JUDGMENT OF THE COURT

21 September 1999 *

In Joined Cases C-115/97, C-116/97 and C-117/97,

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

Brentjens' Handelsonderneming BV

and

Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen

on the interpretation of Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) and Articles 5, 85, 86 and 90 of the EC Treaty (now Articles 10 EC, 81 EC, 82 EC and 86 EC),

THE COURT,

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

* Language of the case: Dutch.

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

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Brentjens' Handelsonderneming BV, by T.R. Ottervanger, of the Rotterdam Bar,

— Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen, by E. Lutjens, of the Amsterdam Bar, and O. Meulenbelt, of the Utrecht Bar,

— the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

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

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

— the Swedish Government, by E. Brattgård, Departementsråd in the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Brentjens' Handelsonderneming BV, represnted by T.R. Ottervanger; Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen, represented by E. Lutjens and O. Meulenbelt; the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by C. Chavance; the Swedish Government, represented by A. Kruse, Departementsråd in the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by W. Wils, at the hearing on 17 November 1998,

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

gives the following

Judgment

1 By three judgments of 18 March 1997, received at the Court on 20 March 1997, the Kantongerecht (Cantonal Court), Roermond, referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC)

four questions on the interpretation of Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) and Articles 5, 85, 86 and 90 of the EC Treaty (now Articles 10 EC, 81 EC, 82 EC and 86 EC).

2 Those questions were raised in three actions brought by Brentjens' Handelsonderneming BV (hereinafter 'Brentjens') against Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (the Building Materials Trade Fund, hereinafter 'the Fund') concerning Brentjens' refusal to pay to the Fund contributions for the three periods 1990 to 1994, 1995 and 1996, on the ground that compulsory affiliation to the Fund by virtue of which such contributions are claimed from it is contrary to Articles 3(g), 5, 85, 86 and 90 of the Treaty.

The national legislation

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

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

5 The second pillar comprises supplementary pensions provided in the context of employment or self-employed activity, which serve in most cases to top up the basic pension. Such supplementary pensions are normally managed by collective schemes covering a sector of the economy, a profession or the employees of an undertaking by funds affiliation to which has been made compulsory, as in the

case in the main proceedings, by the Wet van 17 maart 1949 houdende vaststelling van en regeling betreffende verplichte deelneming in een bedrijfspensioenfonds (Law of 17 March 1949 on compulsory affiliation to a sectoral pension fund, hereinafter the 'BPW').

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

7 The Wet op de Loonbelasting (Wages Tax Law) provides that pension contributions are deductible only if the pension does not exceed a 'reasonable' level. They are not deductible in the case of a pension exceeding that level, which is set at 70% of the final salary after a 40-year career. The effect of this tax regime is that the current standard in the Netherlands for establishing a pension, including the State pension under the AOW, is a pension corresponding to 70% of the final salary.

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

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

...

(b) sectoral pension fund: a fund operating in a sector of activity for the purposes of which funds are collected either solely for the benefit of

employees in the sector concerned or also for the benefit of persons engaged in an activity in another capacity in the said sector.

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The main proceedings

25 The Fund was established in 1958 under the BPW. By an order of 28 June 1958 (which has been amended several times, hereinafter 'the order making affiliation compulsory'), the Minister for Social Affairs and Employment made affiliation compulsory for employees aged between 23 and 64 inclusive who are employed in an undertaking which is exclusively or principally engaged in wholesale trade in building materials and articles connected therewith.

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

27 Brentjens, which commenced trading in 1963, made pension arrangements on 1 January 1968 for its employees with a life assurance company established in the Netherlands, the Levensverzekerings Maatschappij de Nederlanden van 1870 (which subsequently became Generali Levensverzekeringsmaatschappij, hereinafter 'Generali').

28 When the Fund became aware of Brentjens' existence, it affiliated it to its scheme as from 1 January 1990. It exempted Brentjens from the payment of contributions in respect of the period prior to its affiliation, thereby respecting Brentjens' pension arrangements for the period from 1963 to 1 January 1990.

29 Taking the view that the pension arrangements with Generali were superior to those of the scheme offered by the Fund as regards the level both of contributions and of benefits, Brentjens asked for an exemption from compulsory affiliation. By decision of 23 August 1994 the Fund refused Brentjens' request. Brentjens lodged an objection to that decision with the Insurance Board. By decision of 18 May 1995, the Insurance Board dismissed its objection as unfounded.

30 On 13 May 1996 the Fund served Brentjens with three demands for payment of the contributions due, the first for the years 1990 to 1994, the second for 1995 and the third for 1996. Brentjens contested each of the demands before the Kantongerecht Roermond in three separate sets of proceedings. Brentjens, Generali and Assicurazioni Generali SpA, of Trieste, Italy, also lodged a parallel complaint with the Commission of the European Communities alleging infringement by the Kingdom of the Netherlands and the Fund of Articles 3(g) and 5 of the Treaty, Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and Articles 85, 86 and 90 of the Treaty.

31 Before the Kantongerecht, Brentjens contended in particular that compulsory affiliation to the Fund was contrary to Community competition law.

32 The Kantongerecht stated first that it was not required to rule on the fact that the Fund had not exercised its discretion to grant Brentjens an exemption. It observed, in passing, that the Insurance Board had considered the Fund's decision to be in conformity with the applicable rules.

33 The Kantongerecht, relying in particular on the judgment in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, took the view that the order making affiliation compulsory could involve an agreement restricting competition in the building materials sector or constitute, at least, a decision restrictive of competition binding on that sector. However, the Kantongerecht queried whether the Fund was to be regarded as an undertaking or association of undertakings within the

meaning of Article 85 et seq. of the Treaty or as a social security institution. It stressed in that connection that the fact *inter alia* that the Fund was set up on the initiative of undertakings in the building materials sector did not mean that it had to be regarded as an association of undertakings. The fact that the Fund could fix the amount of the contributions and benefits likewise did not mean that it was an undertaking. According to the referring court, a more important issue is to determine to what extent the Fund engages in any economic activity and to what extent such activity results solely from the social objective it pursues.

34 Moreover, if it should be established that the Fund is an undertaking within the meaning of the Treaty competition rules, the Kantongerecht wonders whether in this case it is abusing its dominant position within the meaning of Article 86 of the Treaty and whether any such abuse of a dominant position might be justified under Article 90 of the Treaty. In that connection, it is necessary to weigh the solidarity within a sector of activity which compulsory affiliation seeks to achieve against the restriction of individual freedom to choose different pension arrangements.

35 In those circumstances, the Kantongerecht stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions, which are identical in each of the three cases:

'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?'

36 By order of 13 May 1997, the President of the Court joined Cases C-115/97, C-116/97 and C-117/97 for the purposes of the written procedure, the oral procedure and judgment.

Admissibility

37 The French Government queries the admissibility of the questions submitted, taking the view that the national court has not, in its orders for reference, sufficiently explained the factual and legal context of the main proceedings. In the absence of a detailed account from the national court of the legal provisions applicable to the main proceedings, the circumstances in which the Fund was set up and the management rules of the Fund, the Court cannot give a useful interpretation of Community law and the Member States and other interested parties are not in a position to submit written observations suggesting answers to the questions on which a ruling is sought.

38 According to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in certain areas, such as that of competition, where the factual and legal situations are often complex (see in particular Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7, Case C-284/95 *Safety High-Tech* v *S. & T.* [1998] ECR I-4301, paragraphs 69 and 70, and Case C-341/95 *Bettati* [1998] ECR I-4355, paragraphs 67 and 68).

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

40 In this case, it is clear from the observations submitted under Article 20 of the EC Statute of the Court of Justice by the governments of the Member States and the other interested parties that the information contained in the orders for reference was sufficient to enable them to take a position on the questions referred to the Court.

41 Moreover, in their observations, the French Government and the Commission expressly refer to Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121. The order for reference in that case, which also concerns the compatibility with the Community competition rules of compulsory affiliation to a sectoral pension fund, contains a detailed account of the legislation applicable to the main proceedings.

42 Furthermore, even though the French Government may have taken the view in this case that the information provided by the national court was not sufficient to enable it to take a position on certain aspects of the questions submitted to the Court, it must be emphasised that further information was made available in the documents forwarded by the national court, the written observations and the answers given to the questions raised by the Court. All that information, which was included in the Report for the Hearing, was brought to the notice of the governments of the Member States and the other interested parties for the purposes of the hearing, at which they had an opportunity, if necessary, to amplify their observations.

43 Finally, the information supplied by the referring court, supplemented as necessary by the abovementioned details, sufficiently apprises the Court of the factual and legislative background to the main proceedings to enable it to interpret the competition rules in the light of the circumstances of those proceedings.

44 It follows that the questions referred are admissible.

The first question

45 By its first question, the national court seeks essentially to ascertain whether a decision taken by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty.

46 Brentjens contends that the request by management and labour to make affiliation to a sectoral pension fund compulsory constitutes an agreement

between the undertakings operating in the sector concerned, contrary to Article 85(1) of the Treaty.

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

48 The effects of such an agreement on competition are 'appreciable' because it affects the entire Netherlands building materials sector. They are aggravated by the cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy and for all undertakings in those sectors.

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

50 It must be noted, first, that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted the authors of the Treaty to provide expressly in Article 85(2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void.

51 Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 of the EC Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

52 In that connection, Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.

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

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

55 Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the

Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

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

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

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

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

60 Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a

certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

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

62 The answer to be given to the first question must therefore be that a decision taken by organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty.

The second question

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

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

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

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

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

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

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

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

The third question

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

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

73 First, compulsory affiliation of all workers in a given sector to a supplementary pension scheme pursues an essential social function within the pension system applicable in the Netherlands because of the extremely limited amount of the statutory pension calculated on the basis of the minimum statutory wage. Provided that a supplementary pension scheme has been established by a

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

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

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

76 On that basis, the Fund and the intervening governments consider that the sectoral pension fund is an organisation charged with the management of social

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

77 It should be borne in mind that, in the context of competition law, the Court has held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; *Poucet and Pistre,* cited above, paragraph 17; and *Fédération Française des Sociétés d'Assurance,* cited above, paragraph 14).

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

79 In contrast, in *Fédération Française des Sociétés d'Assurance*, cited above, the Court held that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the

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

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

81 The sectoral pension fund itself determines the amount of the contributions and benefits and the Fund operates in accordance with the principle of capitalisation.

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

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

damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

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

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

86 Undoubtedly, the pursuit of a social objective, the abovementioned manifestations of solidarity and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered by insurance companies. Although such constraints do not prevent the activity engaged in by the fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme.

87 The answer to the third question must therefore be that a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

The fourth question

88 By its fourth question, the national court seeks essentially to ascertain whether Articles 86 and 90 of the Treaty preclude the public authorities from conferring on a pension fund an exclusive right to manage a supplementary pension scheme in a given sector.

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

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

91 Next, it should be noted that according to settled case-law an undertaking which has a legal monopoly in a substantial part of the common market may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (see Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 14, and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 17).

92 A sectoral pension fund of the kind at issue in the main proceedings, which has an exclusive right to manage a supplementary pension scheme in an industrial sector in a Member State and, therefore, in a substantial part of the common market, may therefore be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty.

93 It must not be forgotten, however, that merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State is in breach of the prohibitions contained in those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses (*Höfner and Elser*, cited above, paragraph 29; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 37; *Merci Convenzionali Porto di Genova*, cited above, paragraphs 16 and 17; Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph 18; and Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 27).

94 Brentjens contends in that connection that the system of compulsory affiliation to the supplementary pension scheme managed by the Fund is contrary to the combined provisions of Articles 86 and 90 of the Treaty. The pension benefits available from the Fund do not, or no longer, match the needs of the undertakings. The benefits are too low, are not linked to wages and, consequently, are generally inadequate. Employers have therefore to make other pension arrangements. The system of compulsory affiliation deprives those employers of any opportunity of arranging for comprehensive pension cover from an insurance company. Pension arrangements spread over a number of insurers would increase administrative costs and reduce efficiency.

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

96 In the present case, it is important to note that the supplementary pension scheme offered by the Fund is based on the present norm in the Netherlands, namely that every worker who has paid contributions to that scheme for the maximum period

of affiliation receives a pension, including the State pension under the AOW, equal to 70% of his final salary.

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

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

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

100 According to Brentjens, the fact that members pay 'average contributions' likewise does not justify compulsory affiliation. First, neither the BPW nor the order making affiliation compulsory requires a system based on such contributions. Second, a number of sectoral pension funds to which affiliation is not compulsory operate perfectly well on the basis of 'average contributions'.

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

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

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

104 In view of the interest of the Member States thus defined they cannot be precluded, when determining what services of general economic interest to entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings (*Commission* v *Netherlands*, cited above, paragraph 40).

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

106 Moreover, the importance of the social function attributed to supplementary pensions has recently been recognised by the Community legislature's adoption of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ 1998 L 209, p. 46).

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

108 If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of 'good' risks would leave the sectoral pension fund with responsibility for an increasing share of 'bad' risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost.

109 Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund displays a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity

for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.

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

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

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

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

114 In paragraph 25 of that judgment, the Court stated that the vesting in such a company of powers both to authorise or refuse the connection of telephones to the network and to lay down the technical standards to be met by such equipment

and verify whether devices not manufactured by it conformed with the specifications adopted by it was tantamount to conferring upon it the power to determine at will which terminal equipment might be connected to the public network, thereby placing it at an obvious advantage over its competitors.

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

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

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

118 Next, under Article 1 of the Guidelines for exemption from affiliation, a sectoral pension fund is entitled to grant an exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the

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

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

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

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

122 Finally, as regards Brentjens' argument that an adequate level of pension for workers could be assured by laying down minimum requirements to be met by pensions offered by insurance companies, it must be emphasised that, in view of the social function of supplementary pension schemes and the margin of appreciation enjoyed, according to settled case-law, by the Member States in

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

123 The answer to the fourth question must therefore be that Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.

Costs

124 The costs incurred by the Netherlands, German, French and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Kantongerecht, Roermond, by judgment of 18 March 1997, hereby rules:

1. A decision taken by organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the EC Treaty (now Article 81 EC).

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

3. A pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty.

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

Rodríguez Iglesias Puissochet Hirsch

Jann Moitinho de Almeida Gulmann

Murray Edward Rangemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass G.C. Rodríguez Iglesias

Registrar President