is no justification for a flexible approach in this case, in any event to allow for a period of notice.'

40. Despite that ruling, the Fund did not reconsider its decision and Albany was served on 11 November 1992, upon application by the Fund, with an injunction ordering it, pursuant to Article 18 of the BPW, to pay the statutory contributions for 1989, interest on that amount and collection costs.

41. Albany appealed against that injunction to the Kantongerecht Arnhem con-

tending inter alia that the Netherlands system of compulsory affiliation was incompatible with the competition rules of the Treaty.

42. The Kantongerecht adopted the finding of the Insurance Board that the Albany plan was at least comparable to the arrangements introduced as from 1 January 1989 by the Fund. Furthermore, it considered that the relations between the Fund and its participants were governed by 'requirements of reasonableness and fairness and/or by general principles of sound administration'. Consequently any sectoral pension fund should take careful account, when deciding whether or not to grant an exemption, of the ruling of the Insurance Board as an independent statutory body.

43. As regards the alleged violation of Community law, the Kantongerecht decided by judgment of 4 March 1996 to seek a preliminary ruling on the following questions:

'1. Is a sectoral pension fund within the meaning of Article 1(1)(b) of the Wet betreffende verplichte Deelneming in een Bedrijfspensioenfonds an undertaking within the meaning of Articles 85, 86, or 90 of the EC Treaty?

2. If so, is the fact of making membership of the sectoral pension fund for industrial undertakings compulsory a measure adopted by a Member State which nullifies the effectiveness of the competition rules applicable to undertakings?

3. If question 2 must be answered in the negative, can other circumstances render compulsory membership incompatible with Article 90 of the Treaty, and if so, which?'

B — *Joined Cases C-115/97, C-116/97 and C-117/97 Brentjens' Handelsonderneming BV* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*

44. By a Decree of 28 June 1958 ('the 1958 Decree' or 'the Decree') following a request made on 8 March 1958 by representatives of employers and employees in the building materials trade, the State Secretary for Social Affairs made participation in the Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen ('the Building Materials Trade Fund' or 'the Fund') compulsory. The Decree, which is based on the BPW, has since been further amended on a number of occasions. Under the Decree, participation is compulsory for workers aged between 23 and 64 years inclusive

who are employed in an undertaking which is exclusively or principally engaged in wholesale trade in building materials.

45. According to the parties to the main proceedings, the Fund operates on the basis of a fixed-sum plan. The pension benefits granted are not related to salary, but consist of a fixed amount per year of service which is the same for all employees. According to the Fund, the maximum pension, depending on length of service, is NLG 5 300 per year. In practice the majority of employees in the sector reach a total pension of 70% of their final salary.

46. Brentjens' Handelsonderneming BV ('Brentjens') commenced trading in 1963. On 1 January 1968 Brentjens made pension arrangements for its employees with the life assurance company De NV Levensverzekerings Maatschappij de Nederlanden van 1870, which subsequently became Generali Levensverzekeringsmaatschappij n.v. ('Generali'), a Netherlands undertaking falling under the Wet toezicht verzekeringsbedrijf 1993 (Law on the control of insurances of 1993) and belonging to the Italian group Assicurazioni Generali.

47. In 1989 the Fund became aware of Brentjens' existence and affiliated it to its scheme as of 1 January 1990, exempting it from contributions in respect of previous periods. Thus the Fund undertook to respect Brentjens' existing pension arrangements for the period from 1963 to 1 January 1990.

48. Brentjens considered that the pension arrangements with Generali were superior to the scheme offered by the Fund as regards the level both of contributions and of benefits and asked for an exemption from compulsory affiliation. By decision of 23 August 1994 the Fund refused Brentjens' request. Brentjens lodged an objection against the decision with the Insurance Board. The Insurance Board did not agree with Brentjens' objections and held, by decision of 18 May 1995, that the Fund's decision was correct.

49. On 13 May 1996 the Fund then served Brentjens with three separate demands for payment of the contributions due under its pension regulations for the years 1990 to 1994, 1995 and 1996.

50. Brentjens instituted three sets of proceedings before the Kantongerecht Roermond seeking annulment of the demands. It appears that Brentjens and Generali also, acting jointly, lodged a parallel complaint with the Commission of infringement by the Netherlands and the Fund of Arti-

cles 3(g), 5 and 85, 90 and 86, and 52 and 59 of the Treaty.

51. On 18 March 1997 the Kantongerecht delivered three identical judgments in which it dismissed three of the four pleas raised by Brentjens. As regards Brentjens' fourth plea to the effect that compulsory participation in the Fund was contrary to Community law, the Kantongerecht put the following questions to the Court:

'1. Must Article 85(1) of the EC Treaty be interpreted as meaning that there is an agreement or decision of an undertaking or association of undertakings which restricts competition or affects trade between Member States, as those elements are respectively referred to in that provision, where representatives of employers and employees within a particular sector of activity make agreements concerning pensions under which a single sectoral pension scheme is set up for the whole sector, to which all workers employed within the sector are in principle to be compulsorily affiliated and which is to have the sole right to administer the funds collected for that purpose within the sector?

2. Must Articles 3(g), 5 and 85 of the EC Treaty, read together, be interpreted as meaning that there is an infringement of those provisions where the authorities make participation in a single sectoral pension scheme, as described in question 1, compulsory for undertakings within a particular sector of activity?

3. Must the term "undertaking", as used in the competition provisions (Articles 85 to 94) of the EC Treaty, be interpreted as including a sectoral pension fund within the meaning of the Wet betreffende verplichte Deelneming in een Bedrijfspensioenfonds (Law on Compulsory Participation in a sectoral Pension Fund)?

4. Must Articles 86 and 90 of the EC Treaty, read together, be interpreted as meaning that there is an infringement of those provisions where the authorities accord a sectoral pension scheme an exclusive right which gives rise to a serious restriction of the freedom to make pension arrangements with a private insurer?'

C — *Case C-219/97 BV Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*

52. The appellant in the main proceedings, BV Maatschappij Drijvende Bokken ('Drijvende Bokken'), carries on the business of hiring out floating derricks, often together with tugboats, for use in the offshore industry, for construction and building activities, for shipbuilding and ship repair work, in the chemical industry and for

hoisting heavy loads on to pontoons and ships.

53. The respondent in the main proceedings, the Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven ('the Dock Fund' or 'the Fund'), is a sectoral pension fund within the meaning of the BPW. By Decree of 9 September 1959 ('the 1959 Decree' or 'the Decree') the State Secretary for Social Affairs and Public Health, acting on behalf of the Minister, made affiliation to the fund compulsory for all male employees aged 18 years or more who are employed by a dock business in the dock area of the port of Rotterdam. By Decree of 17 December 1991 the scope of the Decree was extended to cover all employees who are regularly employed in a dock or similar business.

54. According to Drijvende Bokken, the Fund operates on the basis of a fixed-sum plan in which pension benefits are not related to salary.

55. Drijvende Bokken considered that it did not fall within the scope of the Decree and therefore joined another pension fund. Following the extension of the scope of the Decree in 1991 the Fund maintained that Drijvende Bokken fell within the scope of the Decree and that affiliation to the fund was compulsory for Drijvende Bokken's employees. The Fund therefore served a final demand on Drijvende Bokken, requiring it to pay pension contributions amounting to NLG 132 000 together with interest and costs.

56. Drijvende Bokken appealed against the demand for payment to the Kantongerecht. It argued, first, that it did not fall within the scope of the Decree and, secondly, that compulsory affiliation was contrary to the Community competition rules.

57. The Kantongerecht held that Drijvende Bokken's employees were not employed in a dock business within the meaning of the Decree and that therefore Drijvende Bokken's appeal was well founded.

58. On appeal by the Fund the Rechtbank (District Court) held that Drijvende Bokken's employees were employed in a dock business or equivalent business and that the Decree therefore applied. The Rechtbank further rejected Drijvende Bokken's contention that the requirement of compulsory affiliation to the Fund was contrary to Community competition rules. It held that the Fund could not be regarded as an

undertaking within the meaning of Articles 85 and 86 of the Treaty but rather as a social institution.

59. Drijvende Bokken's appeal to the Hoge Raad was based solely on the ground that the compulsory affiliation rule was contrary to Community law. The Hoge Raad decided to refer the following questions to the Court for a preliminary ruling:

'1. Is a sectoral pension fund such as the fund in the main proceedings, 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, inwhat circumstances?

4. If Question 3 is to be answered in the negative, are there other circumstances which may render such compulsory affiliation incompatible 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 provisions 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?'

## IV — Admissibility

60. In Case C-67/96 *Albany* the French and Netherlands Governments, citing *Meilicke,* [8] *Telemarsicabruzzo,* [9] and *Max Mara,* [10] suggest that the questions may be inadmissible because the referring court does not explain sufficiently the legislative and factual context in which its questions arise. The Commission, too, expresses doubts on that point. In Joined Cases C-115/97 to C-117/97 *Brentjens* the French Government raises a similar objection.

61. It follows from the case-law of the Court that the information on the factual and legal context provided in references for a preliminary ruling serves essentially two purposes.

62. First it enables the Court to give an interpretation of Community law which will be of use to the national court. [11] As the Court has observed, the need for adequate information is particularly acute in the field of competition law which is characterised by complex factual and legal situations. [12] In that regard the parties to the main proceedings, the Netherlands Government and the Commission have given the Court in their respective written observations a considerable amount of

8 — Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871.

9 — Joined Cases C-320/90, C-321/90 and C-322/90 [1993] ECR I-393.

10 — Case C-307/95 [1995] ECR I-5083.

11 — See *Meilicke*, cited in note 8, paragraph 26 of the judgment, and *Telemarsicabruzzo*, cited in note 9, paragraph 6.

12 — *Telemarsicabruzzo*, cited in note 9, paragraph 7 of the judgment, and Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 5 of the order.

background information on the factual circumstances in which the cases arise and on the Netherlands legislation. Notwithstanding any lacunas which there may be in the referring courts' decisions I therefore consider that the Court is in a position to give a useful reply to the national courts' questions.

63. The requirement to provide adequate information on the legal and factual context also serves a second purpose, namely to give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the Statute of the Court. It is the Court's duty to ensure that this opportunity is safeguarded. [13] In that regard it must be borne in mind that only the orders for reference are notified to the interested parties. [14]

64. As regards, first, the legal context, I agree with the two Governments and the Commission that in *Albany* the Kantongerecht gives relatively little information. It merely mentions certain rules of the BPW which are applicable. However, the two parallel references in *Brentjens* and in *Drijvende Bokken* were notified to the Governments and the Commission four and three months respectively before the end of the written procedure in *Albany* as a result of the proceedings in *Albany* being suspended. The Hoge Raad's reference in *Drijvende Bokken*, in particular, contains a detailed account of the Netherlands legal framework. The French and the Netherlands Governments and the Commission submitted their written observations in *Albany* after those in *Brentjens* and in parallel to those in *Drijvende Bokken*. It is apparent from their observations in *Albany* that they were aware of the two other references. In the circumstances, therefore, it is clear that those wishing to submit observations were sufficiently apprised of the relevant Netherlands legal background in time to take a position on the issues raised.

65. As regards, secondly, the factual context, I do not agree with the contention that the orders for reference in *Albany* and *Brentjens* are not explicit enough. The orders explain clearly why the referring courts need an interpretation of Community law in order to be able to give judgment in the respective cases and the reasoning underpinning their questions.

66. I therefore consider that the questions referred in all three proceedings are admissible.

13 — *Max Mara*, cited in note 10, paragraph 8 of the orders and Case C-326/95 *Banco de Fomento e Exterior* [1996] ECR I-1385, paragraph 7.

14 — *Max Mara*, cited in note 10, paragraph 8 of the orders and Case C-2/96 *Sunino and Data* [1996] ECR I-1543, paragraph 5.

## V — The scope of the questions referred

67. I agree with the Commission that the referring courts' questions raise the following five distinct issues.

68. First, is Article 85(1) of the Treaty infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single sectoral pension fund with an exclusive right to administer the collected contributions and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector? [15] Secondly, does a Member State infringe Article 5 read together with Article 85 of the Treaty where, at the request of the representatives of employers and employees, it makes participation in a sectoral pension scheme compulsory for all undertakings belonging to that sector? [16] Thirdly, are the Netherlands sectoral pension funds 'undertakings' within the meaning of the competition provisions of the Treaty? [17] Fourthly, does a Member State infringe Articles 86 and 90 of the Treaty, read together, where it provides for compulsory affiliation to a sectoral pension fund and grants the pension fund an exclusive right to administer the collected contributions? [18] Fifthly, if such compulsory affiliation is declared to be contrary to Community law, what is the legal consequence of such a decision? [19]

69. Albany, Brentjens and Drijvende Bokken ask the Court to address as a sixth issue the compatibility of the Netherlands legislation with Article 90, read in conjunction with Article 52 or 59 of the Treaty. They argue that the Kantongerecht Arnhem indirectly raises the problem in *Albany* in its question 3 by asking whether 'other circumstances' can render compulsory membership incompatible with Article 90 of the Treaty.

70. It is apparent from the order for reference in *Albany* that the Kantongerecht modelled its questions on the Hoge Raad's last three questions in *Van Schijndel*, [20] which for procedural reasons the Court did not have to answer. It is also clear that the Kantongerecht understood the three ques-

15 — Question 1 in *Brentjens*, question 2 in *Drijvende Bokken*.

16 — Question 2 in *Brentjens*, question 3 in *Drijvende Bokken*, to a certain extent question 2 in *Albany*.

17 — Question 3 in *Brentjens*, question 1 in *Drijvende Bokken*, question 1 in *Albany*.

18 — Question 4 in *Brentjens*, questions 4 and 5 in *Drijvende Bokken*, question 3 in *Albany*.

19 — Question 6 in *Drijvende Bokken*.

20 — Joined Cases C-430/93 and C-431/93, cited in note 2.

tions as being concerned solely with the Community competition rules. Nothing in the file indicates that the parties or the national court discussed the applicability of Article 52 or Article 59 of the Treaty, which require the abolition of restrictions on the freedom of establishment and on the freedom to provide services within the Community. In *Albany*, in contrast to the situation in *Brentjens* where a foreign insurance company acting through its Netherlands branch is involved, there does not seem to be any cross-border element. I therefore consider that the Kantongerecht's question, despite its apparently broad wording, cannot be interpreted as including the issue of applicability of Article 52 or 59 of the Treaty.

## VI — Article 85(1) of the Treaty

71. I now turn to the first question, namely whether Article 85(1) of the Treaty is infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single sectoral pension fund with an exclusive right to administer the collected contributions and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector.

72. Albany, Brentjens and Drijvende Bokken contend that in circumstances such as these the employers of a given sector infringe Article 85(1) of the Treaty. Their argument runs as follows.

73. First, there are 'agreements between undertakings' within the meaning of Article 85(1). Every collective agreement between representatives of employers and employees implies an agreement between employers to negotiate jointly and to be bound by the result of the bargaining. In the present cases, all employers have committed themselves to affiliating their employees to a single pension fund and to complying with the rules of the fund.

74. Secondly, the agreements 'restrict competition'. Competition with regard to the employing undertakings is restricted, because one important cost factor is harmonised throughout an entire sector, the freedom to choose the most attractive pension arrangement is limited and employers cannot attract employees

through more advantageous pension arrangements. With regard to life assurance, insurance companies are excluded from an important part of the market.

75. Thirdly, the agreements also 'affect trade between Member States'. The employers involved have cross-border activities. Moreover, foreign insurance companies are effectively prevented from offering cross-border services or from establishing themselves through branches in the Netherlands.

76. Finally, the agreements have an appreciable impact on competition and trade between Member States. Each pension fund covers an entire sector of the economy. Moreover, as those agreements exist in virtually all sectors of the Netherlands economy, their cumulative effect has to be taken into account.

77. The Commission, the three Governments who have submitted observations to the Court on this point and the Funds which are parties to the main proceedings all agree that Article 85(1) of the Treaty is not infringed. In support of that conclusion they put forward a variety of arguments.

78. It is argued first that Article 85(1) is not applicable *ratione materiae* to collective agreements between representatives of employers and employees. Alternatively, it is said either that there is no agreement between 'undertakings', or that competition is not restricted, or that trade between Member States is not affected, or that in any event under the 'de minimis' rule the agreements are not caught by Article 85(1) of the Treaty because their impact on competition or trade is negligible.

79. Those arguments raise the fundamental issue of the relationship between the prohibition contained in Article 85(1) of the Treaty and collective agreements concluded between representatives of employers and employees, an issue which the Court has not yet had occasion to consider. [21] In view of its relative novelty and the potentially far-reaching implications of the Court's answer it may be helpful to examine how the antitrust systems of different Member States and of the United States deal with the problem.

21 — See however the Opinion of Advocate General Lenz in Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraphs 273 and 274; see also the Commission's Decision of 30 September 1986 86/507/EEC Irish Banks' Standing Committee, OJ 1986 L 295, p. 28 and the reply to the Written Question No 777/89, OJ 1990 C 328, p. 3. I will discuss those statements in more detail below.

A — *Comparative overview*

80. In France the prohibition of cartels [22] is applicable to collective agreements between management and labour. According to the *Conseil de la Concurrence* (Competition Authority) collective agreements are not excluded by their nature from the material scope of the competition rules. Freedom of collective bargaining is seen as a mere variation of freedom of contract subject to similar general limitations including the prohibition of cartels. [23] Trade unions are analysed as economic actors which jointly with the employers' side may influence the competitive process. [24] However, after an analysis of the restrictive effects or a balancing of their anticompetitive features with their social advantages, the *Conseil de la Concurrence* has classified most of the clauses of the agreements under scrutiny as being compatible with the French competition rules. [25]

81. A good example of that line of reasoning is an *Avis* (opinion) of the *Conseil de la Concurrence* in a case similar to the present cases which concerned the French system of *prévoyance collective*. [26] That system provides social benefits which are complementary to the State social security system. It covers three kind of risks: first, illness and maternity, secondly, working incapacity and invalidity, thirdly, death. It is set up — at least partly — by sectoral collective agreements between management and labour. Those agreements designate *inter alia* an *organisme de prévoyance* as exclusive contractor to administer the funds. On joint application by management and labour, affiliation to the system is often made compulsory for the entire sector by a decision of the competent minister.

82. An association of *assureurs-conseils* which wanted to offer services on the market for *prévoyance* complained to the competition authority about the last two of the above features of the system, namely the contractor's exclusivity and the compulsory affiliation of employers which had not taken part in the collective bargaining process. The *Conseil de la Concurrence* held that the *organismes de prévoyance* provided services and that they therefore fell under the competition rules. Employers and employees were also subject to the rules of competition law, either directly or indirectly through their representatives, in so far as concerned the content of their collective agreements. In designating a

22 — Article 7, Ordonnance n° 86-1243 du 1er décembre 1986.

23 — Conseil de la Concurrence, 26 June 1990, Décision N° 90-D-21 *Syndicats d'artistes-interprètes*.

24 — CA Paris, 1re Chambre, 6 March 1991, Syndicat français des artistes interprètes et autres, reproduced in *Contrats-Concurrence-Consommation*, 1991, 108: '[L]a prohibition édictée par l'ordonnance... intéresse toute forme de concertation, quels qu'en soient les auteurs et les victimes directes, dès lors qu'objectivement elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché.'

25 — See the reasoning in the Décision of the Conseil de la Concurrence, cited in note 23.

26 — Conseil de la Concurrence, Avis N° 92-A-01 of 21 January 1992 *Syndicat français des assureurs-conseils*.

single contractor, however, the employers' and employees' representatives were merely exercising their ordinary right to choose with which service provider to contract. As to the extension of the agreement to the entire sector, the *Conseil* held that it contributed, first, to equal conditions of competition in the sector and, secondly, to economic and social progress. There was therefore no infringement of the competition rules.

83. In Finland Law 480/1992 on competition (Laki kilpailunrajoituksista) excludes by its Article 2(1) agreements concerning the labour market from its scope of application. According to the *travaux préparatoires* collective agreements on working conditions are therefore sheltered from the competition rules. However, it is said, competition rules are applicable to collective agreements which are not concerned with working conditions, but for example with the commercial relations between the employer and his clients. [27]

84. The Supreme Administrative Court decided on the scope of that exception in a case [28] concerning a collective agreement in the paper industry which restricted the possibility for employers to subcontract to independent service providers certain tasks (e.g. cleaning) which were traditionally fulfilled by employees. The court held that only clauses directly affecting working conditions, such as for example wages, working time, and protection against dismissal, were excluded from the scope of the prohibition of cartels. The restrictions in question were therefore not covered by the exception. Employees were sufficiently protected by a legal provision prohibiting dismissal in case of subcontracting.

85. In Denmark Article 2(1) of the recently adopted law on competition [29] provides that it is applicable to any kind of economic activity. According to the *travaux préparatoires* the notion of 'economic activity' has to receive a wide interpretation and includes all kinds of economic activities on markets for goods and services. Neither a profit-making purpose nor a certain legal form are required for the law to be applicable.

86. Article 3 provides that the law is not applicable to wages and working conditions. According to the *travaux prépara-*

27 — Kom. 1987:4, p. 61; HE 148/1987 vp., p. 14 and HE 162/1991 vp., p. 9.

28 — KHO taltio 1586, 11 April 1995.

29 — Lov No 384, 10 June 1997.

*toires* that exception is limited to the relationship between employers and employees.

87. It follows also from the *travaux préparatoires* that the exception contained in the new law must be interpreted in conformity with the interpretation of the former laws on monopolies. A judgment of the Supreme Court of 1965 [30] is therefore still of importance. The court had to decide on rules in a collective agreement which resulted in excluding certain groups of consumers from the supply of clothes produced in a less expensive way. It held that the exception was not applicable since the agreement went further then regulating wages and working conditions. Furthermore, the law was applicable *ratione personae* to the 'social partners' in so far as they were dealing with 'such economic interests'. Thus, the Danish prohibition of cartels is applicable to rules in collective agreements which are 'related to an economic activity' and which 'do not concern wages or working conditions'.

88. In Germany the Federal Law against Restrictions on Competition (Gesetz gegen Wettbewerbsbeschränkungen, 'GWB') excludes certain fields of the economy and agreements from its material scope of application. However, neither the labour market nor collective agreements are expressly mentioned.

89. The general prohibition of cartels concerns only agreements 'in so far as they are likely to influence... market conditions with respect to trade in goods or commercial services'. [31] According to the *travaux préparatoires* dependent labour cannot be classified as 'commercial services'. Thus, it is said, collective agreements between management and labour on wages and working conditions are sheltered from the prohibition of cartels. [32]

90. The courts and the Federal Cartel Office have on several occasions had to consider the legality of collective agreements between management and labour which affected shop opening or more generally trading hours in certain sectors of industry, either directly, or indirectly through the regulation of working time schedules.

91. The Bundesarbeitsgericht (Federal Labour Court) held [33] that collective agree-

30 — Ufr. 1965.634H cf. Ufr. 1965B.260.

31 — '... soweit sie geeignet sind, die Erzeugung oder die Marktverhältnisse für den Verkehr mit Waren oder *gewerblichen Leistungen* durch Beschränkung des Wettbewerbs zu beeinflussen.'

32 — Amtliche Begründung für den Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drucks. 2/1158, S. 30.

33 — Judgment of 27 June 1989, 1 AZR 404/88, partly reproduced in WuW/E VG 347.

ments between management and labour fell as a matter of principle outside the material scope of the competition rules. There were several reasons. First, the court stated by way of introduction that collective bargaining was one of the activities protected by the fundamental rights granted by Article 9(3) of the Grundgesetz (German Basic Law). Secondly, the labour market enjoyed a special status (ordnungspolitische Sonderstellung). Thirdly, the conditions for paragraph 1 of the GWB to apply were not fulfilled: trade unions could not be classified as undertakings for the purpose of competition law, since they were not acting on the markets for goods or services. Thus, collective agreements were not agreements between undertakings. In consequence, the necessary preconditions for the conclusion of such agreements, namely the decision by employers to negotiate jointly, also had to enjoy antitrust immunity. Fourthly, a balancing of the interests involved was not possible because there were no clear normative criteria available. Fifthly, the prohibition of cartels would apply only in the case of abusive collusion by employers who intentionally used the framework of collective agreements to cover an anticompetitive cartel on the markets for goods or services.

92. The Bundeskartellamt (Federal Cartel Office) reached a different result. In an opinion on a collective agreement which harmonised directly the end of trading activity on Saturdays and holiday periods in the sector of wholesale distribution [34] the Office held that such agreements directly affected the markets for goods and commercial services and were therefore not a priori sheltered from the application of paragraph 1 of the GWB. It distinguished those agreements from agreements merely regulating working time.

93. On a second occasion the Office went even further. [35] Management and labour in the retail sector had agreed on harmonised working-time schedules which indirectly prevented shop owners from opening after a certain hour. The Office held that the regulation of working time through collective bargaining was a special case due to its dual nature. On the one hand, opening hours in retailing were an important factor of competition. The trade unions and employers influenced indirectly but effectively the activity of the employing undertakings on the markets for goods and services and were therefore engaged in an economic activity. On the other hand, collective bargaining was protected by fundamental rights in so far as it concerned working conditions. In that specific and exceptional case of conflict only a balancing of the interests involved could lead to a workable solution. In the case under exam-

34 — Letter of the Bundeskartellamt of 31 January 1961 — Z 2 — 121 100 — 465/60, reproduced in WuW/E BKartA 339.

35 — Written submissions of the Bundeskartellamt in proceedings before the Landgericht Berlin of 3 April 1989 — P-178/88, summarised in WuW 1989, pp. 563 and 564.

ination the interest in competition had to prevail.

94. The Kammergericht (Higher Regional Court, Berlin), ruling on appeal [36] on the same working-time schedules on which the Bundeskartellamt had commented, [37] adopted a third line of reasoning. It held that neither collective agreements nor the contracting parties to such agreements were a priori excluded from the scope of application of the German cartel law. Collective agreements on working conditions and wages were nevertheless normally lawful under paragraph 1 of the GWB, since they were not likely to influence 'market conditions with respect to trade in goods or commercial services'. As regards the particular collective agreements under scrutiny, the indirect but effective restrictive influence on shop opening hours on the market for goods led in principle to an infringement of the prohibition of cartels. However, agreements on working time were at the heart (*im Kernbereich*) of the German fundamental right to bargain collectively. Such agreements were fully sheltered from prohibitions contained in ordinary laws.

95. In the United Kingdom under the Fair Trading Act 1973 the Secretary of State could refer restrictive labour practices to the Monopolies and Mergers Commission for it to consider their impact on the public interest. Until recently that provision was never used: traditionally competition law has not been invoked in the United Kingdom to deal with industrial relations issues. [38] In 1988 the first such reference was made under the Act: it concerned labour practices in television and film-making. The Monopolies and Mergers Commission concluded that the practices in question did not operate against the public interest. [39] The position does not seem to be substantially different under the new Competition Act 1998, which is broadly modelled on Articles 85 and 86 of the Treaty.

96. In the United States trade union activities are in principle sheltered from the prohibition of cartels contained in Section 1 of the Sherman Act [40] through a 'statutory' and a 'non-statutory' labour exemption.

36 — Judgment of the Kammergericht of 21 February 1990 — Kart. U 4357/89, reproduced in WuW/E OLG 4531.

37 — See note 35.

38 — R. Whish, *Competition Law*, Butterworths, 3rd edition, 1993, at p. 77. See also, under the former Restrictive Trade Practices Act 1976, the employment exceptions in section 9(6) (goods) and section 18(6) (services): agreements relating to remuneration, conditions of employment, hours of work and working conditions were not registrable.

39 — Labour Practices in TV and Film-making, Cm 666 (1989).

40 — 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal.'

Those exemptions are however limited in their respective scope.

97. As to the 'statutory' exemption, Congress enacted as early as 1914 the Clayton Act which was designed to confer antitrust immunity on unilateral activities of trade unions in the course of labour disputes. It provided *inter alia* that '[t]he labour of a human being is not a commodity or article of commerce'. Since the intention of the legislator was partly frustrated by the federal courts' narrow interpretation of the Act,[41] Congress passed in 1932 the Norris-LaGuardia Act, which was meant to extend the scope of the previous exemption. In *United States* v *Hutcheson*[42] the Supreme Court stated the three conditions for that statutory exception to apply. First, there must be a labour dispute. Secondly, the trade union must act in its 'self-interest'. Thirdly, the union must not combine with non-labour groups, i.e. employers.

98. Although the statutory exemption did not cover agreements between unions and employers, the Supreme Court recognised in its subsequent case-law the existence of a non-statutory exemption, albeit limited in principle to agreements on wages and working conditions. In *Connell*[43] the Supreme Court stated:

'The non-statutory exemption has its source in the strong labour policy favouring the association of employees to eliminate competition over wages and working conditions. Union success in organising workers and standardising wages ultimately will affect price competition among employers, but the goals of federal labour law never could be achieved if these effects on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labour policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.... Labour policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally..., the non-statutory exemption offers no similar protection when a union and a non-labour party agree to restrain competition in a business market.'

41 — *Duplex Printing Press Co.* v *Deering*, 254 US 443.

42 — 312 US 219.

43 — *Connell Construction* v *Plumbers and Steamfitters Local Union No 100*, 2 June 1975, 421 US 616.

99. It will be helpful to examine briefly three major decisions of the United States Supreme Court on the scope of the non-statutory labour exemption.

100. *United Mine Workers of America* v *Pennington*[44] concerned an alleged conspiracy between the trade unions and large coal companies to impose *inter alia* the wages contained in a collective agreement on all operators in the sector, regardless of their ability to pay, in order to force small employers out of business.

101. The majority (6-3) held that the behaviour did not enjoy antitrust immunity. The statutory exemption was not applicable since there was an agreement between a union and employers. A collective agreement on selling prices of coal would clearly be a violation of the antitrust rules. By contrast, wages were at the very heart of the matters on which employers and unions bargained. Therefore, the effect on the product market resulting from the elimination of competition based on wages among employers in a bargaining unit was in principle 'not the kind of restraint Congress intended the Sherman Act to proscribe'. Accordingly, a union was entitled to conclude a wage agreement with a multi-employer bargaining unit and to seek, in pursuance of its own interests, and not by agreement with all or part of the employers of that unit, the same wages from other employers. However, 'one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy'. Therefore, the alleged agreement between

44 — 7 June 1965, 381 US 657.

the union and the large coal producers to secure uniform labour standards throughout the entire industry was not exempt from the antitrust laws.

102. *Meat Cutters* v *Jewel Tea Co.*,[45] which was decided on the same day, concerned shop opening hours. A local union representing virtually all the butchers in the area agreed with a trade association of food retailers that food store meat departments would be open only from 9 a.m. to 6 p.m. from Monday to Saturday inclusive. Faced with a strike unless it agreed to such terms, an employer signed the contract and then sued the union seeking invalidation under the Sherman Act.

103. The majority (6-3) held that the antitrust rules were not applicable, but disagreed on the reasoning. Three of the majority argued that the marketing-hours restriction was so intimately related to wages, hours of work and working conditions that bona fide, arm's-length bargaining for such a provision was exempt from the Sherman Act. The three other judges of the majority, who had dissented in *Pennington*, stated that collective bargaining activity on mandatory subjects of bargaining under the relevant labour laws was by its very nature not subject to antitrust law. They argued primarily that judges had to respect the intentions of the legislator and that there were no normative criteria available to an antitrust judge to distinguish beneficial from harmful collective agreements.

104. The minority expressed the view that the agreement directly concerned the product market and had no pro-competitive effects whatsoever. It was therefore prohibited by the Sherman Act.

105. In its recent decision in *Brown* v *Pro Football*[46] the Supreme Court was faced with employers collectively and unilaterally imposing employment terms on their employees after a collective bargaining impasse. The case dealt with the somewhat special case of bargaining between the

45 — 7 June 1965, 381 US 676.

46 — 116 S. Ct. 2116 (1996).

National Football League and the football players' union.

106. The majority (8-1) held that the non-statutory labour exemption shielded post-impasse agreements among several employers to implement the terms of the employers' last best good-faith wage offer, on the assumption that such conduct was unobjectionable as a matter of labour law and policy. It argued, first, that multi-employer bargaining itself was a well-established, important and pervasive method of collective bargaining, offering advantages to both management and labour. Secondly, to subject the practice in question to antitrust law was to require antitrust courts to answer a host of important practical questions about how collective bargaining on working conditions was to proceed — the very result the labour exemption sought to avoid. Thirdly, to permit antitrust liability threatened to introduce instability and uncertainty into the collective bargaining process.

107. The dissenting justice (Justice Stevens) expressed the view that neither the policies underlying the labour and antitrust statutes, nor the purpose of the non-statutory exemption, provided a justification for exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level that would be produced in a free market.

108. The results of that comparative overview can be summarised as follows.

109. In all the systems examined collective agreements between management and labour are to some extent sheltered from the prohibition of anticompetitive cartels. However, that immunity is not unlimited.

110. The legal sources from which the immunity flows and the legal mechanisms through which it is reached differ widely. One can find

— supremacy of a fundamental right to bargain collectively (Germany),

— an express exemption in the antitrust or other statutes (Denmark, Finland, statutory exemption in the United States),

— creations of the courts (non-statutory exemption in the United States),

— the requirement of a specific condition, normally not fulfilled by the agreements in question, without which the prohibition of cartels is not infringed (Germany),

— application of the general conditions for an infringement of the prohibition of cartels in such a way as to lead to the desired result (France),

— a traditional practice of not applying the competition rules to industrial relations (United Kingdom).

111. The scope of immunity also varies. However, the courts regularly ask the following questions:

— Are the agreements under scrutiny concerned with wages, working time or other working conditions, which are core subjects of collective bargaining?

— To what extent do the agreements affect the markets for goods and services on which the employers operate?

— To what extent do the agreements affect third parties? Third parties potentially affected are undertakings acting on the same market which did not take part in the bargaining process, undertakings acting on other markets, and consumers.

— Do the agreements have an anticompetitive purpose?

— Is it more appropriate to apply hard and fast rules or to engage in a case by case balancing process of the conflicting interests involved?

112. Against that background, I turn now to the analysis of Article 85(1) of the Treaty. I will examine successively, first, the applicability *ratione materiae* of Article 85(1) of the Treaty, secondly, whether

there is an agreement or concertation between undertakings and, thirdly, whether that concertation restricts competition to an appreciable extent.

B — *Applicability* ratione materiae *of Article 85(1) of the Treaty*

113. According to the Funds and the Netherlands, French and Swedish Governments, Article 85(1) is not as a matter of principle applicable *ratione materiae* to collective agreements between representatives of employers and employees on pensions. Their arguments can be summarised as follows.

114. First, those agreements deal with social matters and promote the Treaty's objectives in the social field. The applicability of Article 85(1) would jeopardise the achievement of those objectives.

115. Secondly, to apply Article 85(1) of the Treaty would deprive the two sides of industry of their fundamental right to bargain collectively recognised by various international and European instruments.

116. Thirdly, the applicability of Article 85(1) would be incompatible with various rules of Community law expressly encouraging and promoting collective bargaining between the representatives of employers and employees.

117. Those arguments raise two distinct issues which I will address separately.

118. The first argument is related to the subject-matter of the agreements. It raises the question whether a given agreement, irrespective of its form, falls outside the scope of the competition rules because it deals with social issues such as labour conditions or pensions and has a social objective. In other words, is there in Community competition law a generalised exception for the social field?

119. The second and third arguments are related to the framework in which the agreements in question are concluded. They raise the more limited question whether collective agreements between management and labour have a special status under

Community law with the result that Article 85(1) cannot apply to them as a matter of principle. Is there an exception for collective bargaining between management and labour?

1. Is there a general exception for the social field?

120. Article 85(1) of the Treaty is part of the 'system ensuring that competition in the internal market is not distorted' which is, according to Article 3(g) of the Treaty, one of the activities of the Community.

121. Article 3(i) provides that the activities of the Community shall also include 'a policy in the social sphere'. Article 2 defines as tasks of the Community *inter alia* 'to promote... a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

122. According to the Funds, it follows from those provisions that the social field is not subject to the competition rules. Because of the special features of that area, competition law cannot and should not interfere. They contend that collective agreements between representatives of employers and employees have as their purpose the promotion of the social objectives of the Treaty. Accordingly, they are part of that social field which as a matter of principle is not subject to Articles 85 and 86 of the Treaty.

123. I do not share that view. The Court has consistently held that 'where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect':[47] examples of such Treaty rules are Article 42(1) with respect to agriculture, Article 223(1)(b) with respect to military equipment and to a limited extent Article 90(2) with respect to certain undertakings.

124. As regards the social field, there is no provision in the Treaty which like Article 42 expressly excludes the application of the competition rules or makes it subject to a decision by the Council.

125. Furthermore, the Court has unequivocally upheld the applicability of the Community competition rules to a number of other 'special' sectors which fall outside the scope of the competition rules in certain Member States. In those sectors, the applic-

47 — See, for example, Joined Cases 209/84 to 213/84 *Ministère Public* v *Asjes* [1986] ECR 1425, paragraph 40 of the judgment.

ability of the competition rules has frequently been contested, with arguments based on the special features of the sectors concerned and on the conflicting policy objectives enumerated in Article 3 of the Treaty.

126. The Court has however regularly rejected such arguments and applied Articles 85 and 86 to such sectors as transport,[48] energy,[49] banking[50] and insurance[51] on the basis that there are other mechanisms such as, for example, exemptions under Article 85(3) of the Treaty through which Community competition law allows account to be taken of the special characteristics of certain branches of the economy.[52] In those cases the Court did not take the view that the existence of conflicting policy objectives — as contained for example in Article 3(f) (a common policy in the sphere of transport) and Article 3(t) (Community measures in the energy sector) — in itself precluded the application of the competition rules to the sectors concerned. It does not follow from the fact that the Community pursues a certain policy that that area of the economy is thereby excluded from the competition rules.

127. Moreover, and of particular relevance to the present cases, the Court has already accepted in a series of important decisions the principle that the competition rules apply to the social field, and in particular to employment and to pensions. Thus the Court accepted that principle as regards labour markets in *Höfner*[53] and in *Job Centre*[54] and as regards pensions in *Poucet*[55] and in *Fédération Française des Sociétés d'Assurances*.[56] It will be necessary to consider those cases more fully below. It suffices at this stage to note that, in examining whether the bodies concerned were to be classified as undertakings within the meaning of Article 85 or 86, the Court implicitly accepted that the competition rules applied *ratione materiae* in those areas. More recently in *Sodemare* the Court — without even examining whether private non-profit-making bodies engaged in health-care activities were to be classified as undertakings — simply applied the competition rules and found that there was no agreement within the meaning of Article 85(1).[57]

128. That conclusion is not negated by the judgment of the Court in *Garcia*, which is relied upon in particular by the French Government.[58] At issue there was the

48 — Joined Cases 209/84 to 213/84 *Ministère public* v *Asjes*, cited in note 47, paragraph 40 of the judgment; Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803.

49 — Case C-393/92 *Almelo* [1994] ECR I-1477.

50 — Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraphs 6 to 9 of the judgment.

51 — Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405.

52 — Case 45/85, cited in note 51, paragraph 15 of the judgment.

53 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979.

54 — Case C-55/96 [1997] ECR I-7119.

55 — Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

56 — Case C-244/94 *Fédération Française des Sociétés d'Assurances* [1995] ECR I-4013.

57 — Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraph 43 of the judgment.

58 — Case C-238/94 *García and Others* v *Mutuelle de Prévoyance Sociale d'Aquitaine and Others* [1996] ECR I-1673.

applicability *ratione personae* of the third non-life insurance directive,[59] which is based on the rules on free movement of services and on freedom of establishment. The Court held that Article 2(2) of the directive 'must be interpreted as meaning that social security schemes such as those in issue in the main proceedings are excluded from the scope of the directive'.

129. Contrary to the contention of the French Government, paragraph 14 of that judgment deals with the personal scope of the directive in question, i.e. the bodies to which the directive applies, and does not concern the applicability of the competition rules to the social field. The Court, in referring to the reasoning used in *Poucet*, merely recalled its case-law on the applicability *ratione personae* of the competition rules to certain institutions which provide social benefits. Moreover, paragraph 12 of the judgment confirms that the Court adhered to the approach adopted in *Poucet* and in *Fédération Française des Sociétés d'Assurances* already cited. As I have explained, that approach presupposes that the area of pensions and other social benefits does not *ipso facto* fall outside the material scope of the competition rules.

130. Accordingly, in my view, there is no generalised exception sheltering the social field as a whole from the competition rules.[60]

2. Is there an exception for collective agreements between management and labour?

131. As I have already noted, two arguments are put forward to support the view that collective agreements between management and labour should be given a special status. The first is based on an alleged fundamental right to bargain collectively and the second on the fact that Community law itself encourages the conclusion of such collective agreements.

(a) Is there a fundamental right to bargain collectively?

132. The Funds, the Netherlands and French Governments and the Commission maintain that it follows from a number of international legal instruments that in the Community legal order there is a funda-

59 — Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC, OJ 1992 L 228, p. 1.

60 — See to the same effect the Opinion of Advocate General Lenz in *Bosman*, in which he stated: 'There is in my view no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty', Case C-415/93, cited in note 21, paragraph 273 of the Opinion. In paragraph 138 of its judgment, the Court considered that it was not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty.

mental right to bargain collectively. To apply Article 85(1) to those agreements, it is said, would be equivalent to depriving management and labour of that fundamental right.

133. Does the Community legal order really contain such a fundamental right? That is a seminal question since if there is such a right, any impairment of the substance of the right, even in the public interest, might be unlawful. [61]

134. For analytical purposes, I will distinguish between three rights: first, the right of individuals to form and join a trade union or an association of employers; secondly, the general right of a trade union or association to take collective action in order to protect occupational interests; and, thirdly, the specific right at issue in the present cases of trade unions and associations of employers to bargain collectively.

135. The EC Treaty itself, although — as discussed below — encouraging collective bargaining, does not explicitly grant any of the three above rights.

136. Under the Community Charter of the Fundamental Social Rights of Workers, [62] employers and workers shall have the right to form and to join professional organisations or trade unions 'for the defence of their economic and social interests' (Article 11). Management and labour shall have 'the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice' (Article 12). Accordingly, the Charter encompasses the three aforesaid 'rights'.

137. However, the Charter has very limited legal effects. It is not a legal act of the Community but a solemn political declaration adopted by Heads of State or Government of 11 of the then 12 Member States, and it has not been published in the Official Journal. In the Agreement on social policy attached to the Treaty on European Union the same 11 Member States which adopted the Charter were not willing to confer legal effect on the rights to which they had given their political support in the Charter.

138. The Court's case-law gives more guidance on the general question whether Community law recognises any of the abovementioned three rights. The Court has consistently held that 'fundamental rights form an integral part of the general

61 — Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 78 and 87 of the judgment.

62 — Community Charter of the Fundamental Social Rights of Workers, The Heads of State or Government of the Member States of the European Community meeting in Strasbourg on 9 December 1989.

principles of law whose observation the Court ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.' [63] 'The European Convention on Human Rights has special significance in that respect.' [64]

139. In *Union Syndicale, Massa and Kortner* [65] the Court stated: 'Under the general principles of labour law the freedom of trade union activity recognised under Article 24a of the Staff Regulations means not only that officials and servants have the right without hindrance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees.' Thus, the Court arguably recognised, first, the individual right to form and join an association and, secondly, the collective right to take action. The fundamental nature of those two rights was confirmed in *Bosman* with respect to freedom of association in general [66] and in *Maurissen* more specifically with regard to trade unions. [67] The question whether there is a third specific fundamental right to bargain collectively has not yet been decided.

63 — Opinion 2/94 [1996] ECR I-1759, paragraph 33.

64 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41 of the judgment.

65 — Case 175/73 [1974] ECR 917, paragraph 14 of the judgment.

66 — Case C-415/93, cited in note 21, paragraphs 79 and 80 of the judgment.

67 — Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1990] ECR I-95, paragraphs 11 to 16 and 21 of the judgment.

140. I now turn to the relevant international legal instruments invoked by the Funds, by certain Member States and by the Commission.

141. The Commission in particular contends that the right to collective bargaining on pay and other conditions of employment is a fundamental right guaranteed by Article 11 of the European Convention on Human Rights, Article 6 of the European Social Charter, Article 22 of the International Covenant on Civil and Political Rights and Article 8 of the International Covenant on Economic, Social and Cultural Rights, as well as Conventions Nos 87 and 98 of the International Labour Organisation.

142. An analysis of the relevant international legal instruments does not however support that contention.

143. Taking first the European Convention on Human Rights, the central relevant right guaranteed by the Convention (Article 11) is the individual right to form or to join a trade union. That right is also recognised by the European Social Charter (Article 5), the International Covenant on Civil and Political Rights (Article 22), the International Covenant on Economic, Social and Cultural Rights (Article 8), as well as the Freedom of Association and Protection of

the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention both adopted within the framework of the International Labour Organisation.

144. As regards the right of trade unions to take collective action, the European Court of Human Rights relied on the phrase 'for the protection of his interests' in Article 11(1) of the European Convention on Human Rights in holding that freedom of association included the rights that were 'indispensable for the effective enjoyment' or 'necessarily inherent elements' of trade union freedom. [68] Article 11 therefore also 'safeguards the freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible'. [69]

145. However, that apparently broad statement seems to cover only a core of specific activities. To date the only right expressly recognised by the Court has been to be 'heard' by the State. [70] On the other hand, a trade union has no right to be consulted by the State, [71] nor is the State obliged to conclude collective agreements, [72] nor does Article 11 necessarily imply a right to strike, since the interests of the members can be furthered by other means. [73]

146. As to the right to bargain collectively, contrary to the contentions of the Funds, the Commission and the abovementioned Governments, solely Article 6 of the European Social Charter seems expressly to recognise its existence. However the mere fact that a right is included in the Charter does not mean that it is generally recognised as a fundamental right. The structure of the Charter is such that the rights set out represent policy goals rather than enforceable rights, and the States parties to it are required only to select which of the rights specified they undertake to protect.

147. Article 4 of the carefully drafted 'Right to Organise and Collective Bargaining Convention' imposes on the Contracting States an obligation to 'encourage and

68 — *National Union of Belgian Police* v *Belgium*, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975), paragraph 39.

69 — *National Union of Belgian Police* v *Belgium*, cited in note 68, paragraph 40.

70 — *National Union of Belgian Police* v *Belgium*, cited in note 68, paragraph 39; *Swedish Engine Drivers' Union* v *Sweden*, 6 February 1976, Eur. Court HR Rep., Series A, 20 (1976), paragraph 40.

71 — *National Union of Belgian Police* v *Belgium*, cited in note 68, paragraph 38.

72 — *Swedish Engine Drivers' Union* v *Sweden*, cited in note 70, paragraph 39.

73 — *Schmidt and Dahlström* v *Sweden*, 6 February 1976, Eur. Court HR Rep., Series A, 21 (1976), paragraph 36.

promote' collective bargaining. No right is granted.

148. In the case-law of the European Court of Human Rights there is a telling absence of any reference to the right to bargain collectively. In *Swedish Engine Drivers' Union* v *Sweden* for example the majority of the Commission of Human Rights had argued in favour of the recognition of trade unions' right to engage in collective bargaining. The Court held that it did not have to give a ruling on that question since, it said, such a right was not at issue and was granted to the applicant union under national law. [74] Since then, the European Court of Human Rights has never expressly recognised the existence of that right. On the contrary, there is evidence that the Court is reluctant to do so.

149. First, the Court's interpretation of Article 6 of the European Social Charter suggests such reluctance. As to Article 6(1), which requires that the States 'promote joint consultation between workers and employers', the Court has said that '[t]he prudence of the terms used shows that the Charter does not provide for a real right to consultation'. [75] As to Article 6(2), which requires the State 'to promote, where necessary and appropriate, machinery for voluntary negotiations between employers and employees', the Court has held that 'the prudence of the wording... demonstrates that the Charter does not provide for a real right to have any such agreement concluded ...'. [76]

150. Secondly, the Court has consistently stressed that 'trade union freedom is only one form or a special aspect of freedom of association' and that 'Article [11] does not secure any particular treatment of trade unions'. [77]

151. Thirdly, the judgment in *Gustafsson* [78] is of interest. The Court had to consider a conflict between a trade union and an employer who did not want to take part

74 — *Swedish Engine Drivers' Union* v *Sweden*, cited in note 70, paragraph 38 of the judgment.

75 — *National Union of Belgian Police* v *Belgium*, cited in note 68, paragraph 38. The Court commented upon the meaning of Article 6(1) of the Charter in the course of interpreting Article 11 of the European Convention on Human Rights.

76 — *Swedish Engine Drivers' Union* v *Sweden*, cited in note 70, paragraph 39. The Court commented upon the meaning of Article 6(2) of the Charter again in the course of interpreting Article 11 of the European Convention on Human Rights.

77 — *Schmidt and Dahlström* v *Sweden*, cited in note 73, paragraph 34 of the judgment.

78 — *Gustafsson* v *Sweden*, 25 April 1996, R.J.D., 1996-II, No 9.

in the collective bargaining process in his industry. Through boycotts and other actions the trade union exercised pressure on him to join the employers' side of a sectoral collective agreement. The employer contended that compulsion to participate in the collective agreement would in practice amount to compulsion to join an employers' association. Thus, in his view the Swedish Government should have intervened in order to protect his negative freedom not to join an employers' association.

152. It is interesting to consider first two dissenting opinions.

153. Eight judges argued in their partly dissenting opinion that in reality the employer's claim was not based on his negative freedom not to join an association but on his negative freedom not to bargain collectively. They interpreted the previous case-law as meaning that 'the right of collective bargaining is not an inherent component of freedom of association'. In their view Article 11 was therefore not applicable at all. [79]

154. Two dissenting judges took the opposite view. They considered that the right to bargain collectively was an inherent part of freedom of association. Accordingly, the Court should have entered into a balancing process between the trade union's positive right to bargain collectively and the employer's negative right not to be involved in such a process against his will. [80]

155. Both opinions have in common that the Court would have had to take a definitive position on the existence of such a right.

156. Instead, the majority of the Court chose a third solution. With regard to trade union activities it first held that '[I]n view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests... and the wide degree of divergence between the domestic systems in the particular area under consideration, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed'. [81] Then it merely stressed that it saw 'no reason to doubt that the union action pursued legitimate interests consistent with Article 11 of the Convention'. It continued that '[I]t

79 — Partly dissenting opinion of Judges Ryssdal, Spielmann, Palm, Foighel, Pekkanen, Loizou, Makarczyk and Repik in *Gustafsson* v *Sweden*, cited in note 78.

80 — Dissenting opinion of Judge Martens, joined by Judge Matscher in *Gustafsson* v *Sweden*, cited in note 78, paragraph 6.

81 — *Gustafsson* v *Sweden*, cited in note 78, paragraph 45 of the judgment.

should also be recalled in this context that the legitimate character of collective bargaining is recognised by a number of international instruments.' [82] Thus the Court appears to have been careful to avoid concluding that the Convention guarantees the right to collective bargaining.

157. This analysis leads me to the following conclusions concerning the recognition by Community law of a right to collective bargaining.

158. The Community legal order protects the right to form and join trade unions and employers' associations which is at the heart of freedom of association.

159. In my view, the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law.

160. However, it cannot be said that there is sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively.

161. Moreover, the collective bargaining process, like any other negotiation between economic actors, is in my view sufficiently protected by the general principle of freedom of contract. Therefore, a more specific fundamental right to protection is not needed. In any event the justified limitations on the alleged right to bargain collectively would arguably be identical to those on freedom of contract.

162. In that context it may also be recalled that, in its case-law on the free movement of workers and on equal pay, the Court regularly examines whether clauses in agreements between management and labour infringe Community prohibitions of discrimination on grounds of nationality [83] or of sex. [84] That could be seen as an application of the general rule that the exercise of a fundamental right may be restricted, provided that the restriction in fact corresponds to objectives of general interest pursued by the Community and does not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. [85] There can be no

82 — *Gustafsson* v *Sweden*, cited in note 78, paragraph 53 of the judgment.

83 — Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47; Case C-35/97 *Commission* v *France*, judgment of 24 October 1998.

84 — Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.

85 — Case C-44/94 *R* v *Minister of Agriculture, Fisheries and Food, ex parte Fishermen's Organizations and Others* [1995] ECR I-3115, paragraph 55 of the judgment.

doubt that in the present cases Article 85(1) pursues an important aim of the Treaty, namely the creation of a system ensuring that competition in the internal market is not distorted (Article 3(g)).

163. It follows from those considerations that, while management and labour are in principle free to enter into such agreements as they see fit, they must, like any other economic actor, respect the limitations imposed by Community law. The mere recognition of a fundamental right to bargain collectively would therefore not suffice to shelter collective bargaining from the applicability of the competition rules.

164. However, it is also clear from the foregoing analysis that there is international consensus on the legitimate and socially desirable character of collective bargaining.

165. That leads me to the second argument against the applicability of the competition rules, namely that those rules are incompatible with various provisions in the Treaty encouraging collective bargaining.

(b) Encouragement of collective bargaining under Community law

166. Article 118 of the Treaty provides that 'the Commission shall have the task of promoting 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'.

167. Article 118b of the Treaty provides:

'The Commission shall 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.'

168. In addition the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of

Great Britain and Northern Ireland, annexed to the Protocol on social policy [86] attached to the Treaty on European Union, contains the following provisions.

169. According to Article 1 of that Agreement '[t]he Community and the Member States shall have as their objectives the promotion of... dialogue between management and labour...'.

170. Article 2(4) states: 'A Member State may entrust management and labour, at their joint request, with the implementation of directives...'.

171. Under Article 3(1) '[t]he Commission shall have the task of promoting the consultation of management and labour at Community level....'

86 — OJ 1992 C 191, p. 90.

172. Article 4(1) provides: 'Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.'

173. According to Article 4(2) '[a]greements concluded at Community level shall be implemented... in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'.

174. The Funds, the Netherlands and French Governments and the Commission draw the following conclusions from those rules. The Treaty and the Agreement on Social policy expressly encourage the process of collective bargaining and the conclusion of agreements between management and labour. Community law accepts that the dialogue between management and labour may contribute to the legislative process at Member State and even Community level. Therefore, Article 85 of the

Treaty clearly cannot apply to this category of agreements.

175. The Commission maintains in its written submissions that, if Article 85 were applicable, most collective agreements would fulfil the conditions of restriction of competition and effect on trade between Member States. Under Article 85(1) and (2) they would thus be prohibited and void. Even an exemption under Article 85(3) would be unlikely, because, it is said, that provision does not allow social objectives to be taken into account.

176. To a certain extent I agree with those arguments.

177. This follows, first, from a systematic interpretation of the Treaty. Two potentially conflicting sets of rules are relevant. On the one hand there are the aforesaid rules encouraging the conclusion of collective agreements. Those rules clearly start from the assumption that collective agreements between management and labour are in principle legal. There is, on the other hand, Article 85. According to Article 85(1) certain categories of agreements are prohibited. Those prohibited agreements are automatically void under Article 85(2). Only if the requirements of Article 85(3) are satisfied may the Commission declare the prohibition of Article 85(1) inapplicable.

178. As illustrated by the present cases and the comparative survey of national law, there is in any legal system potential tension between those two sets of rules. Normal collective agreements on core subjects of collective bargaining such as wages and other working conditions admittedly restrict competition between employees: they cannot offer to work for a wage below the agreed minimum. However the main purpose of trade unions and of the collective bargaining process is precisely to prevent employees from engaging in a 'race to the bottom' with regard to wages and working conditions. That is why collective bargaining is encouraged by all national legal orders, international legal instruments and more particularly by the Treaty itself; moreover Community legislation in the employment field contains elaborate provisions for measures to be implemented by means of collective bargaining as well as by legislation. [87] If such agreements were to fall under the prohibition of Article 85(1), it would be necessary to apply to the Commission for negative clearance or for exemption. Such agreements by their very nature however do not fit comfortably into the framework of the competition rules.

87 — See for example Articles 4, 6, 17(3) and 18(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of working time, OJ 1993 L 307, p. 18.

179. The authors of the Treaty either were not aware of the problem or could not agree on a solution. The Treaty therefore does not give clear guidance. In those circumstances one has to draw a line according to established principles of interpretation. Since both sets of rules are Treaty provisions of the same rank, one set of rules should not take absolute precedence over the other and neither set of rules should be emptied of its entire content. Since the Treaty rules encouraging collective bargaining presuppose that collective agreements are in principle lawful, Article 85(1) cannot have been intended to apply to collective agreements between management and labour on core subjects such as wages and other working conditions. Accordingly, collective agreements between management and labour on wages and working conditions should enjoy automatic immunity from antitrust scrutiny.

180. There are also considerations of a practical nature reinforcing that basic conclusion.

181. It is widely accepted that collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency. A measure of equilibrium between the bargaining power on both sides helps to ensure a balanced outcome for both sides and for society as a whole.

182. Furthermore, collective agreements on wages, working time or other working conditions, although they may restrict competition between employees, probably do not have an appreciable restrictive effect on competition between employers. As regards competition on the demand side of the labour market, normally each employer remains free to offer more advantageous conditions to his employees. As regards competition on the product or services markets on which the employers operate, first, agreements on wages or working conditions harmonise merely one of many production cost factors. Therefore only one aspect of competition is affected. [88] Secondly, as follows from the practice of the Commission, [89] proximity to the market of the factor in issue is an important criterion for assessing appreciability. In the case of collective agreements on wages and working conditions the final price of the products or services in question will be influenced by many other factors before they reach the market. Thirdly, and perhaps most importantly, production fac-

88 — Irish Banks' Standing Committee, OJ 1986 L 295, p. 28, paragraph 16.

89 — Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, OJ 1993 C 43 p. 2., III.2(d).

tor costs are only apparently harmonised, because in economic terms labour — in contrast to raw materials — is not a homogeneous commodity. The fact that employees earn nominally the same wage does not mean that the real costs for their respective employers are identical. Real costs can be determined only when the employees' productivity is taken into account. Productivity itself is determined by many factors such as for example professional skills, motivation, technological environment, work organisation. All those factors can be and are in reality influenced by employers. That is precisely the task of efficient management of human resources. Thus, competition on labour as a cost factor is in reality strong. Finally, it may be seen as empirical support for the lack of appreciable effects that it has taken almost 40 years for the first case on the compatibility of a collective agreement with Article 85 to reach the Court and that in the above survey of national law there is not a single case dealing with normal agreements on wages and working conditions.

183. This conclusion in favour of a limited antitrust immunity for collective agreements between management and labour is not incompatible with the arguments developed above to the effect that there is no exception for the social field as a whole. The main difference is that with regard to collective bargaining I advocate an exception based not merely on the subject-matter of the agreement but mainly on the framework in which it is concluded.

184. The rationale underlying the competition rules' wide scope of applicability *ratione materiae* is simple. It can be presumed that private economic actors normally act in their own and not in the public interest when they conclude agreements between themselves. Thus, the consequences of their agreements are not necessarily in the public interest. Competition authorities should therefore be able to scrutinise private actors' agreements even in special areas of the economy such as banking, insurance or even the social field. The Treaty consequently contains only a very limited number of sectoral exceptions to the applicability of the competition rules based solely on the subject-matter of the agreement. As already stated, the Court should continue to construe those exceptions narrowly.

185. However, by encouraging the conclusion of collective agreements between management and labour, the Treaty recognises the possibility of an exception to the general presumption on the consequences of agreements between private actors on the ground that under normal circumstances this particular category of agreements furthers the public interest. That is confirmed by the national law and practice of the competition authorities and courts of the Member States, which treat collective

bargaining as normally fulfilling a valuable social function. To regard collective bargaining as falling within the competition rules would in fact reverse the practice generally followed in the Member States. Not only would it require such agreements to be notified under Community and/or national competition law; it would also make them justiciable in the courts.

186. Nevertheless I consider that the proposed antitrust immunity for collective agreements between management and labour should not be without limitations.

187. That follows first and foremost from the Treaty interpretation I adopted above. If on the one hand Article 85(1) cannot interfere with the majority of agreements encouraged by the rules on collective bargaining, on the other hand those rules cannot deprive Article 85(1) of all its meaning.

188. That is also evident from the wording of the Treaty: Article 117 ('... such a development [improved working conditions and an improved standard of living for workers] will ensue... from the functioning of the common market...') and Article 118 ('Without prejudice to the other provisions of this Treaty...') seem to presuppose that the competition rules apply to a certain extent to collective agreements between management and labour. As to the Agreement on social policy, the preamble to the Protocol states expressly that 'this Protocol and the said Agreement are without prejudice to the provisions of this Treaty...'.

189. Furthermore, the above survey of national law has shown that there may be instances where collective bargaining is used as a framework for agreements between employers with seriously anti-competitive effects on third parties or third markets. In fact the reported agreements examined by the different national courts and authorities all dealt with third markets or third parties. None of those agreements was a normal agreement on wages or working conditions.

190. I propose therefore three conditions for *ipso facto* immunity.

191. First, as the Commission has pointed out, the agreement must be made within the formal framework of collective bargaining between both sides of industry. Unilateral coordination between employers unconnected with the collective bargaining process should not be automatically shel-

tered, whatever the subject of the coordination may be.

192. Secondly, the agreement should be concluded in good faith. In that context account must be taken of agreements which apparently deal with core subjects of collective bargaining such as working time but which merely function as cover for a serious restriction of competition between employers on their product markets. In those exceptional cases, too, competition authorities should be able to examine the agreement in question.

193. Thirdly, it is necessary to delimit the scope of the collective bargaining immunity, so that the immunity extends only to those agreements for which it is truly justified. It will not be easy to find a criterion which draws the line in the right place and also provides the requisite legal certainty. I would tentatively suggest as a possible criterion that the collective agreement must be one which deals with core subjects of collective bargaining such as wages and working conditions and which does not directly affect third parties or markets. The test should be whether the agreement merely modifies or establishes rights and obligations within the labour relationship between employers and employees or whether it goes beyond that and directly affects relations between employers and third parties, such as clients, suppliers, competing employers, or consumers. The above survey of national law provides several examples of the latter type of agreement. Since those agreements have potentially harmful effects on the competitive process, they should be subject to antitrust scrutiny by the Commission or other competent authorities, which would examine whether there was in fact an appreciable restriction of competition. If so, the Commission should be able to balance the different interests involved and where appropriate grant an exemption according to Article 85(3) of the Treaty. Both the Court and the Commission have on occasions recognised the possibility of taking account of social grounds in that context, in particular by interpreting the conditions of Article 85(3) broadly so as to include concerns for employment. [90]

194. Accordingly, my conclusion on antitrust immunity for collective agreements is that collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties are not caught by Article 85(1) of the Treaty.

90 — Case 26/76 *Metro* [1977] ECR 1875, paragraph 43 of the judgment; Case 42/84 *Remia* [1985] ECR 2545, paragraph 42; *Synthetic Fibres*, OJ 1984 L 207, p. 17, paragraph 37; and *Ford/Volkswagen*, OJ 1993 L 20, p. 14, paragraph 23.

195. Are the agreements under scrutiny in the present proceedings covered by the immunity?

196. It will be recalled that according to Netherlands law employers are in principle free to decide whether or not to offer supplementary pensions to their employees. If they want to do so they can conclude collective agreements where management and labour merely agree on minimum pensions. In those cases the employing undertakings decide what to do with the collected contributions. Management and labour can also agree to set up a sectoral pension scheme. The sectoral scheme itself can be managed either by the representatives of management and labour or by an insurance company. Once management and labour have decided to set up a sectoral pension fund they have to decide whether to apply to the competent Minister to make affiliation to the sectoral fund compulsory for the entire sector.

197. It follows from that variety of choices that the agreements under scrutiny can be analysed as three distinct agreements with the following content:

(a) For each employee belonging to a given sector employers make an agreed pension contribution of a specified amount.

(b) With the collected pension contributions a single sectoral pension scheme is set up which representatives of employers and trade unions manage jointly.

(c) Both sides of industry apply jointly to the competent Minister seeking compulsory affiliation for all undertakings belonging to the sector.

198. As regards the first agreement, pension contributions of employers are part of the remuneration employees receive.[91] They raise the same analytical problems as wages and other working conditions. Collective bargaining on harmonised pension contributions is therefore negotiation on the content of the labour contract and does not directly affect third parties. Accordingly, it is covered by the immunity I advocated above.

199. The position is more difficult with the other two agreements. They might be regarded as merely ancillary to the first agreement. However, it is possible to contend, on the basis of the criterion suggested above, that they should not fall within the immunity. On the one hand, there is a restriction on the freedom of participating employers to entrust insurance companies

91 — Case C-262/88 *Barber* [1990] ECR I-1889.

with the administration of the funds (or their freedom to do it themselves). On the other hand, management and labour try jointly to oblige employers who did not take part in the collective bargaining process to comply with the bargaining result. Thus, both agreements are not just collective negotiations on the content of the labour relationship, but directly concern the relations of employers with third parties and are not covered by the immunity I have proposed.

200. Accordingly, I turn now to the analysis of Article 85(1) with regard to the last two agreements.

C — *Agreement between undertakings*

201. According to the Netherlands, French and Swedish Governments and the Commission, there is no agreement between 'undertakings' and therefore Article 85(1) of the Treaty is not applicable *ratione personae*. The employees are not 'undertakings', it is said, because they are not independent entities engaged in an economic activity but are attached to their employer. Their representatives, i.e. the trade unions, are not engaged in an economic activity, at least not when they are involved in collective bargaining on working conditions or pensions. Thus, one of the two parties to the agreements in question cannot be qualified as an undertaking.

202. As regards the argument that there is an implied 'agreement between undertakings' or a 'decision by an association of undertakings' on the employers' side, the Netherlands Government maintains that employers taking part in collective bargaining on pensions are not engaged in an economic but in a social activity.

203. The Commission reaches an identical conclusion. However, it is not clear from its observations how it considers that that conclusion should be reached. It merely draws the attention of the Court to the consequences of a decision to the contrary.

204. I will first examine whether the economic actors involved can be classified as undertakings or associations of undertakings. Secondly, I will consider whether there is an agreement or other form of concertation.

1. *Undertaking or association of undertakings*

205. The Court has held that 'the concept of 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'.[92] In that respect it may be helpful to make two preliminary observations.

206. First, I consider that the concept of 'undertaking' serves a dual purpose in the system of Article 85. On the one hand — and this function is more obvious — it makes it possible to determine the categories of actors to which the competition rules apply. That issue arises for example in cases concerning public bodies.[93] The test in such cases is whether the actor is engaged in an activity of an economic or commercial nature. On the other hand, it serves to establish the entity to which a certain behaviour is attributable. That second issue arises, for example, in cases involving the relationship between subsidiary and parent companies.[94] The test here is whether there is an independent entity acting in its own right or whether there is only an 'agent' without autonomy to determine its course of action.

207. Secondly, the Court has held that 'in competition law, the term "undertaking" must be understood as designating an economic unit *for the purpose of the subject-matter of the agreement in question*'.[95] Accordingly, the notion of 'undertaking' is relative and has to be established *in concreto* with regard to the specific activity under scrutiny. In *Höfner*[96] for example a public body engaged *inter alia* in the business of employment procurement was classified in that respect as an undertaking. By contrast, in *Cali*[97] a limited private company which had been entrusted by the State with preventive anti-pollution surveillance was held to fall outside the personal scope of the competition rules with respect to that specific activity.

208. As to the present cases, I will examine successively whether (a) employees, (b) trade unions, or (c) employers should be classified as undertakings or associations of undertakings for the purposes of competition law.

(a) Employees

209. The Court stated in *Suiker Unie* that employees form 'an economic unit'[98] with their employing undertaking. 'Auxiliary

92 — Case C-41/90 *Höfner and Elser*, cited in note 53.

93 — See, for example, Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479; Case C-41/90 *Höfner*, cited in note 53, and Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.

94 — Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457 and the cases quoted in that judgment at paragraph 16.

95 — Case 170/83 *Hydrotherm* v *Compact* [1984] ECR 2999 (emphasis added), paragraph 11 of the judgment.

96 — Case C-41/90, cited in note 53.

97 — Case C-343/95 *Cali e Figli* [1997] ECR I-1547.

98 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73, and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 539 of the judgment.

organs forming an integral part of the principal's undertaking' [99] cannot be regarded as undertakings. In that case the Court merely had to draw the line between employees and independent commercial agents in their respective relations to third parties. Thus, it could base its reasoning mainly on the attributability of employees' activities to their employer.

210. However, in the present cases the relationship between employees and their employers is at issue. Employees in these cases are engaged in negotiations through their trade unions on supplementary pensions and their administration. Those pensions form part of their remuneration. [100] In that respect employees are acting autonomously and in their own right. The reasoning of the Court in *Suiker Unie* is therefore not directly in point.

211. Accordingly, the question arises how to classify the fact that employees offer labour against remuneration.

212. One could argue that it is an economic activity similar to the sale of goods or the provision of services. From an economic point of view, that may — arguably — be true. However, I do not think that, from a legal perspective, the assertion is correct.

213. First, it is difficult to see how the term 'undertaking' could be understood in the sense of 'employee'. To interpret the Treaty in a manner that would include the latter term in the former would, in my view, exceed the limits which its wording imposes.

214. Secondly, the functional interpretation of the term 'undertaking' which the Court has adopted in its case-law leads to the same result. With respect to public bodies the Court examines whether the activity in question is — at least potentially — performed by private entities engaged in the supply of goods or services. [101] Individuals, too, may be classified as undertakings [102] if they are independent economic actors on the markets for goods or services. The rationale underlying those cases is that the entities under scrutiny are fulfilling the 'function' of an undertaking. The application of Articles 85 and 86 is justified by the fact that those public bodies or individuals

99 — Ibid., paragraph 542 of the judgment.

100 — Case C-262/88 *Barber*, cited in note 91.

101 — See the judgments in Case C-343/95 *Cali*, cited in note 97, and Case C-41/90 *Höfner*, cited in note 53.

102 — See recently, with respect to Italian customs agents, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851.

are operating on the same or similar markets and according to similar principles as 'normal' undertakings. [103]

215. Dependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community [104] or national law.

216. Thirdly, the system of Community competition law is not tailored to be applicable to employees. The examples of anticompetitive practices in Articles 85(1) and 86 or the conditions for exemption in Article 85(3) are clearly drafted with regard to economic actors engaged in the supply of goods or services. Article 85(1)(a) for example refers to 'purchase or selling prices' and to 'other trading conditions'. Employees, on the contrary, are concerned with 'wages' and 'working conditions'. To apply Article 85(1) to employees would therefore necessitate the use of uneasy analogies between the markets for goods and services and labour markets.

217. Accordingly, in my view, employees in principle fall outside the personal scope of the prohibition of Article 85(1). The future will probably show whether that principle applies also in certain borderline areas such as for example professional sport.

(b) Trade unions

218. Since employees cannot be qualified as undertakings for the purposes of Article 85, trade unions, or other associations representing employees, are not 'associations of undertakings'.

219. However, are trade unions themselves 'undertakings'?

220. The mere fact that a trade union is a non-profit-making body does not automa-

103 — See, for a detailed comparison with 'normal' undertakings, the judgment in *Commission* v *Italy*, cited in note 102, paragraphs 36 to 38.

104 — For example Articles 48 and 59 of the Treaty.

tically deprive the activities which it carries on of their economic character. [105]

221. A trade union is an association of employees. It is established that associations may also be regarded as 'undertakings' in so far as they themselves engage in an economic activity. [106]

222. It must be borne in mind that an association can act either in its own right, independent to a certain extent of the will of its members, or merely as an executive organ of an agreement between its members. In the former case its behaviour is attributable to the association itself, in the latter case the members are responsible for the activity.

223. With regard to ordinary trade associations, the result of that delimitation is often not important, since Article 85 applies in the same way to agreements between undertakings and to decisions by associations of undertakings. [107] It may be relevant when the Commission has to decide to whom to address its decision and whom to fine. [108]

224. However, in the case of trade unions that delimitation becomes decisive, since, if the trade union is merely acting as agent, it is solely an executive organ of an agreement between its members, who themselves — as seen above — are not addressees of the prohibition of Article 85(1).

225. With regard to trade union activities one has therefore to proceed in two steps: first, one has to ask whether a certain activity is attributable to the trade union itself and if so, secondly, whether that activity is of an economic nature.

226. There are certainly circumstances where activities of trade unions fulfil both conditions. Some trade unions may for example run in their own right supermarkets, savings banks, travel agencies or other businesses. When they are acting in that capacity the competition rules apply.

105 — See Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 88 of the judgment; and Case C-244/94 *Fédération Française des Sociétés d'Assurances*, cited in note 56, paragraph 21.

106 — Implicit in Case 127/73 *BRT* v *Sabam and Fonior* [1974] ECR 313, paragraph 7 of the judgment; Opinion of Advocate General Mayras in that Case, at page 322; Opinion of Advocate General Lenz in Case C-415/93 *Bosman*, cited in note 21, paragraph 256.

107 — Opinion of Advocate General Lenz in Case C-415/93 *Bosman*, cited in note 21, paragraph 258.

108 — See the problems in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407 and in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739.

227. However in the present cases the trade unions are engaged in collective bargaining with employers on pensions for employees of the sector. In that respect the trade unions are acting merely as agent for employees belonging to a certain sector and not in their own right. That alone suffices to show that in the present cases they are not acting as undertakings for the purposes of competition law.

(c) Employers

228. In the present cases employers are engaged in economic activities on different markets for goods and services. In that respect they are to be classified as undertakings.

229. In order to be able to produce those goods or services they engage employees. To employ persons is therefore an inherent part of their main economic activities.

230. As already mentioned, the Netherlands Government contends that employers participating in collective bargaining on wages or working conditions are not engaged in an economic but in a social activity and cannot at least with regard to that activity be classified as undertakings. The Commission reaches an identical conclusion.

231. Since I propose in any event a limited exception to the applicability *ratione materiae* of the competition rules, which covers the category of agreements to which the Netherlands Government and the Commission refer, it is not really necessary to analyse that argument in depth. However it is I think useful to point out that the employers are engaged in economic activities.

232. First, employers engaged in collective bargaining on working conditions, wages or pensions are normally not, or at least not solely, motivated by social considerations. More realistically, there are economic motives, for example prevention of costly labour conflicts, lower transaction costs through a collective and rule-based negotiation process, and greater planning certainty and transparency in the field of production costs.

233. Secondly, an undertaking's economic success on the national or international markets for goods and services will depend

on its ability to conclude an optimal collective agreement with its employees, which will affect its cost structure. Negotiation with employees is therefore part and parcel of its economic activity on the markets and cannot be artificially segregated.

234. Thirdly, the very concept of collective bargaining implies that each side is defending its interests. The employees' side tries to secure a maximum of social advantages. The employers' side tries to defend the economic interests of the undertakings involved. The optimal outcome for both parties and for society is allegedly guaranteed through an equilibrium in the bargaining power of each side. It would therefore not even be desirable that employers should be affected by other than economic considerations.

235. Accordingly employers remain undertakings when they engage in collective bargaining.

236. It follows also that the associations of employers in the present cases are associations of undertakings.

2. Agreement or other form of concertation

237. Since neither employees nor their representatives are undertakings, I will focus on the issue whether or not a collective agreement between management and labour contains an implied agreement between the employing undertakings.

238. The Court held in *BNIC* v *Clair* that 'the legal framework within which such agreements [between undertakings] are made and such decisions [by associations of undertakings] are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned'. [109]

239. In *Frubo* the Court held that 'Article 85(1) applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers. To place any other interpretation on Article 85(1) would be to remove its substance.' [110]

109 — Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17 of the judgment.

110 — Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 30 and 31 of the judgment.

240. Furthermore, it follows from the case-law of the Court that an agreement can be oral [111] or tacit [112] and that it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves in a particular way. [113]

241. For a collective agreement between management and labour to take place, both sides have to coordinate their action, either through agreements *ad hoc* or institutionalised through associations. As a minimum, they have to agree to negotiate jointly and to abide by the bargaining result obtained by their representatives.

242. Thus, in the light of the judgments of the Court considered above, there can be no doubt that on the employers' side there is an implied agreement between undertakings for the purposes of Article 85(1). At the very least, there is a concerted practice which is equally addressed by Article 85(1).

243. The Commission acted consistently with that approach in the only decision which it has taken on the relationship between Article 85(1) and collective agreements concluded by management and labour. In *Irish Banks' Standing Committee* [114] an association of Irish banks applied for negative clearance of an agreement on opening hours concluded between the banks involved 'and also with the Trade Union of the Banks' employees'. The Commission held, first, that the competition rules were applicable to the banking sector and, secondly, that 'the banks participating in the agreements for which negative clearance is sought are undertakings within the meaning of Article 85 of the EEC Treaty'. It then went on to say: 'The application for negative clearance refers to the agreements contained therein as agreements between the parties on behalf of whom the application was made. As such the agreements may be taken to constitute agreements between undertakings for the purpose of Article 85.'

244. I accordingly conclude that every collective agreement between management and labour contains an implied agreement between undertakings on the employers' side.

D — *Restriction of competition*

245. The issue is whether the implied agreements between employers — as far as they are not covered by antitrust immunity — 'have as their object or effect the

111 — Case 28/77 *Tepea* v *Commission* [1978] ECR 1391, paragraph 41 of the judgment.

112 — Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 38 of the judgment.

113 — Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112 of the judgment; and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, cited in note 105, paragraph 86.

114 — Cited in note 88.

prevention, restriction, or distortion of competition' within the meaning of Article 85(1).

246. The Funds and the Netherlands Government contend that neither the object nor the effect of the collective agreements in question is to restrict competition. Those agreements have a social purpose and are not designed to limit competition between the undertakings involved. If there is any restriction at all then it is caused not by the actions of the employers but by the action of the State making affiliation for all undertakings in the sector compulsory.

247. Before starting the analysis it is appropriate to make two preliminary observations.

248. First, in the present cases the interaction between the collective agreements under scrutiny and State intervention is complex. There is the collective agreement between the representatives of employers and employees. That agreement presupposes two implied agreements, one between employers and one between employees. Finally, there is the Netherlands Government's intervention making affiliation to the fund compulsory.

249. The analysis must focus on the consequences of the implied agreement between employers and thus in each case on the causal link between that agreement and the effects on the different actors and markets.

250. Secondly, in the present cases a careful analysis taking into account the specific economic context is necessary.

251. Contrary to many national competition law systems the Community competition rules are applicable to virtually all sectors of the economy (e.g. agriculture, banking, insurance, energy, transport, the social field) and categories of agreements (e.g. vertical agreements). That large scope makes it increasingly important to take the specific economic features of a given sector or a category of agreements into account when assessing whether the competition rules are infringed in a particular case.

252. As regards the interpretation of 'prevention, restriction or distortion of compe-

tition' within the meaning of Article 85(1), clear-cut rules, which simply identify restrictions of conduct of individual traders, normally provide a valid basis for presuming an anticompetitive effect and also promote desirable legal certainty. However, in cases involving specific sectors [115] or specific categories of agreement, [116] the Court has gone beyond that mechanistic approach and has adopted a more searching analysis. In view of the subject-matter and nature of the agreements concerned in the present proceedings, their economic context and the sometimes complex underlying economic rationale have therefore to be taken into account.

253. I turn now to the agreements under scrutiny. As I stated above, the collective agreements in question may be broken up into three legally and economically independent elements.

254. As already said, the first element, namely the agreement between employers harmonising pension contributions throughout an entire sector, is sheltered from Article 85(1). It is in fact an agreement on the remuneration of employees, which is a core subject of collective bargaining not directly affecting third parties or markets. Thus, the antitrust rules should not apply.

255. At issue here are therefore only the second and third parts of the agreements, which have — or are at least alleged to have — consequences for insurance companies and employers which did not take part in the collective agreements in question. Moreover it must be recalled that only the implied agreement between employers is relevant. Thus, I will examine whether there is an appreciable restriction of competition caused by an implied agreement between employers as regards, first, the agreement to set up a single pension fund which employers manage jointly with the trade unions and, secondly, the agreement to apply jointly with the trade unions to the competent Minister to make affiliation compulsory for all undertakings belonging to the sector.

1. *The agreement to set up a single pension fund which employers manage jointly with the trade unions*

256. In order better to understand the reasons underlying the agreement it is

115 — Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 31 of the judgment; Case C-399/93 *Oude Luttikhuis and Others* v *Coberco* [1995] ECR I-4515, paragraph 10; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission*, judgment of the Court of First Instance of 15 September 1998, paragraphs 136 and 137.

116 — Case *56/65 Société Technique Minière* v *Machinenbau Ulm* [1966] ECR 235; Case C-234/89 *Delimitis* [1991] ECR I-935; Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487; Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015; and Case 161/84 *Pronuptia* [1986] ECR 353.

helpful to bear in mind the options available to employers and employees. There are collective agreements where management and labour merely agree on minimum pension contributions for each employee. In those cases the employing undertakings decide what to do with the collected contributions. They can choose freely either to set up a company pension fund, or to conclude a group insurance agreement with an insurer specifically for their undertaking, or to set up a common pension fund with other employers.

257. In the present cases the representatives of employers and employees have chosen the third option, namely to set up a common pension fund managed jointly by representatives of both sides of industry.

258. How can that agreement be analysed from a competition law perspective? First, it represents a form of voluntary horizontal cooperation between undertakings belonging to the same sector as regards the administration of the pensions of their employees. It is only the subsequent intervention of the Netherlands Government which makes participation in the fund compulsory. Secondly, that cooperation is carried out not on an *ad hoc* basis but within a permanent structure separate from the participating undertakings.

259. Thus, the setting up of the pension funds as an institutionalised form of cooperation is in many respects identical to what is commonly called the setting up of a cooperative joint venture.

260. I will examine separately the effects of the agreements in question (a) on the employing undertakings and (b) on insurance companies.

(a) Restriction of competition with regard to employers

261. Does the setting up of the pension funds restrict competition between employers to an appreciable extent?

262. With regard to an agricultural buying cooperative the Court has held:

'... organising an undertaking in the specific legal form of a cooperative association does not in itself constitute anticompetitive conduct.... [T]hat legal form is favoured both by national legislators and by the Community authorities because it encourages mod-

ernisation and rationalisation... and improves efficiency.' [117]

263. In its 'Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises' [118] the Commission states:

'...

I. The Commission welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more efficiently and increase their productivity and competitivity on a larger market. While considering that its duty is to facilitate cooperation among small and medium-sized enterprises in particular the Commission recognises that cooperation among large enterprises, too, can be economically desirable without presenting difficulties from the angle of competition policy.

...

There may also be forms of cooperation between enterprises other than those listed below which are not prohibited by Article 85(1) of the EEC Treaty...

...

II. The Commission takes the view that the following agreements do not restrict competition.

...

2. Agreements having as their sole object:

(a) cooperation in accounting matters,

(b) joint provision of credit guarantees,

(c) joint debt-collecting associations,

(d) joint business or tax consultant agencies.

117 — Case C-399/93 *Oude Luttikhuis and Others* v *Coberco*, cited in note 115, paragraph 12 of the judgment.

118 — OJ 1968 C 75, p. 3 corrected by OJ 1968 C 84, p. 14.

In such cases, the cooperation involved covers fields that are not concerned with the supply of goods and services or the economic decisions of the enterprises taking part, and thus does not lead to restraints of competition.'

264. In its 'Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty' [119] the Commission states at paragraph 15:

'Article 85(1) does not therefore apply to certain categories of J[oint] V[entures] because they do not have as their object or effect the prevention, restriction or distortion of competition. This is particularly true for:

...

— J[oint] V[entures] with activities neutral to competition within the meaning of the 1968 Notice on cooperation between enterprises: the types of cooperation therein do not restrict competition because:

...

— they have as their sole object management cooperation,

— they have as their sole object cooperation in fields removed from the market.'

265. The rationale underlying the Court's judgment and the two Notices is that institutionalised management cooperation which allows the companies involved to achieve significant economies of scale, and which takes place in a field remote from the product or services markets, is generally pro-competitive.

266. That reasoning applies equally to sectoral pension funds.

267. The setting up of a single sectoral pension fund has several advantages for the

119 — OJ 1993 C 43, p. 2.

participating employers. First, there are economies of scale with regard to services essential to the running of a scheme, such as administration of contributions and payments or custodial arrangements. Administration is also far simpler when a worker moves from one company to another within the same sector.

268. Moreover a sectoral fund is in a stronger position on the investment markets or with regard to service providers (consultants, insurance companies). There are therefore strong pro-competitive effects.

269. On the other hand, as with joint accounting or tax consultancy agencies, the cooperation on pension administration covers a field which is not directly 'concerned with the supply of goods and services or the economic decisions of the enterprises taking part'. On the contrary, the cooperation takes place in a field which is even more remote from the product market than for example joint research and development.

270. Accordingly, the setting up of a voluntary sectoral pension fund is an efficient and rational form of pro-competitive cooperation between undertakings which is not in principle caught by Article 85(1).

271. Albany, Brentjens and Drijvende Bokken submit however that Article 85(1) is infringed because their freedom to organise their own pension arrangements is restricted.

272. As regards rules of an agricultural cooperative which limited the possibilities of withdrawing from the association, the Court has held:

'However, it does not follow that the provisions in the statutes governing relations between the association and its members, in particular those relating to the termination of the contractual link and those requiring the members to reserve their milk production for the association, automatically fall outside Article 85(1) of the Treaty.

In order to escape that prohibition, the restrictions imposed on members by the statutes of cooperative associations intended to secure their loyalty must be limited to what is necessary to ensure that the cooperative functions properly and in particular to ensure that it has a sufficiently

wide commercial base and a certain stability in its membership.' [120]

273. Accordingly, while undertakings can in certain circumstances create cooperative associations, connected *contractual* restrictions of their commercial freedom have to be limited to the necessary minimum.

274. In my view, a voluntary sectoral pension fund in which there were limitations on withdrawal might be an analogous case where certain limited ancillary contractual restrictions intended to secure members' loyalty were indispensable 'to ensure that it has a sufficiently wide commercial base and a certain stability in its membership'.

275. In the present cases the situation is, however, different. Nothing in the file indicates that the restrictions in question follow directly from the collective agreements under scrutiny. Freedom to make special pension arrangements seems to be limited not because of the agreements setting up the Funds but because of the Netherlands' decision to make affiliation compulsory. There is thus no direct causal link between the original agreements among certain employers to set up a common pension fund and the actual difficulties experienced by the plaintiffs when seeking exemption from compulsory affiliation. The restriction of the plaintiffs' freedom is dependent upon the Netherlands Government's intervention. The compatibility of that intervention with Articles 5 and 85(1), and with Articles 86 and 90(1) is a different question and will be analysed below.

(b) Restrictions with regard to pension insurance companies

276. Albany, Brentjens and Drijvende Bokken contend that the prohibition on concluding agreements on supplementary pensions with private insurance companies adversely affects the competitive position of insurance companies. The latter are effectively prevented from concluding group insurance contracts with employers belonging to a certain sector and are thereby excluded from an important part of the Netherlands insurance market. Moreover, there is a cumulative effect because compulsory affiliation can be found in virtually all sectors of the Netherlands economy.

277. I will analyse first the effects of the original agreements among certain employers and representatives of employees to set up a common sectoral pension fund which they manage jointly. For that purpose I will

120 — Case C-399/93 *Oude Luttikhuis*, cited in note 115, paragraphs 13 and 14 of the judgment.

examine the agreement *in abstracto* without taking into account subsequent Government intervention and starting therefore from the assumption of a voluntary pension fund. I will discuss subsequently the effects of the Government's decision to make affiliation compulsory.

278. As to the setting up of a common voluntary sectoral pension fund, it must be borne in mind that an individual employer can choose either to set up a company pension fund or to conclude a group insurance contract for his employees with an insurance company.

279. From a competition law perspective both alternatives are neutral. The choice is comparable to a manufacturer's decision whether to 'buy' certain services (e.g. cleaning, accounting) from outside suppliers or to 'produce' them in-house. A decision in such circumstances not to engage in contractual relationships with outside suppliers is protected by freedom of contract. Such refusal to deal would be relevant only in the context of an undertaking holding a dominant position.

280. The decision of certain employers to cooperate with others in order to set up a single fund does not worsen the situation of pension insurance companies. As has already been seen, all participating employers are free not to offer pensions at all or to offer them through a company pension fund. From the point of view of the insurance companies it makes no difference if several employers decide to pool the pension contributions in a single fund instead of having separate company pension funds.

281. Moreover, as already mentioned, nothing in the file indicates that the original collective agreement to set up a joint pension fund contained any restriction on members' leaving the fund and concluding a more advantageous agreement with an outside insurance company. Therefore a mere voluntary pension fund without exclusivity and without limitations on withdrawal does not have any real exclusionary effects.

282. Finally, all the parties and the Netherlands Government agree that the representatives of employers and employees can entrust insurance companies with the administration of the sectoral fund. Insurance companies thus gain a supplementary opportunity to offer their management services to big funds representing a large number of employers and employees.

283. The decision by the representatives of employers and employees to manage the pension fund jointly and not to enter into a management contract with an insurance company is again a refusal to deal which is in principle covered by freedom of contract and would be relevant only for the purposes of Article 86.

284. Thus, as regards the employers taking part in the original agreement to set up a sectoral pension fund, there are no real exclusionary effects on the insurance companies. An employer's choice of joining a sectoral pension fund instead of entrusting an insurance company with the management of the contributions is protected by freedom of contract.

285. Again, the plaintiffs' arguments are therefore essentially directed against the effects of compulsory affiliation. It is only compulsory affiliation which limits the freedom of employers to conclude group insurance agreements with insurance companies. Its secondary effect is that insurance companies do not have access to the potential market for supplementary pension insurance. As already mentioned, the compatibility with Community law of the Netherlands Government's intervention is a different issue, with which I will deal below.

286. Accordingly, the original implied agreement between employers to set up a common sectoral pension fund which they manage jointly with the representatives of employees is not caught by Article 85(1). If there are any restrictive effects, they are caused by the intervention of the Netherlands Government.

2. *The agreement to apply jointly with the trade unions to the competent Minister to make affiliation compulsory for all undertakings belonging to the sector*

287. At issue is the joint application to the Minister to make affiliation compulsory for all undertakings belonging to the sector.

288. As regards employers, the agreement can be analysed as a coordinated approach seeking government intervention in order to create equal conditions of competition among all employers in the sector.

289. First, such action has to be distinguished from direct action against competing outside undertakings in order to force them to join or to comply with a given agreement. Commonly used methods in such instances are for example boycotts and reciprocal exclusive dealing agreements with purchasers or suppliers. In those circumstances the infringing under-

takings have often claimed that they were engaged in the prevention of unfair competition, dumping, or more generally, acting in pursuit of the public interest. The Court and the Commission have consistently held that it is for the public authorities or the courts and not for private undertakings to protect the interests of the public in matters such as product safety or the prevention of unfair competition. [121]

290. Secondly, it has just been shown that the original agreement by certain employers and representatives of employees to set up a single pension fund is not contrary to Article 85(1). Therefore, the joint application in question can be distinguished from an application by undertakings to extend the effects of a prohibited agreement to other undertakings belonging to the sector.

291. However, in my view, that last point is not decisive for the assessment of the legality of the behaviour in question. Mere efforts on the part of undertakings to convince public authorities to extend the effects of a certain agreement to other economic actors are not caught by Article 85(1). [122]

292. First, such action by itself does not affect the competitive process or the freedom to compete of anyone. Any restriction is a consequence of subsequent State action.

293. Secondly, coordinated application to the State authorities is part of our democratic societies. Natural or legal persons are entitled to organise themselves and to submit jointly their requests to the government or the legislature. The public authorities then have to decide whether the proposed action is in the public interest. They have sole power, but also sole responsibility for their decision.

294. Accordingly, joint application to make affiliation compulsory is not caught by Article 85(1) either.

295. As neither agreement restricts competition, there is no need to examine

121 — Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 37 of the judgment; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 115 to 119; and *Cement*, OJ 1994 L 343, p. 112, point 8.

122 — *Cement*, cited in note 121.

their effects on trade between Member States.

296. I conclude that Article 85(1) is not applicable *ratione materiae* to collective agreements between the two sides of industry whereby employers agree to make for each employee belonging to a given sector a pension contribution of a specified amount since such agreements are collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties. Nor is Article 85(1) in the present cases applicable *ratione personae* to employees or trade unions since in the context of collective bargaining neither is acting as an undertaking within the meaning of the competition rules. As regards the two implied agreements between employers to set up a single sectoral pension scheme managed jointly by management and labour and to apply jointly with the trade unions to the competent Minister seeking compulsory affiliation, Article 85(1), albeit in principle applicable, is not infringed since neither agreement restricts competition.

297. Accordingly Article 85(1) is not infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single sectoral pension fund and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector.

## VII — Articles 5 and 85

298. The issue is whether a Member State infringes Articles 5 and 85 of the Treaty where, at the request of the representatives of employers and employees, it makes participation in a sectoral pension scheme compulsory for all undertakings belonging to that sector.

299. Albany, Brentjens and Drijvende Bokken contend that, in first creating the legislative framework for compulsory affiliation and in then making affiliation to each of the three funds compulsory, the Netherlands has on the one hand encouraged and on the other hand reinforced the effects of an agreement which is contrary to Article 85. In their view, that amounts to an infringement of Articles 5 and 85 as interpreted by the Court in *Meng*[123] and *Ohra*.[124]

123 — Case C-2/91 *Meng* [1993] ECR I-5751.
124 — Case C-245/91 *Ohra* [1993] ECR I-5851.

300. The Funds, the Netherlands, French and Swedish Governments, and the Commission maintain that in the present cases there is no agreement contrary to Article 85(1) which could be encouraged or the effects of which could be reinforced within the meaning of the case-law of the Court. Moreover, according to the Funds, the Netherlands has not delegated, within the meaning of the case-law of the Court, responsibility for taking decisions in the economic sphere to private economic operators.

301. The Court's case-law has established the following principles. [125] Article 85, read in isolation, relates only to the conduct of undertakings. Thus, it does not in principle cover legislative or regulatory measures adopted by Member States. However, Article 85, read in conjunction with Article 5(2), requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. Such is the case in three situations: where a Member State, first, requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85, secondly, reinforces their effects or, thirdly, deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere.

302. As regards the first two situations, the Court requires, for the State measures to be illegal, a link with anticompetitive conduct on the part of undertakings. [126] Thus, State measures requiring or favouring a certain agreement between undertakings or reinforcing its effects are not caught by Articles 5 and 85 where that agreement does not infringe Article 85(1). [127] In the present cases, as already seen, the agreements in question do not restrict competition and are therefore not caught by Article 85(1).

303. With respect to the third issue, namely whether the public authorities have delegated their powers to private economic agents, it follows from the Netherlands legislation that the competent Minister has sole responsibility for the decision to make affiliation to a given fund compulsory. According to Article 3(1) of the BPW, management and labour merely apply to the Minister. The Verzekeringskamer and the Sociaal Economische Raad, which are in any event public bodies, have merely the right to be consulted. In that context, it must also be borne in mind that the competent Minister has the power to end compulsory affiliation (Article 3(4) of the BPW) and must take a new decision

125 — Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 16 of the judgment; Case C-2/91 *Meng*, cited in note 123, paragraph 14; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-245/91 *Ohra*, cited in note 124, paragraph 10; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraphs 20 and 21; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257, paragraphs 14 and 15; Case C-70/95 *Sodemare*, cited in note 57, paragraphs 41 and 42; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraphs 35, 36 and 49; and Case C-35/95 *Commission* v *Italy*, cited in note 102, paragraphs 53 and 54.

126 — See the ruling in Case C-2/91 *Meng*, cited in note 123 and Case C-245/91 *Ohra*, cited in note 124.

127 — See, for a recent example, Case C-266/96 *Corsica Ferries France*, cited in note 125, paragraph 51 of the judgment.

making affiliation compulsory whenever the rules governing the pension scheme are modified (Article 3(5) of the BPW). Thus, the power to take decisions on compulsory affiliation is retained by the competent Minister and not left to an agreement between management and labour.

304. It will become apparent below that the delegation of decision-making powers to the Funds with regard to individual exemptions from compulsory affiliation is a different issue, to be analysed within the framework of the *lex specialis* [128] of Article 90(1).

305. Accordingly, if the Court's case-law on Article 5 is to stand, there is no infringement of Articles 5 and 85 of the Treaty.

**VIII — Classification as undertakings of the Netherlands sectoral pension funds**

306. At issue is whether the Netherlands sectoral pension funds are 'undertakings' within the meaning of the competition provisions of the Treaty. More specifically, it must be established whether the activity of the sectoral pension funds under scrutiny, namely the provision of supplementary pensions to employees, is of an economic nature. [129]

307. The essential features of the funds under scrutiny are the following:

— They provide supplementary old-age pensions.

— They were originally set up by collective agreement between management and labour and cover an entire sector of industry.

— Affiliation has been made compulsory by ministerial decree, subject to possible exemption in certain cases.

— They are funded schemes, operating according to the capitalisation method.

128 — Case C-323/93 *Centre d'insémination de la Crespelle* v *Coopérative de la Mayenne* [1994] ECR I-5077, paragraph 15 of the judgment.

129 — See paragraph 207 above.

— The level of contributions and benefits is fixed by the management board of the fund.

— The pension benefits depend on the reserves made with the contributions, on the financial results of the investments of the funds and on the costs of management.

— The schemes have a social objective.

— There are the following elements of sector-wide solidarity. The funds have an effective obligation to accept every employer and employee belonging to the sector. There is no selection of risks through questionnaires or medical examinations. There is furthermore no link between the risk and the contributions. All those affiliated pay an average contribution which does not take into account for example the age of employees. Contributions for employees of small and medium-sized enterprises are identical to those for employees of big undertakings. In case of incapacity to work, exemptions from the obligation to pay contributions are granted.

— The representatives of employers and employees have to sit in equal numbers on the management board of the fund.

— Management is under an obligation to maintain financial equilibrium.

— The funds have to be invested *op solide wijze* (in a prudent way).

— Like private insurance companies the management is controlled by the Verzekeringskamer.

— The fund is non-profit-making.

308. Albany, Brentjens and Drijvende Bokken contend that the pension funds under examination are undertakings. The Commission also shares that view.

309. The Funds and the Netherlands, French, German, and Swedish Govern-

ments all agree that the pension funds are not to be classified as undertakings.

310. Before turning to the more specific cases — *Poucet*, [130] *Van Schijndel*, [131] and *FFSA* [132] — it is helpful to recall some general principles concerning the classification of an entity's activities in Community competition law.

311. As already stated, the Court has generally adopted a functional approach. [133] The basic test is therefore whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits.

312. It follows from that functional interpretation that some recurrent arguments have been rejected by the Court as irrelevant. First, neither the legal status of the entity nor the way in which it is financed is significant. [134] Thus, for example, public authorities like the German *Bundesanstalt für Arbeit* [135] or the Italian *Amministrazione Autonoma dei Monopoli di Stato* [136] have been held to be engaged in activities of an economic nature with regard to employment procurement or the offering of goods and services on the market for manufactured tobacco. By contrast, the competition rules have been held to be inapplicable to a private company engaged in antipollution surveillance with which it had been entrusted by a Member State. [137] Secondly, the non-profit-making character of an entity [138] or the fact that it pursues non-economic objectives [139] is in principle immaterial. Thirdly, the fact that certain entities have been entrusted by the State with certain tasks in the public interest does not mean that those entities are not undertakings, since Article 90(1) and (2) would in that case be meaningless. Therefore the competition rules apply to the activities of, for example, public telecommunication [140] and postal service providers, [141] public television broadcasters [142] or dock-work companies and undertakings. [143] Finally, the mere fact that certain activities are normally entrusted to public agencies does

130 — Joined Cases C-159/91 and C-161/91 *Poucet and Pistre*, cited in note 55.

131 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF*, cited in note 2.

132 — Cited in note 56.

133 — See above in paragraph 214.

134 — Case C-41/90 *Höfner*, cited in note 53, paragraph 21 of the judgment; and Case C-55/96 *Job Centre*, cited in note 54, paragraph 21.

135 — Case C-41/90 *Höfner*, cited in note 53.

136 — Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 6 to 16 of the judgment; and Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 50.

137 — Case C-343/95 *Cali e Figli*, cited in note 97.

138 — Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, cited in note 105, paragraph 88 of the judgment; Opinion of Advocate General Lenz in Case C-415/93 *Bosman*, cited in note 21, paragraph 255.

139 — Case 155/73 *Sacchi* [1974] ECR 409, paragraphs 13 and 14 of the judgment.

140 — Case 41/83 *Italy v Commission* [1985] ECR 873, paragraphs 18 and 19 of the judgment.

141 — Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 8 of the judgment.

142 — Case C-260/89 *ERT*, cited in note 64, paragraph 33 of the judgment; Case C-311/84 *CBEM v CLT and IPB* [1985] ECR 3261, paragraph 17.

143 — Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 9 of the judgment.

not suffice to shelter those activities from the competition rules. [144]

313. In some cases the Court has adopted an approach which goes beyond that functional interpretation. In *IAZ*, for example, the Court held that 'Article 85(1) of the Treaty applies also to associations of undertakings in so far as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress'. [145] The Court of First Instance has held to similar effect that 'Article 85(1) of the EC Treaty is aimed at economic units made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to in that provision'. [146]

314. By contrast, an entity's activities may be sheltered from the applicability of the competition rules in two situations. First, the competition rules are not applicable to 'activities in the exercise of official authority' [147] or emanations of the State acting 'in their capacity as public authorities'. [148] In that context it is immaterial whether the State exercises its official authority directly through a body forming part of the State administration or by way of a private body on which it has conferred special or exclusive rights. [149] An entity acts in the exercise of official authority where the activity in question is 'a task in the public interest which forms part of the essential functions of the State' and where that activity 'is connected by its nature, its aim and the rules to which it is subject with the exercise of powers... which are typically those of a public authority'. [150] Secondly, it seems to follow from paragraph 22 of the judgment in *Höfner* that the competition rules do not apply if the activity in question has always been and is necessarily carried out by public entities. [151]

315. I turn now to the three cases in which the classification of bodies similar to the ones in the present proceedings was at issue.

316. In *Poucet* [152] the Court held that certain French bodies administering the sickness and maternity insurance scheme for self-employed persons engaged in non-agricultural occupations and the basic pension scheme for skilled trades were not to be classified as undertakings for the purpose of competition law.

144 — Case C-41/90 *Höfner and Elser*, cited in note 53, paragraph 22 of the judgment.

145 — Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 20 of the judgment; Case 71/74 *Frubo* v *Commission*, cited in note 110, paragraphs 30 and 31.

146 — Case T-6/89 *Enichem* [1991] ECR II-1623, paragraph 235 of the judgment.

147 — Case 118/85 *Commission* v *Italy*, cited in note 136, paragraphs 7 and 8 of the judgment; and Case C-343/95 *Cali e Figli*, cited in note 97, paragraphs 16 and 17 of the judgment.

148 — Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 18 of the judgment.

149 — Case 118/85 *Commission* v *Italy*, cited in note 136, paragraphs 7 and 8 of the judgment; and Case C-343/95 *Cali e Figli*, cited in note 97, paragraphs 16 and 17.

150 — Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol*, cited in note 93, paragraph 30 of the judgment; Case C-343/95 *Cali e Figli*, cited in note 97, paragraphs 22 and 23.

151 — Case C-41/90 *Höfner and Elser*, cited in note 53.

152 — Joined Cases C-159/91 and C-161/91 *Poucet and Pistre*, cited in note 55.

317. The schemes had the following characteristics:

— The old-age pension scheme provided the basic pension.

— The schemes were set up by law.

— Affiliation to the schemes was compulsory.

— The pension scheme was a non-funded scheme: it operated on a redistributive basis with active members' contributions being directly used to finance the pensions of retired members.

— The schemes had a social objective in that they were intended to provide cover for the beneficiaries against the risks of sickness or old age regardless of their financial status and state of health at the time of affiliation.

— The principle of solidarity was embodied in the old-age insurance scheme in that the contributions paid by active workers served to finance the pensions of retired workers. It was also reflected by the grant of pension rights where no contributions had been made and of pension rights that were not proportional to the contributions paid. Finally, there was solidarity between the various social security schemes, with those in surplus contributing to the financing of those with structural difficulties.

318. Concluding on the nature of the schemes, the Court held:

'It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for the application of the principle of solidarity and the financial equilibrium of those schemes.'

319. The bodies managing those schemes had the following features:

— Management was entrusted to them by statute.

— The funds' activities were subject to control by the State.

— The funds applied the law and could not influence the amount of the contributions, the use of the assets or the fixing of the level of benefits.

320. Concluding on the nature of the funds' activities, the Court held:

'... [O]rganisations involved in the management of the public social security system fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contribution.

Accordingly, that activity is not an economic activity...'

321. In my Opinion in *Van Schijndel*[153] I concluded that the Netherlands physiotherapists' occupational pension fund which had similar features to the ones under scrutiny in the present proceedings did not, in its relations with its members, act as an undertaking. However, owing to a lack of information on the factual and legal background I confined myself to giving a provisional view.

322. The characteristics of the scheme and the fund were the following:

— The scheme provided supplementary pensions.

— The scheme was set up by the physiotherapists' profession.

— Compulsory membership was provided for by a ministerial decree issued under a Netherlands pension law.

— The scheme was funded, i.e. pensions were financed from reserves rather than from current contributions. It was not financed from the State budget.

— The physiotherapists' scheme performed a social function. The law under which membership had been

153 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *Stichting Pensioenfonds voor Fysiotherapeuten*, cited in note 2, paragraphs 53 to 65 of the Opinion.

made compulsory aimed to ensure that retirement income reflected rising general levels of income, that younger colleagues contributed to the higher cost of providing pensions for older colleagues and that provision was made for pension rights in respect of years prior to the entry into force of the schemes.

— The scheme entailed elements of solidarity between members. In principle a standard contribution was levied and a standard pension was paid. That was so regardless of the age at which an individual member entered the profession and regardless of his state of health on joining. Insurance cover continued without payment of contributions in the case of incapacity to work.

— The fund administering the scheme was non-profit-making.

— The board of directors was made up exclusively of members of the fund.

— Directors received only expenses and not remuneration.

323. In my Opinion, I applied the argument of the Court in *Poucet* and stated — on a provisional basis, as already mentioned — that the fund more closely resembled a social security institution than a commercial insurer. The fund in its relations with its members did not act as an undertaking but as a social institution which the members of the profession had entrusted with responsibility for making their pension arrangements. The Court did not deal with the question whether the fund was an undertaking for the purposes of Article 85(1).

324. Subsequently in *FFSA* [154] the Court considerably clarified and refined its case-law on the applicability of the competition rules to pension schemes and the institutions which manage them.

325. The French supplementary retirement scheme for self-employed farmers at issue had the following characteristics:

— The scheme provided supplementary pensions.

— It was set up and regulated by statute.

154 — Case C-244/94 *Fédération Française des Sociétés d'Assurances*, cited in note 56.

— Membership was optional.

— The scheme was a funded scheme, operating according to the capitalisation method rather than on a redistributive basis.

— Contributions were directly related to income.

— The benefits to which it conferred entitlement depended solely on the amount of the contributions paid and on the financial results of the investments made by the managing organisation. Benefits and contributions were determined not by law but by the board of the managing fund.

— The scheme pursued a social purpose. It was created by the Government in order to protect a population whose income was lower and whose average age was higher than those of other socioeconomic categories and whose basic old-age insurance was not sufficient.

— There were elements of solidarity. Contributions were not linked to the risks incurred. In that context no prior questionnaire or medical examination was required and no selection took place. Members unable to pay contributions because of illness could be exempted from payment. Payment of contributions could be temporarily suspended for reasons connected with the economic situation of the member. In the event of the premature death of a member an amount corresponding to the contributions paid was made available to the scheme rather than to his successors.

— The managing institution was a non-profit-making body administered by volunteers.

— Management was controlled by the State.

— The collected funds could be used only for certain investments authorised by the Government.

326. The essential elements of the Court's ruling are the following:

'The first point to note is that membership of the Coreva scheme is optional, that the scheme operates in accordance with the principle of capitalisation, and that the

benefits to which it confers entitlement depend solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organisation. The [managing body] therefore carries on an economic activity in competition with life assurance companies.

...

The elements of solidarity forming part of the scheme... and the other characteristics... cannot alter that conclusion.

First,... the principle of solidarity is extremely limited in scope, which follows from the optional nature of the scheme. In those circumstances, it cannot deprive the activity carried on by the body managing the scheme of its economic nature.

Secondly, whilst the pursuit of a social purpose, the requirements of solidarity and the other rules... — in particular, the rights and obligations of the managing body and the persons insured, the rules of that body and the restrictions to which it is subject in making its investments — may make the service provided by the Coreva scheme less competitive than the comparable service provided by life insurance companies, such limitations do not prevent the activity carried on by the [managing body] from being regarded as an economic activity. A separate question, still to be examined, would be whether those limitations could be relied upon, for example, in order to justify the exclusive right of that body to provide old-age insurance in respect of which contributions are deductible from taxable earnings.

Finally, the mere fact that the [managing organisation] is a non-profit-making body does not deprive the activity which it carries on of its economic character since... that activity may give rise to conduct which the competition rules are intended to penalise.

The answer to the national court's question must therefore be that a non-profit-making organisation which manages 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 in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits, is an undertaking within the meaning of Article 85 et seq. of the Treaty.'

327. Before discussing the different features of the funds under scrutiny in the present proceedings, it may be helpful to

draw some general conclusions from that case-law.

328. First, as already stated in my Opinion in *Van Schijndel*, pension schemes take a variety of forms ranging from State social security schemes at one end of the spectrum to private individual schemes operated by commercial insurers at the other. The task of classifying intermediate categories of schemes is difficult: it is a question of degree which requires analysis of a series of criteria.

329. Secondly, the Court in its judgment in *FFSA* has considerably refined and clarified its analysis of the question. I am accordingly in a position to re-consider the provisional view which I expressed in *Van Schijndel*.

330. Thirdly, it is clear from the general case-law on the concept of undertaking — particularly the judgment in *Höfner* and paragraph 20 of the judgment in *FFSA* — that the decisive factor is whether a certain activity is *necessarily carried out by public entities or their agents*. Contrary to the contentions of the Funds, that issue is to be distinguished from the separate question whether and to what extent the grant of certain exclusive rights is necessary for the fulfilment of tasks in the public interest. The latter question is only relevant for the purposes of Article 90(2) of the Treaty. It follows from Article 90 that the fact that the grant of exclusive rights is necessary does not of itself deprive an entity's activities of their economic nature.

331. Fourthly, whether the entity is in a position to adopt a certain line of conduct which the competition rules try to prevent is also relevant according to the case-law and in particular paragraph 21 of the judgment in FFSA.

332. In the light of the foregoing I will now discuss which of the features of the Netherlands funds under scrutiny are relevant to the question whether their activity is of an economic nature.

333. I consider that the following characteristics are not relevant.

334. First, the way in which the scheme or the managing organisation was set up and the legal status of the scheme are immaterial for the classification of a fund's activities. In *FFSA* the Court held that the activities of the French *Caisse Centrale de*

*la Mutualité Sociale Agricole* managing a scheme set up by law were of an economic nature. In neither *Poucet* nor *FFSA* was the legal status of the different *Caisses* mentioned. The fact that the Court did not consider it to be relevant to its analysis is fully consistent with the general case-law. [155] The fact that in the present cases the supplementary pension schemes were set up by collective agreement and are managed jointly by representatives of management and labour in the legal form of a *Stichting* accordingly has no bearing on the classification of their activities.

335. Secondly, the rules governing the composition of the managing body, the restrictions to which it is subject in making investments and the way in which it is controlled by the public authorities are, on the basis of paragraph 20 of the judgment in *FFSA*, also immaterial. In *Poucet* the Court still mentioned control by the State as relevant. [156] However, in *FFSA* that feature is not mentioned despite the fact that the French Government had raised the issue. [157] Accordingly, it is not relevant in the present cases that representatives of employers and employees sit in equal numbers on the management board of the fund, that management is under an obligation to maintain financial equilibrium and to invest in a prudent way and that management is controlled by the Verzekeringskamer. On the contrary, I agree with Albany, Drijvende Bokken and Brentjens that the identity of the control mechanism for insurance companies and pension funds is a sign that their activities are similar.

336. Thirdly, the funds' pursuit of a social objective and their non-profit-making character are not relevant either. In *Poucet* the Court seems to have attached some importance to those two features. [158] However, in summarising *Poucet* in paragraph 15 of its judgment in *FFSA* the Court did not mention them. Consistently with its general approach of not taking into account the objective pursued or the non-profit-making character, [159] it held at paragraphs 20 and 21 of its judgment in *FFSA* that those two characteristics could not influence its assessment.

337. By contrast, the following features are relevant for the purposes of the analysis.

338. First, in the light of the *FFSA* judgment (paragraph 16) and contrary to what I stated on a provisional basis in *Van Schijndel*, the way the pension scheme operates is an important factor. I consider that a non-funded pension scheme operating according to the redistribution method where

155 — See paragraph 312 above and notes 134 to 137.

156 — Paragraph 14 read in conjunction with paragraph 16 of the judgment.

157 — Paragraph 11 of the judgment.

158 — Paragraph 18 of the judgment.

159 — See paragraph 312 above and notes 138 and 139.

current contributions finance the pensions of the currently retired is necessarily operated directly by the State or indirectly through bodies acting as or in a similar way as agents of the State. I cannot see any — even theoretical — possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle. Nobody would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same. That is precisely why it was historically necessary to introduce such systems, managed or at least protected by the State. I consequently have some difficulty with the view that the activities of such a scheme could be of an economic nature. By contrast, it is clear that the market has generated pension schemes operating on the basis of the capitalisation principle. The fact that the activities of such schemes, like those of many other insurance activities, are regulated by the legislator for the benefit of consumers and investors does not deprive those activities of their economic character. Restrictions on their activities may fall to be assessed under Article 90 of the Treaty. It is accordingly significant that in the present cases the sectoral pension funds operate on a funded basis.

339. Secondly, the decision-making mechanisms and the financial factors which influence the level of contributions and benefits are also relevant.

340. On the one hand, schemes in which the levels of benefits and contributions are fixed by the legislator are to be distinguished from schemes in which those levels are fixed by independent decision of the fund's management board. In that context, the principle underlying paragraph 21 of the judgment in *FFSA* and certain other judgments of the Court, [160] which are discussed above, is relevant: independent entities which are in a position to generate effects which the competition rules seek to prevent should be subject to those rules.

341. In that respect the German Government and the Commission argue that, since the legal effects of collective agreements between management and labour are similar to those of legislation, the situation in the present proceedings is comparable to that in *Poucet* where contributions and benefits were fixed by law. In my view, however, it is not necessary to take a position on the issue to what extent collective agreements and legislation have similar legal effects. In the present proceedings the decisions on contributions and benefits are not taken by both sides of industry within the formal framework of collective bargaining but by majority decisions within the management board of the fund. More-

160 — See paragraph 313 above and notes 145 and 146.

over, it appears that the management board's principal objective is to further the interests of all participants in the fund, and those interests may differ from the interests of the trade unions and associations of employers which nominate the members of the board.

342. On the other hand, schemes where the State guarantees a certain level of contributions or benefits are different from those where the State does not intervene. That feature was important for the Court's judgment in *Poucet* where there was solidarity between the various social security institutions,[161] with those in surplus contributing to the financing of those with financial difficulties. That feature was again mentioned in the summary of that judgment in *FFSA*.[162] By contrast, in the present cases — as in *FFSA* — the level of benefits depends solely on the amount of contributions, the financial results of the investments made by the managing body and the costs generated by that body.

343. Thirdly, the elements of solidarity forming part of the scheme are relevant. That is clear from the judgment in *Poucet*[163] and from its summary in *FFSA*.[164] However, the Court considered in *FFSA* that in the case at issue the elements of solidarity inherent in the scheme were extremely limited and could not deprive the activity of the scheme of its economic nature.[165] In the present cases the elements of sector-wide solidarity are neither more nor stronger than in *FFSA*, where there was no link between contributions and risk and no selection of risks through questionnaires or medical examinations. The fund had an obligation to accept every employer and employee belonging to the sector.[166] In case of illness exemptions from the obligation to pay contributions were granted.[167] The only difference appears to be that some of the Netherlands funds require the payment of average contributions whereas the contributions in *FFSA* were related to income. However, since it seems that the Netherlands funds also provide average pensions which are not related to salary, the difference is not relevant. Accordingly, in the present cases, too, the elements of solidarity are not strong enough to deprive the funds' activities of their economic nature.

344. All the relevant characteristics of the Netherlands supplementary pension funds so far considered suggest that their activities are of an economic nature. However, the question arises whether that conclusion is affected by the fact that affiliation to the vast majority of those funds is made compulsory by the Netherlands Govern-

161 — Paragraph 12 of the judgment.
162 — Paragraph 15 of the judgment.
163 — Paragraphs 10 and 18.
164 — Paragraph 15.
165 — Paragraph 19 of the judgment.
166 — Paragraph 9 of the judgment.
167 — Paragraph 10 of the judgment.

ment on the basis of a special legislative framework. It must be borne in mind that in *FFSA* membership was optional.

345. In *Poucet* the Court stated that a system of compulsory contribution was indispensable for application of the principle of solidarity and the financial equilibrium of the schemes at issue. [168] In its summary of *Poucet* contained in *FFSA* the Court reiterated that point and held that the elements of solidarity forming part of the schemes at issue necessarily required the various schemes to be managed by a single body and membership of those schemes to be compulsory. [169] Thus, compulsory membership was analysed as a necessary consequence of the presence of strong elements of solidarity. However, it is not clear whether it was a pre-condition of the conclusion as to the non-economic nature of the fund's activities.

346. In *FFSA* the Court relied on optional membership in concluding that the scheme's activities were of an economic nature. [170] I agree with that point. Optional membership is a particularly strong signal that the activities in question are comparable to those of a private insurer and that they should be scrutinised by competition authorities.

347. However, the case-law illustrates that the Court has not yet decided the present issue, namely whether any conclusions should be drawn from the fact that affiliation to a given scheme is compulsory. In my view, no such conclusions should be drawn. To do so would, first, allow the Member States to withdraw a certain entity's activities from the scope of the competition rules merely by making affiliation to the scheme compulsory. Secondly, compulsory affiliation is to be analysed as the granting of exclusive rights. It follows from Article 90(1) of the Treaty that undertakings enjoying such exclusive rights remain undertakings and are subject to the competition rules.

348. Accordingly, I conclude that the Netherlands supplementary pension funds' activities are of an economic nature and that they are therefore undertakings for the purposes of Community competition law.

## IX — Articles 90 and 86

349. The next question is whether a Member State infringes Articles 90(1) and 86 of the Treaty, read together, where it sets up a

168 — Paragraph 13 of the judgment.
169 — Paragraph 15.
170 — Paragraphs 17 and 22 of the judgment.

system of compulsory affiliation to sectoral pension funds such as that in the Netherlands and where in the framework of that system it makes affiliation to sectoral pension funds compulsory.

350. It is helpful at this point to recall the main features of the Netherlands system.

351. A first set of rules (rules on sector-wide compulsory affiliation) determines the conditions under which the Government can make affiliation to a certain fund compulsory as regards all undertakings belonging to a given sector. Management and labour representing a sector of industry apply jointly to the Minister with a view to making affiliation to a sectoral pension fund compulsory. The Minister then examines whether the regulations governing the fund's activities fulfil all the legal requirements. Before taking a decision he consults different bodies including the Insurance Board. He then adopts a decree making affiliation compulsory for all undertakings and employees belonging to the sector. In the event of a change in the rules governing the scheme the Minister must adopt a new decree.

352. There is then a second set of rules (rules on individual exemptions) on the circumstances in which individual undertakings or employees may be exempted from compulsory affiliation, where they have or wish to have special alternative pension arrangements.

353. In order to be exempted the alternative scheme must fulfil several conditions. Most importantly the alternative scheme must grant pension benefits which are at least equivalent to those granted by the sectoral fund.

354. The sectoral pension fund itself decides on any request to grant exemption. The fund must grant an exemption where the alternative pension arrangements were in force six months before the submission of the request as a result of which participation in the pension fund was made compulsory ('the six month exemption ground'). In all other cases the fund enjoys discretion.

355. There is provision for a complaint ('bezwaar') against a pension fund's refusal to exempt. The complaint is heard by the Insurance Board. According to the Netherlands Government, the Insurance Board's decision on the complaint is however merely a proposal for conciliation and has no legal authority. There is no appeal against the Board's decision.

356. It appears from the orders for reference, particularly the Kantongerecht's order in *Albany*, that the civil courts are in principle competent to review the legality of the funds' decisions. That may be a direct or indirect consequence of the fact that the funds are legal persons organised in the form of a private *Stichting* (foundation).

357. The extent of the civil courts' powers to review the funds' discretionary decisions on exemptions is, however, not entirely clear. The referring Kantongerecht in Brentjens stated:

'It is not for this court to rule on the circumstance that the Pension Scheme has seen no cause to make use of its discretionary power to grant Brentjens an exemption, since that power stems from the Pension Scheme's own management policy.'

358. However, other statements of the referring courts and a formula used in *Albany* seem to imply that there is a limited power to review:

'The relations between the Pension Scheme and its participants are also governed by requirements of reasonableness and fairness and/or by general principles of sound administration.'

359. It appears also from the above formula that the Netherlands courts have some doubts as to which principles govern the question. That again may be a consequence of the hybrid nature of the pension funds' decision.

360. According to the Netherlands Government a modified version of the exemption guidelines has been in force since 26 April 1998. First, whereas previously the only obligatory ground was the six-month exemption ground, three new obligatory exemption grounds have been added. Now an exemption must also be granted where

— the employing undertaking forms part or will form part of a group of undertakings which does not fall within the scope of application of the sectoral pension fund in question;

— the employing undertaking has its own collective agreement with its employees and is therefore exempt from compul-

sory participation in a general collective agreement; or

— the performance of a sectoral pension fund with respect to the profitability of its investments is significantly inferior over a period of several years to the results of a standard portfolio previously established by the pension fund. Accounting principles are laid down in order to measure that performance.

361. Secondly, new rules as regards the equivalence of the alternative scheme and the calculation of the aforesaid compensation for actuarial loss [171] have been introduced.

362. Thirdly, the possibility of a complaint to the Insurance Board has been abolished.

363. However, since the main proceedings are governed by the previous version of the exemption guidelines, the modified version is not directly relevant for the present proceedings.

171 — See paragraph 15 above.

364. Finally, it should be recalled that as a matter of fact affiliation to 15 sectoral pension funds has not been made compulsory.

365. I turn now to the analysis of Article 90(1) read together with Article 86.

366. Article 90(1) provides:

'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.'

367. Article 86 provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the com-

mon market in so far as it may affect trade between Member States....'

368. Albany, Brentjens and Drijvende Bokken maintain that the Netherlands system of compulsory sectoral pension funds infringes those rules in two respects. First, they maintain that the system is such that the pension services offered by the funds do not satisfy, or no longer satisfy, the needs of the undertakings. In that respect they refer to the Court's judgment in *Höfner*. [172] Secondly, in their view it follows from the judgment in *GB-INNO-BM* [173] that the funds should not be allowed to decide themselves on individual exemptions from compulsory affiliation.

369. The Funds, the Netherlands and French Governments and the Commission all agree — albeit for different reasons — that Articles 90(1) and 86 are not infringed or that in any event the Netherlands system is justified under Article 90(2).

370. I should make two introductory remarks on Articles 90(1) and 86.

371. First, it is important to consider the place of Articles 90(1) and 86 in the system of the Treaty. As already mentioned, [174] Articles 85 and 86 are addressed to undertakings, not to Member States. However, there is a general principle — flowing from Article 5(2) — that Member States may not adopt or maintain in force any measures, even of a regulatory nature, which could deprive the competition rules of their effectiveness. [175] The case-law on Articles 5 and 85 applying that general principle to State intervention in the context of agreements between undertakings has been examined above. [176] Article 90(1) is another — statutory — application of that general principle. [177] Where Article 90(1) is applicable *ratione personae* it is *lex specialis* with respect to Article 5(2). [178]

372. Secondly, it is necessary to bear in mind that the applicability or even an infringement of Article 90(1) has no automatic consequences as to the applicability of Articles 85 and 86 to the undertakings involved. Undertakings enjoying exclusive rights remain subject to the competition rules. [179] The only exception to that rule is where the actual conduct under scrutiny is

172 — Case C-41/90, cited in note 53.

173 — Case C-18/88 [1991] ECR I-5941.

174 — See paragraph 301 above.

175 — Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, paragraphs 30 and 31 of the judgment; Case 66/86 *Ahmed Saeed Flugreisen* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs*, cited in note 48, paragraph 48; and Case C-260/89 *ERT*, cited in note 64, paragraph 35.

176 — See paragraphs 298 to 305 above.

177 — Case 13/77 *Inno* v *ATAB*, cited in note 175, paragraphs 32 and 42 of the judgment; and Case 66/86 *Ahmed Saeed Flugreisen* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs*, cited in note 48, paragraph 50.

178 — Case C-323/93 *Centre d'insémination de la Crespelle* v *Coopérative de la Mayenne*, cited in note 128, paragraph 15 of the judgment.

179 — Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraphs 43 and 44 of the judgment; Case 311/84 *CBEM* v *CLT and IPB*, cited in note 142, paragraphs 16 and 17; and Case C-323/93 *Centre d'insémination de la Crespelle* v *Coopérative de la Mayenne*, cited in note 128, paragraphs 24 to 27.

not attributable to the undertaking, namely where anticompetitive conduct is required by national legislation or where that legislation creates a legal framework which itself eliminates any possibility of competitive activity. [180] Accordingly, and independently of the Court's answers to the questions on Article 90(1), the individual funds will remain in principle subject to the competition rules.

373. In order to answer the national courts' questions it must be established, first, whether the funds are undertakings to which the Netherlands have granted special or exclusive rights, secondly, whether the funds hold a dominant position within a substantial part of the common market, and thirdly, whether the Netherlands has — within the meaning of Article 90(1) — 'enacted or maintained in force a measure contrary to the rules of the Treaty', in particular contrary to Article 86, which cannot be justified under Article 90(2).

A — *Applicability of Article 90(1): undertakings enjoying special or exclusive rights*

374. According to the Netherlands Government, the Minister's decree making affiliation compulsory merely creates obligations on the parts of the undertakings concerned but does not grant exclusive rights with regard to pension insurance or even supplementary pensions.

375. In my view that argument is misconceived since the contributions reserved by employers and employees for supplementary pensions are bound to be administered by the funds. Therefore, the funds enjoy an exclusive right to collect and administer the contributions. The funds' exclusive right in that respect is merely the other side of the coin of the sector-wide obligation to affiliate employees to a certain supplementary pension fund.

376. Furthermore, it could also be argued that under the Netherlands rules on individual exemption the funds enjoy a second exclusive right, namely the right to decide on a discretionary basis on applications for individual exemptions from compulsory affiliation.

377. Accordingly, the funds are the kind of undertakings to which Article 90(1) applies.

180 — Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke* [1997] ECR I-6265, paragraphs 32 to 37 of the judgment.

B — *Applicability of Article 86: dominant position within a substantial part of the common market*

378. According to Albany, Brentjens and Drijvende Bokken, each fund holds a dominant position on the market for supplementary pension insurance services in its particular sector of industry.

379. The Funds assert that they are relatively small actors on the market for pension insurance where many other undertakings are active. In their view, the arguments of the applicants are based on an extremely narrow definition of the relevant market.

380. Initially in its written observations the Commission contested the existence of dominance, mainly on the basis of the arguments used by the Funds. At the hearing however the Commission adopted the opposite position and in that respect joined the French Government. It argued that where affiliation was compulsory there was no alternative choice either on the supply or on the demand side of the market.

381. I can be brief on that point. The Court has consistently held that an undertaking with a statutory monopoly on the provision of certain services in a substantial part of the common market may be regarded as being in a dominant position within the meaning of Article 86 of the Treaty. [181] Thus, the fact that the position of the pension fund is a result of government intervention is not relevant. [182]

382. Where affiliation is compulsory, other forms of private pension insurance are not a valid substitute for a sectoral supplementary pension. For the purposes of supplementary pensions, employers and employees simply do not have the possibility of affiliating themselves elsewhere. Therefore, the fact that each fund operates just one pension scheme and that there are many other, more important schemes, is similarly not relevant. [183]

383. Finally, each pension fund covers the Netherlands' whole territory and therefore a substantial part of the common market. Each of the funds accordingly holds a dominant position with regard to the

181 — Case 311/84 *CBEM* v *CLT and IPB*, cited in note 142, paragraph 16 of the judgment; Case C-41/90 *Höfner and Elser*, cited in note 53, paragraph 28; Case C-260/89 *ERT*, cited in note 64, paragraph 31; Case C-179/90 *Merci Convenzionali Porto di Genova*, cited in note 143, paragraph 14; Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 25; and Case C-266/96 *Corsica Ferries France*, cited in note 125, paragraph 39.

182 — Case 311/84 *CBEM* v *CLT and IPB*, cited in note 142, paragraph 16 of the judgment.

183 — Case 26/75 *General Motors* [1975] ECR 1367, paragraph 9 of the judgment.

provision of supplementary pension insurance for a given sector of industry in the Netherlands.

C — *National measures contrary to Articles 90 and 86*

384. As already stated, Albany, Brentjens and Drijvende Bokken contest the compatibility of the Netherlands system with Articles 90(1) and 86 on two grounds, referring to the Court's judgments in *Höfner* and *GB-INNO-BM*.

385. As regards the first point, namely the argument that the pension services offered by the funds do not satisfy, or no longer satisfy, the undertakings' needs, the applicants argue that the pension benefits offered are too low, are not related to salary and are therefore systematically inadequate. In their view, there are other negative secondary effects in that employers have to make further pension arrangements and cannot conclude a single global pension insurance agreement with an insurance company. Thus undertakings have to operate with several layers of pension regime which increases administrative costs and entails other losses of efficiency.

386. Secondly, as regards the argument that the funds should not be allowed to decide themselves on individual exemptions from compulsory affiliation, the applicants contend that the funds are put in a position where they can choose the degree of competition to which they are exposed.

387. In my view, those arguments raise two separate issues: whether and to what extent, first, compulsory affiliation to sectoral pension funds as such and, secondly, the rules on discretionary individual exemptions are compatible with Articles 90(1) and 86.

1. *Compatibility of compulsory affiliation with Articles 90 and 86*

388. Article 90(1) is, as already stated, a special application of Article 5(2) and imposes obligations on Member States, not directly on undertakings. It follows from its interplay with Article 86 that it cannot be the appropriate legal basis for

holding Member States responsible for independent anticompetitive behaviour on the part of undertakings merely because it takes place within their jurisdiction. Article 90(1) can therefore be infringed only where there is a causal link between a Member State's legislative or administrative intervention on the one hand and anticompetitive behaviour of undertakings on the other hand. The Court has held that in the context of Article 90(1) alleged abuses must be the 'direct consequence' of the national legal framework. [184]

389. That is one of the reasons for a fundamental dilemma in the application of Article 90(1). On the one hand, the grant of exclusive rights, or in other words the creation of a statutory monopoly, is a structural State measure which typically facilitates anticompetitive behaviour. On the other hand, the wording of Article 90 seems to imply that the grant of exclusive rights *as such* can in principle not have been the kind of measures which the authors of the Treaty intended Article 90(1) to prohibit.

390. In putting into question compulsory affiliation the applicant undertakings are in effect challenging the funds' exclusive right as such. Thus, it is precisely that dilemma which arises.

391. The Court has consistently held that the mere creation of a dominant position by the grant of exclusive rights will not normally infringe Articles 90(1) and 86. [185]

392. That general principle was at the heart of the Court's judgment in *Crespelle*. [186] At issue was the French monopoly held by insemination centres for the provision of certain services to breeders. The Court first recalled the above principle. It then held that Articles 90(1) and 86 were however exceptionally infringed if in merely exercising the exclusive right granted to it the undertaking in question could not avoid abusing its dominant position. The Court then examined whether there was a direct causal link between the national law and the alleged abuse, making it clear that the mere grant of the exclusive right was normally not sufficient to make abuses unavoidable within the meaning of its formula. [187] It decided that, on the facts, the legislation did not 'lead'

184 — Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne*, cited in note 128, paragraph 20 of the judgment.

185 — See, for example, Case C-311/84 *CBEM* v *CLT and IPB*, cited in note 142, paragraph 17 of the judgment; Case C-41/90 *Höfner and Elser*, cited in note 53, paragraph 29; Case C-179/90 *Merci Convenzionali Porto di Genova*, cited in note 143, paragraph 16; and Case C-320/91 *Corbeau*, cited in note 141, paragraph 11.

186 — Case C-323/93, cited in note 128.

187 — See, for a similar line of argument, Case C-387/93 *Banchero*, cited in note 136, and Case C-55/96 *Job Centre*, cited in note 54.

the centres to abuse their dominant position. Under a different heading, it then examined whether the centres themselves had committed any abuse under Article 86, for which they alone would have been responsible.

393. However, although exclusive rights are not normally contrary to Articles 90(1) and 86, the Court has consistently held that the Member States' freedom with regard to granting exclusive rights is not without limitations. The Court has stated:

'... even though [Article 90(1)] presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special and exclusive rights are necessarily compatible with the Treaty. That depends on different rules, to which Article 90(1) refers.' [188]

394. As regards the scope of those limitations, the formulas used by the Court are not entirely consistent. [189] It is therefore necessary to examine the principal cases in which the Court has had to decide the same difficult question, namely whether an exclusive right as such is compatible with Articles 90(1) and 86. In such cases, the abovementioned dilemma is of course particularly pronounced.

395. The leading judgments on the compatibility of an exclusive right with Article 90(1) can be divided into three groups. I shall call them for convenience the *ERT* type, [190] the *Höfner* type [191] and the *Corbeau* type [192] cases. I will analyse each group's underlying rationale and apply it to the present cases.

(a) The *ERT*-type cases

396. In *ERT* it was the accumulation of two exclusive rights to broadcast the undertaking's own programmes and to retransmit foreign broadcasts which caused a conflict of interest. The monopolist was led to abuse its dominant position by virtue of a discriminatory policy which favoured its own programmes.

188 — Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 22 of the judgment.

189 — See for example Case C-179/90 *Merci Convenzionali Porto di Genova*, cited in note 143, paragraph 17 of the judgment, and Case C-203/96 *Chemische Afvalstoffen Dusseldorp* [1998] ECR I-4075, at paragraph 61.

190 — Case C-260/89, cited in note 64; also Case C-179/90 *Merci Convenzionali Porto di Genova*, cited in note 143; and Case C-163/96 *Raso and Others*, cited in note 181.

191 — Case C-41/90, cited in note 53, and Case C-55/96 *Job Centre*, cited in note 54.

192 — Case C-320/91, cited in note 141; also Case C-266/96 *Corsica Ferries France*, cited in note 125; and Case 155/75 *Sacchi*, cited in note 139.

397. In *Raso* [193] the Italian scheme at issue not only granted dock-work companies an exclusive right to supply temporary labour to certain undertakings but also enabled those companies to compete with undertakings which depended on their services. Again a conflict of interest was inevitable since, merely by exercising its monopoly, the dock-work company could distort competition on the secondary market in its favour.

398. In *Merci Convenzionali Porto di Genova* [194] the Court, ruling on exclusive rights granted to Italian dock-work undertakings and companies, held:

'In that respect, it appears from the circumstances described by the national court and discussed before the Court of Justice that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question are, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices...' [195]

399. It is not entirely clear, either from that cited passage or from the rest of the judgment, whether in fact the legislative framework contained features beyond the grant of exclusive rights justifying the application of Article 90(1). Nevertheless, since the Court referred to specific 'circumstances described by the national court' I would be inclined to classify that case also in the first group.

400. In those three cases it was not merely the monopoly itself which infringed Articles 90(1) and 86 but the monopoly in conjunction with additional features which made abuses very likely. Structural measures beyond the granting of an exclusive right led the undertakings in question to abuse their dominant position. Only then was there justification for holding the State — at least partly — responsible for the anticompetitive behaviour of the monopolist.

401. The question arises whether the cases now before the Court present an *ERT*-type situation, and whether there are structural features beyond the existence of the exclusive right which lead the funds to abuse their dominant position.

402. It is argued, first, that no concrete abuse, such as for example excessively high

193 — Case C-163/96, cited in note 181.
194 — Case C-179/90, cited in note 143.
195 — Paragraph 19 of the judgment.

contributions or excessively low benefits, has yet been proved.

403. That fact alone is not decisive. It follows from the structure of Article 90(1) and the case-law of the Court [196] that the issue is not whether abuses have actually been committed but whether the legislative framework leads — even hypothetically — the undertakings to commit such abuses.

404. Nevertheless, I can see nothing in the Netherlands system which induces the funds to commit such abuses. On the contrary, the funds are controlled by different State authorities and by a council of affiliated persons. They are required to invest the collected funds in a prudent way. The tax rules limit maximum pension benefits. The funds' margin of manœuvre in that respect is therefore limited. Consequently, even in the presence of concrete abuses of that kind, the funds alone would be liable on the basis of Article 86.

405. There are thus no additional structural features in the Netherlands legislation leading the funds to abuse their dominant position.

(b) The *Höfner*-type cases

406. In *Höfner* [197] the Court was asked to rule on the legality of the monopoly of employment procurement in Germany. It held:

'... A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.

Pursuant to Article 86(b), such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it.

A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in

196 — Case C-163/96 *Raso and Others*, cited in note 181, paragraph 31 of the judgment; and Case C-18/88 *GB-INNO-BM*, cited in note 173, paragraphs 23 and 24.

197 — Case C-41/90, cited in note 53.

a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.' [198]

407. In *Job Centre* [199] the Italian State actively enforced a similar employment procurement monopoly through criminal proceedings. The Court confirmed its judgment in *Höfner*. It stressed the particularities of the market for the provision of services relating to the placement of employees and held:

'On such an extensive and differentiated market, which is, moreover, subject to enormous changes as a result of economic and social developments, public placement offices may well be unable to satisfy a significant portion of all requests for services.' [200]

408. In those two cases, contrary to the *ERT*-type cases, the State did nothing more than grant an exclusive right. Nevertheless the Court found that, owing to the specific economic context and the nature of the services involved, the monopolist could not avoid abusing its dominant position by constantly 'limiting production, markets or technical development to the prejudice of consumers' within the meaning of Article 86(b). In the exceptional circumstances the Court therefore felt justified in making a real exception to the principle of not challenging Member States' freedom to grant exclusive rights.

409. However, by referring in *Höfner* to an undertaking *manifestly* not in a position to satisfy demand the Court made it clear that it exercises only marginal review of the legality of monopolies.

410. The question arises whether the present cases present a *Höfner*-type situation where the fund merely by exercising its exclusive right cannot avoid abusing its dominant position. Is the factual and economic context such that compulsory supplementary pension funds are manifestly and systematically unable to satisfy demand?

411. The parties strongly disagree on that point. The Court is not in a position to resolve the question, which requires

198 — Paragraphs 29 to 31 of the judgment.
199 — Case C-55/96, cited in note 54.
200 — Paragraph 34 of the judgment.

detailed economic and factual assessments. In a preliminary reference submitted by a national court in accordance with Article 177 of the Treaty, those assessments are for the national courts. Some guidance may none the less be helpful concerning the factors which the national courts may find relevant in making such assessments.

412. First and foremost, the national courts must bear in mind the respective responsibilities of the Netherlands Government and the funds within Articles 90(1) and 86. A Member State may be held responsible only where there is a system failure, i.e. where abuses are the 'direct consequence' of its regulatory or decisional intervention, whereas undertakings enjoying exclusive or special rights are alone responsible for any infringement of the competition rules attributable exclusively to them. Articles 90(1) and 86 will therefore not be infringed where the only reason for a fund's being 'manifestly not able to satisfy demand' is its own bad management or investment policy.

413. Secondly, the national courts should be aware that that kind of question is always one of degree, raises issues of considerable complexity and entails judgments on important economic and social choices. It must therefore be emphasised that the Court in the *Höfner*-type situation has limited its and the national courts' review to national systems which are manifestly inadequate.

414. Finally, because the granting of exclusive rights involves difficult economic assessments, Member States must in areas such as this enjoy a margin of assessment in deciding whether the monopolist can satisfy demand. That is a further ground for limiting the scope of review by the national court.

415. According to a supplementary argument adduced by the Commission, the funds can in any event not be compared to a normal insurer, since they have to limit their activities to one sector and are not allowed to make a selection of the good and the bad risks.

416. In my view, those arguments are related to Article 90(2) and lead me directly to the third group of cases, namely the *Corbeau*-type cases.

(c) The *Corbeau*-type cases

417. In *Corbeau* [201] the Court was asked to rule on the compatibility with Articles 90(1) and 86 of the monopoly for postal services in Belgium. The Court did not clearly identify which, if any, features of the Belgian legislation were contrary to Articles 90(1) and 86. Instead it stated that Article 90(1) had to be read together with Article 90(2) and immediately started a balancing process on the justification of the scope of the monopoly. It held *inter alia*:

'[Article 90(2)] thus permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive right.' [202]

418. Recently in *Corsica Ferries France* [203] the Court followed the same approach when considering the exclusive rights of mooring groups in two important Italian ports. Without ruling on a prima facie infringement of Article 90(1), it held that in any event those exclusive rights were justified under Article 90(2).

419. Even the early judgment in *Sacchi* [204] falls in my view into that category. In the operative part of the judgment [205] the Court referred to Article 90 without specifying, as it did elsewhere in the judgment, the applicable paragraph. In the light of the Opinion of Advocate General Reischl [206] the possibility that the Court had Article 90(2) in mind cannot be excluded.

420. It follows from that case-law that where the exception in Article 90(2) applies the grant of exclusive rights is in any event justified. Is Article 90(2) applicable in the present cases?

421. Article 90(2) provides:

'Undertakings entrusted with the operation of services of general economic interest or

201 — Case C-320/91, cited in note 141.
202 — Paragraph 14 of the judgment.
203 — Case C-266/96, cited in note 125.
204 — Case 155/73, cited in note 139.
205 — Paragraph 14, third subparagraph.
206 — At page 443.

having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

422. The first issue is whether the funds are entrusted with the operation of services of general economic interest. In my view there can be little doubt on that point.

423. In the Netherlands the statutory pension scheme grants merely a basic pension related to the minimum salary. Thus, supplementary pension schemes help to guarantee that a large proportion of the population enjoys pension benefits going beyond that minimum. The funds thus have a social objective. They do not act primarily in their own or in their affiliated members' individual private interest,[207] but mainly in the general interest. The Community legislature recently indirectly recognised the important social function of supplementary pensions when it adopted a directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.[208]

424. Moreover, the funds are, as already mentioned, non-profit-making. They are obliged to accept every employer and employee belonging to the sector. They are therefore not allowed to make any selection of risks through questionnaires or medical examinations. There is no link between the risk and the contributions. All persons affiliated pay an average contribution which does not take into account, for example, the age of employees or the size of the employing undertaking. In case of incapacity for work, exemptions from the obligation to pay contributions are granted.

425. Accordingly, the decree making affiliation compulsory is an act of a public authority entrusting the fund concerned with a service of general interest.

426. The next issue, whether abolishing the system of compulsory affiliation would obstruct the performance, in law or in fact, of the particular tasks assigned to the funds, is therefore decisive.

207 — Case 127/73 *BRT* v *SABAM and Fonior*, cited in note 106, paragraph 23 of the judgment, and Case 172/80 *Züchner* v *Bayerische Vereinsbank*, cited in note 50, paragraph 7 *a contrario*.

208 — Council Directive 98/49/EC, OJ 1998 L 209, p. 46.

427. The Funds and the Netherlands Government contend that the maintenance of their exclusive rights is a necessary condition for the survival of the pension schemes. Referring to the Court's judgment in *Corbeau*, they argue that in the absence of compulsory affiliation their financial equilibrium would be threatened. In that respect they use the argument of a negative spiral, where the 'good risks' (e.g. big undertakings with a young and healthy workforce engaged in non-dangerous activities) would look for more advantageous arrangements with private insurers leaving the funds with a higher concentration of bad risks. That in turn would lead to an increase in the cost of pensions for employees of e.g. small and medium sized companies with an aged personnel engaged in dangerous activities. As a consequence, it would become more and more difficult, maybe even impossible, to insure bad risks at acceptable prices.

428. Furthermore, they contend that it is only on the basis of compulsory affiliation that average contributions (not linked to risk) and average pensions (not linked to salary) are possible. In their view, that kind of pension insurance could never be offered by private insurers.

429. According to Albany, Brentjens and Drijvende Bokken, the Netherlands system of compulsory affiliation goes beyond what is necessary to achieve the objective of an adequate level of social protection.

430. First, collective agreements containing minimum pension requirements would suffice. The detailed rules for the administration of collected pension contributions should in principle be left to employers. Minimum requirements could also be imposed by law where necessary. A good example of that approach is a law in force since 1 January 1998 which prohibits prior medical examination in the context of group pension insurance contracts.

431. With regard to the argument that average premiums and benefits are only feasible in the context of compulsory affiliation, it is said that a system of average contributions is in fact no longer an essential feature of supplementary pension schemes and is not required by law. Conversely, various sectoral pension schemes operate with average premiums and without compulsory affiliation.

432. Finally, there is empirical evidence that compulsory affiliation is not necessary since 15 supplementary pension schemes in

the Netherlands operate without compulsory affiliation.

433. In my view, too many important points concerning the factual background are still disputed between the parties and/or not entirely clear.

434. Why for example can certain sectoral pension funds survive in the absence of compulsory affiliation? The Netherlands Government's written answer to a question put by the Court still leaves some doubts and was moreover partly contested by the applicants. At the hearing the parties disagreed also on the point whether, and if so to what extent, average contributions and benefits were still a typical feature of the Netherlands sectoral supplementary pension funds.

435. Accordingly, the Court is again not in a position to decide whether abolishing compulsory affiliation would obstruct the performance in law or in fact of the particular tasks assigned to the pension funds. The detailed examination of all the economic, financial and social matters involved is for the national courts, which will have to take into account the following.

436. Article 90(2) seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the internal market. [209] Since it is a provision permitting derogation from the Treaty rules, it must be interpreted strictly. [210]

437. However, when Member States define the services of general economic interest which they entrust to certain undertakings, they cannot be precluded from taking account of national policy objectives. [211] In that respect it must be borne in mind that Member States retain competence to organise their social security systems. [212] They therefore have a wide margin of discretion in that area.

438. The Court has recently made it clear that for the exception of Article 90(2) to

209 — Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39 of the judgment.

210 — Case C-157/94, paragraph 37 of the judgment.

211 — Case C-157/94, cited in note 209, paragraph 40 of the judgment.

212 — Case 283/82 *Duphar* v *Netherlands* [1984] ECR 523, paragraph 16 of the judgment; Joined Cases C-159/91 and C-161/91 *Poucet and Pistre*, cited in note 55, paragraph 6; and Case C-70/95 *Sodemare and Others* v *Regione Lombardia*, cited in note 57, paragraph 27.

apply it is not necessary that the survival of the undertaking itself is threatened.[213] It follows from the wording of that rule that it is sufficient that the application of the competition rules would obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking.

439. The national courts will therefore have to determine first what precisely are the public service obligations assigned to the funds and secondly whether the performance of those obligations would be obstructed in the absence of compulsory affiliation.

440. Accordingly, compulsory affiliation as such infringes Articles 90(1) and 86 only where by reason of the Netherlands regulatory framework the funds are manifestly not in a position to satisfy demand and where abolishing compulsory affiliation would not obstruct the performance of the services of general interest assigned to the funds.

2. *The rules on discretionary exemptions from compulsory affiliation*

441. As already stated, the Netherlands system contains rules on individual exemptions from compulsory affiliation where employers or employees have made or wish to make special alternative pension arrangements. Three features of those rules are important. First, the decision on individual exemptions is taken by the competent sectoral fund itself. Secondly, in most cases the fund enjoys a discretion. Thirdly, as a consequence of that discretion the national courts exercise only marginal review of the fund's decision.[214]

442. Albany, Brentjens and Drijvende Bokken, referring to the judgment in *GB-INNO-BM*,[215] contend that those rules infringe Articles 90(1) and 86 because they put the funds in a position where they can themselves decide upon the degree of competition to which they are exposed.

443. In contrast, the Funds argue that their discretion is *de facto* limited. In practice the funds cannot grant exemptions more often because that would create dangerous precedents. More exemptions would endanger sector-wide solidarity, compulsory affiliation as such and ultimately the existence of the funds. It follows, in their view, that the funds are not comparable to the public body in *GB-INNO-BM*.

213 — Case C-157/94 *Commission* v *Netherlands*, cited in note 209, paragraph 43 of the judgment.

214 — See paragraphs 352 to 363 above.

215 — Case C-18/88, cited in note 173.

444. The Commission contends, first, that the possibility of individual exemptions is an exceptional opening in an otherwise hermetically closed system. In its view, it would not be coherent to examine the compatibility of the rules on individual exemptions where compulsory affiliation as such is compatible with the Treaty.

445. If I correctly understand the Commission's argument, any rule whatsoever concerning individual exemptions would automatically be lawful once compulsory affiliation, and therefore the funds' exclusive right as such, had been held to be compatible with Articles 90(1) and 86.

446. I do not agree with that view.

447. The reach of each fund's monopoly is determined not only by the decree making affiliation compulsory but also by the available possibilities for exemption. If the funds' exclusive right as so defined were held to be lawful, it would indeed be contradictory to claim that Articles 90(1) and 86 required that further (obligatory) grounds for exemption should be created. To that extent I agree with the Commission.

448. However, the problem here is different. The issue is not the material scope of the funds' exclusive right as determined by the decree on compulsory affiliation and by the available grounds for exemption, but the formal mechanism by which decisions on that scope are taken. Where a fund takes a discretionary decision on an application for individual exemption, it in fact itself determines the scope of its statutory monopoly. That delegation of decision-making powers is not a necessary and inherent part of rules on the material scope of the exclusive right. It can therefore be severed from those rules and challenged separately.

449. At the hearing, the Commission argued, secondly, that nothing in the Netherlands regulatory framework led the funds to misuse their discretion. Referring to *Crespelle*,[216] the Commission stated that the funds alone would therefore be responsible for any abuse.

450. Again I am not convinced. By entrusting the funds with the decision on indivi-

216 — Case C-323/93, discussed above at paragraph 392.

dual exemptions, the Netherlands legislation creates an obvious conflict of interest.

451. By adopting rules on discretionary exemption, the Netherlands legislature has recognised that there may be situations where undertakings belonging to a certain sector may have legitimate interests in applying for an exemption. One can think for example of undertakings belonging to a group of undertakings with its own group pension policy, or of other situations which are now laid down as obligatory exemption grounds in the latest version of the exemption guidelines. [217]

452. By contrast, sectoral funds have an obvious interest in maintaining a high level of affiliation. More affiliated persons means, for example, greater economies of scale as regards administrative costs, more buying power on the investment markets and a more advantageous spreading of risks.

453. The exemption guidelines in the version applicable to the main proceedings entrust the funds with the task of balancing those two sets of interests. Thus, in a certain sense the fund occupies simultaneously the role of judge and party.

454. It is settled case-law that the creation of similar conflicts of interest infringes Articles 90(1) and 86.

455. In *France* v *Commission* [218] the Court was asked to rule on a directive based on Article 90(1) and (3) [219] which obliged Member States to ensure that with regard to telecommunications terminal equipment responsibility for regulatory and supervisory matters was entrusted to a body independent of the undertaking operating the public network. The Court held:

'... a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public

217 — See paragraph 360 above.

218 — Case C-202/88 *France* v *Commission*, cited in note 188.

219 — Compare paragraph 13 of the judgment.

network, and thereby placing that undertaking at an obvious advantage over its competitors.' [220]

456. In *GB-INNO-BM* [221] the Court reiterated that statement and added that 'the maintenance of effective competition and the guaranteeing of transparency require' that the body adopting regulatory measures and granting type-approval is independent of any undertaking acting on the market for terminal equipment.

457. In *Tranchant* [222] the Court held more specifically that the requirement of independence 'seeks to eliminate any risk of conflict of interest between on the one hand the regulatory authority... and, on the other hand, undertakings...'.

458. In other similar cases the Court has also exercised a tight control of the requirement of independence. [223] In *Decoster* [224] and *Taillandier* [225] it held for example that independence was not guaranteed where different directorates of the French Ministry for Posts and Telecommunications were responsible simultaneously for operating the public network and implementing commercial policy on the one hand and granting type-approval for terminal equipment on the other hand.

459. A different type of conflict of interest has been held to infringe Articles 90(1) and 86 in the judgments in *ERT* [226] and recently in *Raso*. [227] Particularly in the latter judgment the Court explains clearly why such conflicts of interest are a threat for the competitive process and for competitors.

460. Moreover, it follows from the judgments in *GB-INNO-BM* [228] and in *Raso* [229] that it is the fact that the legal framework causes the conflict of interest in question which is contrary to Articles 90(1) and 86. It is not necessary to identify any particular case of abuse.

461. In the present cases the dangers inherent in such a conflict of interest are considerably aggravated by the two other

220 — Paragraph 51 of the judgment.

221 — Case C-18/88, cited in note 173, paragraph 26 of the judgment.

222 — Case C-91/94 *Tranchant* [1995] ECR I-3911, paragraph 19 of the judgment.

223 — Joined Cases C-271/90, C-281/90, C-289/90 *Spain and Others* v *Commission* ('telecommunications services') [1992] ECR I-5833, paragraph 22 of the judgment; Case C-69/91 *Decoster* [1993] ECR I-5335; Case C-92/91 *Taillandier* [1993] ECR I-5383.

224 — Cited in note 223.

225 — Cited in note 223.

226 — Case C-260/89, cited in note 64, paragraph 37 of the judgment.

227 — Case C-163/96, cited in note 181, paragraphs 28 to 31 of the judgment.

228 — Case C-18/88, cited in note 173, paragraphs 23 and 24.

229 — Paragraph 31.

features of the system, namely the discretion of the funds and the limited judicial review of their decisions.

462. With regard to a similar situation, albeit in a different context, the Court held in *Meroni* v *High Authority*:

'The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.' [230]

463. As regards more particularly the funds' discretion, the Court's judgment in *Lagauche* [231] is relevant. The Belgian telecommunications operator was also entrusted with the task of granting type-approval for telecommunications equipment. In contrast to the situation in the *GB-INNO-BM* case, it was however the minister who determined the technical requirements necessary for type-approval. The sole task of the monopolist was therefore to check whether the equipment complied with the requirements determined by the minister. In the absence of any discretion, the Court did not find an infringement of Articles 90(1) and 86.

464. As regards the importance of full judicial review, it may suffice to point to the same two cases *GB-INNO-BM* [232] and *Lagauche*. [233] In both judgments the Court — albeit in the context of Article 30 — made it clear that decisions of a body with regulatory or supervisory authority which potentially affect the rights which individuals derive from Community law must be subject to judicial review.

465. In the present cases, the exemption guidelines create a framework where all three decisive features, namely conflict of interest, discretion and merely marginal judicial review, are present. I conclude therefore, without its being necessary to take a stance on the new version of the exemption guidelines, that the Netherlands rules on discretionary individual exemption infringe Articles 90(1) and 86.

466. It remains to deal briefly with the Commission's final arguments. It contends

230 — Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, p. 152.

231 — Joined Cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267.

232 — Case C-18/88, cited in note 173, paragraphs 34 to 36 of the judgment.

233 — Cited in note 231, paragraphs 25 to 29 of the judgment.

first that as a matter of fact the management board of the fund is the only body in a position to decide on applications for exemption. Secondly, it invokes the possibility of a complaint to the Insurance Board.

467. In my view the first argument is — at least partly — contradicted by the second. If the independent Insurance Board can hear complaints concerning decisions of the fund, why then is it not able to take decisions on individual exemption? Why should no other independent body be able to strike the balance between the funds' and the affiliated persons' interests? As regards the second argument, it became apparent in the course of the written and oral procedure that, as already stated, the Board cannot take legally binding decisions. Thus, the complaint to the Insurance Board is not an appropriate remedy.

468. Accordingly, rules such as the Netherlands exemption guidelines infringe Articles 90(1) and 86 in so far as they entitle the funds to take discretionary decisions on applications for individual exemption from compulsory affiliation which are subject only to marginal judicial review.

## X — The legal effects of the Court's judgment

469. The Hoge Raad asks the Court expressly to spell out the consequences of its judgment.

470. It follows from the foregoing that two features of the Netherlands legislation must be distinguished: compulsory affiliation as such and the rules on discretionary individual exemptions.

471. The first issue would arise only if the national court were to hold that the Netherlands system of compulsory affiliation as such, or a decree making affiliation to a particular fund compulsory, was contrary to Articles 90(1) and 86, and concerns the consequences of such a judgment.

472. Contrary to the Funds' contention, that national judgment would be based on the *lex specialis* of Articles 90(1) and 86

and not on Article 5(2).[234] Articles 90(1) and 86 have direct effect.[235] National laws and decrees making affiliation compulsory would therefore in principle be inapplicable.[236]

473. The Netherlands Government asks the Court to limit the temporal effects of its ruling.

474. An interpretation which the Court gives to a rule of Community law merely clarifies and defines the meaning and scope of a rule of Community law as it must have been understood and applied from the time of its coming into force. The Court has however held that exceptionally, in application of the general principle of legal certainty and taking account of the serious effects which its judgment might have, the temporal effects of its ruling, as regards the past, may be restricted.[237]

475. Against such a limitation it could be argued that, since the Hoge Raad's reference in *Van Schijndel*,[238] the economic actors concerned could have had some doubts about the legality of compulsory affiliation to supplementary pension funds.[239]

476. In the area of pensions, on the other hand, the need for a limitation *ratione temporis* is particularly acute. Judgments without such limitations could retroactively upset the financial balance of many pension schemes and put into question legal situations which have exhausted all their effects in the past.[240] I am therefore inclined to support an exceptional limitation *ratione temporis* of the effects of the judgment.

477. It must be stressed that it is for the Court alone to decide on such an exceptional restriction and that it may be allowed only in the actual judgment ruling on the interpretation sought.[241]

478. In the present cases, according to my analysis, it is the national court which will have to take the definitive decision on the compatibility of compulsory affiliation with Community law. In my view, that

234 — See paragraph 304 above and Case C-323/93 *Centre d'insémination de la Crespelle* v *Coopérative de la Mayenne*, cited in note 128, paragraph 15 of the judgment.

235 — Case C-179/90 *Merci Convenzionali Porto di Genova*, cited in note 143, paragraph 23 of the judgment.

236 — Case 34/67 *Lück* v *Hauptzollamt Köln* [1968] ECR 245, p. 251; Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze* v *IN.CO.GE'90*, judgment of 22 October 1998, paragraphs 18 to 21.

237 — Case C-231/96 *EDIS*, judgment of 15 September 1998, paragraphs 15 and 16.

238 — Joined Cases C-430/93 and 431/93, cited in note 2.

239 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others*, cited in note 21, paragraph 146 of the judgment.

240 — Case C-262/88 *Barber*, cited in note 91, paragraph 44 of the judgment.

241 — Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze* v *Salumi* [1980] ECR 1237, paragraph 11 of the judgment.

does not however prevent the Court from taking the final decision on the effects *ratione temporis* of its ruling, by explicitly basing its ruling on the assumption that, in the light of its interpretation, the national courts declare the Netherlands framework contrary to Articles 90(1) and 86.

479. The second issue concerns the effects of a judgment declaring rules on individual exemptions such as those found in the Netherlands incompatible with Articles 90(1) and 86.

480. Owing to the direct effect of Articles 90(1) and 86, the rules on discretionary individual exemption are inapplicable. Since those rules are severable, as already mentioned, the rules on compulsory affiliation as such would not be affected.[242] Other effects would again be a matter of national law within the limits imposed by Community law.

242 — See in a comparable situation the Opinion of Advocate General Tesauro in Case C-69/91 *Decoster*, cited in note 223, at p. 5371.

## XI — Conclusion

Accordingly the questions referred in these cases should in my opinion be answered as follows:

(1) Article 85(1) of the Treaty is not infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single sectoral pension fund and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector.

(2) Articles 5 and 85 of the Treaty are not infringed where, at the joint request of the representatives of employers and employees, a Member State makes participation in a sectoral pension scheme compulsory for all undertakings belonging to that sector.

(3) The Netherlands sectoral pension funds are 'undertakings' within the meaning of the competition rules of the Treaty.

(4) Articles 90(1) and 86 of the Treaty preclude rules on compulsory affiliation to sectoral pension funds such as the rules encountered in the Netherlands only where, owing to the regulatory framework and the decree making affiliation compulsory, the funds are manifestly not in a position to satisfy demand and

where the abolition of compulsory affiliation would not obstruct the performance of the services of general interest assigned to the funds.

Articles 90(1) and 86 of the Treaty preclude rules such as the Netherlands exemption guidelines in so far as they entitle the sectoral pension funds to take discretionary decisions on applications for individual exemption from compulsory affiliation which are subject only to marginal judicial review.

(5) In so far as national rules are held to be contrary to Articles 90(1) and 86 of the Treaty, they are inapplicable, subject to a potential restriction imposed by the Court on the effects *ratione temporis* of its ruling.