JUDGMENT OF THE COURT

21 September 1999 (1)

(Compulsory affiliation to a sectoral pension scheme Compatibility withcompetition rules Classification of a sectoral pension fund as an undertaking)

In Case C-67/96,

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

Albany International BV

and

Stichting Bedrijfspensioenfonds Textielindustrie

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

THE COURT,

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

- Albany International BV, by T.R. Ottervanger, of the Rotterdam Bar, andH. van Coeverden, of the Hague Bar,

- Stichting Bedrijfspensioenfonds Textielindustrie, by E. Lutjens, of theAmsterdam Bar, and O. Meulenbelt, of the Utrecht Bar,

- the Netherlands Government, by A. Bos, Legal Adviser in the Ministry ofForeign Affairs, acting as Agent,

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

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

- the Commission of the European Communities, by W. Wils, of its LegalService, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Albany International BV, represented by T.R. Ottervanger; Stichting Bedrijfspensioenfonds Textielindustrie, 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

ForeignAffairs, acting as Agent; the French Government, represented by C. Chavance; theSwedish Government, represented by A. Kruse, Departementsråd in the LegalSecretariat (EU) of the Ministry of Foreign Affairs, acting as Agent, and theCommission, represented by W. Wils, at the hearing on 17 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 January1999,

gives the following

Judgment

1. By judgment of 4 March 1996, received at the Court on 11 March 1996, theKantongerecht (Cantonal Court), Arnhem, referred to the Court of Justice for apreliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) threequestions on the interpretation of Articles 85, 86 and 90 of the EC Treaty (nowArticles 81 EC, 82 EC and 86 EC).

2. Those questions were raised in an action brought by Albany International BV(hereinafter 'Albany') against Stichting Bedrijfspensioenfonds Textielindustrie (theTextile Industry Trade Fund, hereinafter 'the Fund') concerning Albany's refusalto pay to the Fund contributions for 1989 on the ground that compulsory affiliationto the Fund by virtue of which such contributions are claimed from it is contraryto Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) andArticles 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 AlgemeneOuderdomswet (General law on old-age pensions, 'the AOW') and the AlgemeneNabestaandenwet (General law on survivors' benefits). That compulsory statutoryscheme entitles the whole population to receive a pension of a limited amount,regardless of the wage which they actually received previously, calculated byreference to the statutory minimum wage.

5. The second pillar comprises supplementary pensions provided in the context ofemployment or self-employed activity, which serve in most cases to top up the basicpension. Such supplementary pensions are normally managed by collective schemescovering a sector of the economy, a profession or the employees of an undertakingby funds affiliation to which has been made compulsory, as in the case in the mainproceedings, by the Wet van 17 maart 1949 houdende vaststelling van en regelingbetreffende verplichte deelneming in een bedrijfspensioenfonds (Law of 17 March1949 on compulsory affiliation to a sectoral pension fund, hereinafter the 'BPW').

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

7. The Wet op de Loonbelasting (Wages Tax Law) provides that pensioncontributions 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, whichis 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, includingthe State pension under the AOW, is a pension corresponding to 70% of the finalsalary.

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 basedon it, have the following meanings:

...

(b) sectoral pension fund: a fund operating in a sector of activity for thepurposes of which funds are collected either solely for the benefit ofemployees in the sector concerned or also for the benefit of personsengaged 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 heregards as sufficiently representative of the business structure of a sector of activity,after consulting the head of the appropriate general administrative departmentwhose area of responsibility includes the activities of the sector concerned, theSociaal-Economische Raad (Social and Economic Council) and theVerzekeringskamer (Insurance Board), make affiliation to the sectoral pension fundcompulsory for all workers or for certain categories of worker in the sector ofactivity concerned.

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

10.

Article 5(2) of the BPW, as amended, lays down certain conditions to be fulfilledbefore the Minister for Social Affairs and Employment can approve a request forcompulsory 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 sectoralpension fund must adequately safeguard the interests of the members, and therepresentatives of the associations of employers and workers in the sectorconcerned 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 andregulations of the sectoral pension fund must provide for cases in which, and theconditions under which, workers in the sector concerned are not required to beaffiliated to the fund or may be exempted from certain obligations relating to thefund.

12.

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

'Our Minister for Social Affairs and Employment, after hearing the views of theInsurance Board and the Social and Economic Council, shall adopt guidelinesconcerning the matters referred to in Article 5(2)(II)(1). Those guidelines shouldobserve the principle that workers who were already affiliated to a pension

fundof an undertaking or were insured with a life assurance company six months beforethe request referred to in Article 3(1) was lodged, shall not be required to beaffiliated to that sectoral pension fund or shall be exempted, entirely or to areasonable extent, from the obligation to contribute to it, provided that they candemonstrate that, in the course of the period for which they are under noobligation to be affiliated or are exempted from the obligation to pay contributions,in their entirety or as regards a reasonable proportion thereof, they will acquirepension rights which are at least equivalent to those which they would acquire ifaffiliated 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 derichtlijnen voor de vrijstelling van deelneming in een bedrijfspensioenfonds wegenseen bijzondere pensioenvoorziening (Order of 29 December 1952 relating to theadoption of guidelines for the exemption from participation in a sectoral pensionfund in case of special pension arrangements, as amended by the decision of 15August 1988, hereinafter 'the Guidelines for exemption from affiliation□) theMinister for Social Affairs and Employment adopted the guidelines referred to inArticle 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 orfrom the obligation to pay contributions thereto may be granted by that fund at therequest of any interested party, provided that the worker in the sector concernedis covered by special pension arrangements meeting the following conditions:

(a) the arrangements must be applied under the auspices of a company pensionfund, another sectoral fund or an insurer holding a certificate of the kind providedfor by Article 10 of the Wet toezicht verzekeringsbedrijf (Law on supervision of theinsurance industry, *Staatsblad* 1986, p. 638) or be based on the Algemeneburgerlijke 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 Algemenemilitaire pensioenwet (General law on military pensions, *Staatsblad* 1979, p. 305);

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

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

(d) if the exemption entails withdrawal from the fund, compensation consideredreasonable by the Insurance Board must be offered for any loss suffered by thefund, 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 monthsbefore submission of the request on the basis of which affiliation to the sectoralpension fund was made compulsory and it has been shown that, in the course ofthe period for which the worker concerned is under no obligation to be affiliatedor is exempted from the obligation to pay contributions in their entirety or asregards a reasonable proportion thereof, he will acquire pension rights which areat least equivalent to those which he would acquire if affiliated to the sectoralpension fund.

2. If, at the time referred to in paragraph 1, the special pension arrangements didnot meet the condition laid down in Article 1(b), a sufficient period must beallowed to elapse to enable that condition to be met before any decision is takenon the request.

3. An exemption under this article shall enter into force when affiliation to thesectoral 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 theInsurance Board lodged within 30 days of receipt of the decision by the personconcerned. The sectoral pension fund must, in writing, bring the foregoingsentence 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 sectoralpension 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 bythe Insurance Board cannot be the subject of any complaint or appeal.

18.

Sectoral pension funds to which affiliation has been made compulsory are subjectnot only to the BPW but also to the Wet van 15 mei 1962 houdende regelenbetreffende pensioen- en spaarvoorzieningen (Law of 15 May 1962 on pension andsavings funds, amended subsequently a number of times hereinafter 'the PSW').

19.

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

20.

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

21.

Article 1(6) of the PSW makes clear that it also applies to sectoral pension fundsto 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 statutesand regulations of a sectoral pension fund. Thus, Article 4 of the PSW providesthat the setting up of any such fund must be notified to the Minister for SocialAffairs and Employment and to the Insurance Board. Article 6(1) of the PSWconfirms that representatives of the employers' organisations and representativesof the workers' organisations of the sector concerned are to sit in equal numberson the management board of a sectoral pension fund.

23.

In addition, Articles 9 and 10 of the PSW lay down detailed arrangements formanagement of the funds collected. The general rule is set out in Article 9 whichobliges pension funds to transfer the risk linked to their pension commitments orto reinsure it. By way of exception to that rule Article 10 allows pension funds toadminister and invest the capital collected themselves at their own risk. Before itcan be authorised

to do so, a pension fund must submit to the competentauthorities a management plan explaining in detail the way it proposes to handlethe actuarial and financial risks. The plan must be approved by the InsuranceBoard. Furthermore the pension fund is subject to continuous supervision. Thescheme's actuarial profit and loss accounts must be submitted regularly to theInsurance Board for approval.

24.

Finally, Articles 13 to 16 of the PSW lay down rules for investment of the sumscollected. By virtue of Article 13, the assets of the scheme together with expectedincome must be sufficient to cover pension liabilities. Under Article 14 investmentsmust be made prudentially.

The main proceedings

25.

The Fund was established under the BPW. Affiliation to the Fund was madecompulsory by an order of the Minister for Social Affairs and Employment of 4December 1975 (hereinafter 'the order making affiliation compulsory□).

26.

Albany operates a textile business which has been affiliated to the Fund since 1975.

27.

Until 1989 the Fund's pension scheme paid a flat-rate benefit. The pensionawarded to workers was not proportional to their wage but was a fixed amount foreach worker. Albany decided that the scheme was insufficiently generous and in1981 concluded arrangements with an insurance company for a supplementarypension for its workers so that the total pension to which they would be entitledafter 40 years' employment amounts to 70% of their last salary.

28.

With effect from 1 January 1989 the Fund changed its pension scheme. Since thenits scheme awards workers an amount which likewise represents 70% of their finalsalary.

29.

Following the change to the Fund's pension scheme, Albany asked on 22 July 1989to be exempted from affiliation. Its request was rejected by the Fund on 28December 1990. The Fund took the view that under the Guidelines for exemptionfrom affiliation such exemption could only be granted when the conditions laiddown in the Guidelines were satisfied and where the special provisions concerningpensions had already been in force for six months before lodgment of the requestby both sides of the industry in response to which the sectoral pension fund hadbeen declared compulsory.

30.

Albany lodged an objection to the Fund's decision with the Insurance Board. Bydecision of 18 March 1992, the Board found that, even if the Fund was notrequired in the circumstances to grant the exemption, it should be asked to exerciseits power to do so or, at the very least, grant a period of notice, since Albany hadconcluded arrangements for a supplementary pension scheme for its staff severalyears earlier and the latter arrangements had, since 1 January 1989, been similarto those introduced by the Fund.

31.

The Fund did not follow the advice of the Insurance Board and on 11 November1992 served Albany with a demand for payment of the sum of NLG 36 700.29,representing all statutory contributions payable since 1989 together with interest,collection charges, non-judicial expenses and legal aid costs.

32.

Albany challenged that demand before the Kantongerecht, Arnhem. It contendedin particular that the system of compulsory affiliation to the Fund was contrary toArticle 3(g) of the Treaty, Articles 52 and 59

of the EC Treaty (now, afteramendment, Articles 43 EC and 49 EC), and Articles 85, 86 and 90 of the Treaty.

33. According to Albany, the Fund's refusal to grant it an exemption is detrimental toit. Its insurance company would grant it less favourable conditions if it had to join

the supplementary pension scheme set up by the Fund. Moreover, contrary to theFund's contention, other sectoral pension funds, such as the Bedrijfspensioenfondsvoor de Bouwnijverheid and the Bedrijfspensioenfonds voor de Schildersbedrijf, hadgranted an exemption to undertakings which had at an earlier stage concludedsupplementary pension arrangements.

34. The Fund maintained that in this case there was no legal obligation to grant anexemption. Accordingly, the court could only exercise limited review in thatrespect. Under Article 5(3) of the BPW, an exemption had to be granted onlywhere an undertaking had established an equivalent pension scheme at least sixmonths before affiliation was made compulsory. The obligation to grant such anexemption arises only upon initial affiliation to the Fund and does not arise in theevent of a change to the pension arrangements. The Fund also emphasised thatit was important to maintain a proper pension scheme based on the principle ofsolidarity for all workers and undertakings in the textile industry and stressed inthat connection that the grant of an exemption to Albany would entail thedeparture of 110 people from its membership of about 8 800.

35. The Kantongerecht accepted the Insurance Board's argument that since 1 January1989 Albany's supplementary scheme had been similar to the pension schemeintroduced by the Fund. It emphasised that relations between a sectoral pensionfund and its members are governed by requirements of reasonableness and equityas well as by the general principles of sound administration. Accordingly, a sectoralpension fund should give considerable weight to the opinion of a statutorilyappointed independent expert authority such as the Insurance Board when askedto grant an exemption.

36. The Kantongerecht observed that in its judgment in Joined Cases C-430/93 andC-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705 the Court had notexamined the last three questions concerning the compatibility with the Communitycompetition rules of the Netherlands system of compulsory affiliation to anoccupational pension scheme.

37. In those circumstances the Kantongerecht, Arnhem, referring to its interlocutoryjudgments of 19 April 1993, 17 January 1994 and 9 January 1995, stayedproceedings pending a preliminary ruling from the Court of Justice on the followingquestions:

'1. Is a sectoral pension fund within the meaning of Article 1(1)(b) of the[BPW] an undertaking within the meaning of Articles 85, 86, or 90 of theEC Treaty?

2. If so, is the fact of making membership of the sectoral pension fund forindustrial undertakings compulsory a measure adopted by a Member State

which nullifies the effectiveness of the competition rules applicable toundertakings?

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

Admissibility

38. The Netherlands and French Governments and the Commission query theadmissibility of the questions submitted, taking the view that the national court hasnot, in its order for reference, sufficiently explained the factual and legal contextof the main proceedings. In the absence of a detailed account from the nationalcourt of the legal provisions applicable to the main proceedings, the circumstancesin which the Fund was set up and the management rules of the Fund, the Courtcannot give a useful interpretation of Community law and the Member States andother interested parties are not in a position to submit written observationssuggesting answers to the questions on which a ruling is sought.

39. According to settled case-law, the need to provide an interpretation of Communitylaw which will be of use to the national court makes it necessary that the nationalcourt define the factual and legal context of the questions it is asking or, at the veryleast, explain the factual circumstances on which those questions are based. Thoserequirements are of particular importance in certain areas, such as that ofcompetition, where the factual and legal situations are often complex (see inparticular Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo andOthers* [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).

40. The information provided and the questions raised in orders for reference must notonly be such as to enable the Court to reply usefully but must also give thegovernments of the Member States and other interested parties the opportunity tosubmit observations pursuant to Article 20 of the EC Statute of the Court ofJustice. It is the Court's duty to ensure that the opportunity to submit observationsis safeguarded, bearing in mind that, by virtue of the abovementioned provision,only the orders for reference are notified to the interested parties (see, inparticular, the order of 30 April 1998 in Joined Cases C-128/97 and C-137/97 *Testaand Modesti* [1998] ECR I-2181, paragraph 6, and the order of 11 May 1999 inCase C-325/98 *Anssens* [1999] ECR I-0000, paragraph 8).

41. In this case, it is clear from the observations submitted under Article 20 of the ECStatute of the Court of Justice by the governments of the Member States and theother 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 theCourt.

42. In its observations, the French Government refers to those which it submitted inJoined Cases C-115/97, C-116/97 and C-117/97 *Brentjens* (judgment of today's date,not yet reported), which refer expressly to Case C-219/97 *Drijvende Bokken*(judgment of today's date, not yet reported), and the Commission refers in itsobservations directly to the latter case. The order for reference in *DrijvendeBokken*, which also concerns the compatibility with the Community competitionrules of compulsory affiliation to a sectoral pension fund, contains a detailedaccount of the legislation applicable to the main proceedings.

43. Furthermore, even though the French and Netherlands Governments may havetaken the view in this case that the information provided by the national court wasnot sufficient to enable them to take a position on certain aspects of the questionssubmitted to the Court, it must be emphasised that further information was madeavailable in the documents forwarded by the national court, the writtenobservations and the answers given to the questions raised by the Court. All thatinformation, which was included in the Report for the Hearing, was brought to thenotice of the governments of the Member States and the other interested partiesfor the purposes of the hearing, at which they had an opportunity, if necessary, toamplify their observations.

44.

Finally, the information supplied by the referring court, supplemented as necessaryby the abovementioned details, sufficiently apprises the Court of the factual andlegislative background to the main proceedings to enable it to interpret thecompetition rules in the light of the circumstances of those proceedings.

45.

It follows that the questions referred are admissible.

The second question

46.

By its second question, which it is appropriate to consider first, the national courtseeks essentially to ascertain whether Article 3(g) of the Treaty, Article 5 of the ECTreaty (now Article 10 EC) and Article 85 of the Treaty prohibit a decision by thepublic authorities to make affiliation to a sectoral pension fund compulsory at therequest of organisations representing employers and workers in a given sector.

47.

Albany contends that the request by management and labour to make affiliationto a sectoral pension fund compulsory constitutes an agreement between theundertakings operating in the sector concerned, contrary to Article 85(1) of theTreaty.

48.

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

49.

The effects of such an agreement on competition are 'appreciable because itaffects the entire Netherlands textile sector. They are aggravated by the cumulativeeffect of making affiliation to pension schemes compulsory in numerous sectors ofthe economy and for all undertakings in those sectors.

50.

Moreover, such an agreement affects trade between Member States in so far as itconcerns undertakings which engage in cross-frontier business and deprives insurersestablished in other Member States of the opportunity to offer a full pensionscheme in the Netherlands either by virtue of cross-frontier services or throughbranches or subsidiaries.

51.

Therefore, according to Albany, by creating a legal framework for, and accedingto a request from, the two sides of industry to make affiliation to the sectoralpension fund compulsory, the public authorities favoured or furthered theimplementation and operation of agreements between undertakings operating inthe sectors concerned which are contrary to Article 85(1) of the Treaty, therebyinfringing Articles 3(g), 5 and 85 of the Treaty.

52.

It is necessary to consider first whether a decision taken by the organisationsrepresenting employers and workers in a given sector, in the context of a collectiveagreement, to set up in that sector a single pension fund responsible for managinga supplementary pension scheme and to request the public authorities to makeaffiliation to that fund compulsory for all workers in that sector is contrary toArticle 85 of the Treaty.

53.

It must be noted, first, that Article 85(1) of the Treaty prohibits all agreementsbetween undertakings, decisions by associations of undertakings and concertedpractices which may affect trade between Member States and which have as theirobject or effect the prevention, restriction or distortion of competition within

thecommon market. The importance of that rule prompted the authors of the Treatyto provide expressly in Article 85(2) of the Treaty that any agreements or decisionsprohibited pursuant to that article are to be automatically void.

54.

Next, it is important to bear in mind that, under Article 3(g) and (i) of the ECTreaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of theCommunity are to include not only a 'system ensuring that competition in theinternal market is not distorted but also 'a policy in the social sphere. Article 2of the EC Treaty (now, after amendment, Article 2 EC) provides that a particulartask of the Community is 'to promote throughout the Community a harmonious

and balanced development of economic activities and 'a high level of employmentand of social protection.

55.

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

56.

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

57.

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

58.

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

59.

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

60.

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

61.

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

62. First, like the category of agreements referred to above which derive from socialdialogue, the agreement at issue in the main proceedings was concluded in theform of a collective agreement and is the outcome of collective negotiationsbetween organisations representing employers and workers.

63. Second, as far as its purpose is concerned, that agreement establishes, in a givensector, a supplementary pension scheme managed by a pension fund to whichaffiliation may be made compulsory. Such a scheme seeks generally to guaranteea certain level of pension for all workers in that sector and therefore contributesdirectly to improving one of their working conditions, namely their remuneration.

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

65. It must also be borne in mind that, as the Court has held, in particular in Case267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 16, Article 85 of the Treatyitself concerns only the conduct of undertakings and not legislation or regulationsadopted by Member States. However, according to settled case-law of the Courtof Justice, Article 85 of the Treaty, read in conjunction with Article 5, requires theMember States not to introduce or maintain in force measures, whether legislativeor regulatory, which may render ineffective the competition rules applicable toundertakings. Such is the case, according to the same case-law, where a MemberState requires or favours the adoption of agreements, decisions or concertedpractices contrary to Article 85 of the Treaty or reinforces their effects or deprivesits own legislation of its official character by delegating to private tradersresponsibility 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] ECRI-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 53and 54; and Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori delPorto 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 organisationsrepresenting employers and workers to make affiliation to the sectoral pension fundset up by them compulsory is part of a regime established under a number ofnational laws, designed to exercise regulatory authority in the social sphere. Sincethe agreement at issue in the main proceedings does not fall within the scope ofArticle 85(1) of the Treaty, as is clear from paragraphs 52 to 64 of this judgment,the Member States are free to make it compulsory for persons who are not boundas 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 forthe implementation of social agreements.

68. The decision of the public authorities to make affiliation to such a fund compulsorycannot therefore be regarded as requiring or favouring the adoption of agreements,decisions or concerted practices contrary to Article 85 of the Treaty or reinforcingtheir effects.

69. It follows from the foregoing considerations that the decision of the publicauthorities to make affiliation to a sectoral pension fund compulsory does not fallwithin the categories of legislative measures which, according to the case-law of theCourt, 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 85of the Treaty do not prohibit a decision by the public authorities to make affiliationto a sectoral pension fund compulsory at the request of organisations representingemployers and workers in a given sector.

The first question

71.

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

72.

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

73.

First, compulsory affiliation of all workers in a given sector to a supplementarypension scheme pursues an essential social function within the pension systemapplicable in the Netherlands because of the extremely limited amount of thestatutory pension calculated on the basis of the minimum statutory wage. Providedthat a supplementary pension scheme has been established by a collectiveagreement within a framework laid down by law and affiliation to that scheme hasbeen made compulsory by the public authorities, it constitutes an element of theNetherlands system of social protection and the sectoral pension fund responsiblefor management of it must be regarded as contributing to the management of thepublic social security service.

74.

Second, the sectoral pension fund is non-profit-making. It is managed jointly byboth sides of the industry, who are equally represented on its managementcommittee. The sectoral pension fund collects an average contribution fixed by thatcommittee which strikes a balance, collectively, between the amount of the

premiums, the value of the benefits and the extent of the risks. Moreover, thecontributions may not fall below a certain level, so as to establish adequatereserves, and may not, in order to preserve its non-profit-making status, exceed anupper limit, observance of which is ensured by management and labour and by theInsurance Board. Even though the contributions levied are invested on acapitalisation basis, the investments are made under the supervision of theInsurance Board and in accordance with the provisions of the PSW and the statutesof 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 priormedical examination, the continuing accrual of pension rights despite exemptionfrom contributions in the event of incapacity for work, the discharge by the fundof arrears of contributions due from an employer in the event of the latter'sinsolvency and by the indexing of the amount of the pensions in order to maintaintheir value. The principle of solidarity is also apparent from the absence of anyequivalence, for individuals, between the contribution paid, which is an averagecontribution not linked to risks, and pension rights, which are determined byreference to an average salary. Such solidarity makes compulsory affiliation to thesupplementary pension scheme essential. Otherwise, if 'good risks left thescheme, the ensuing downward spiral would jeopardise its financial equilibrium.

76.

On that basis, the Fund and the intervening governments consider that the sectoralpension fund is an organisation charged with the management of social securityschemes of the kind referred to in the judgment in Joined Cases C-159/91 andC-160/91 *Poucet and Pistre* [1993] ECR I-637, and is unlike the organisation at issuein 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 asan 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 hasheld that the concept of an undertaking encompasses every entity engaged in aneconomic activity, regardless of the legal status of the entity and the way in whichit 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 *FédérationFrançaise des Sociétés d'Assurance,* cited above, paragraph 14).

78.

Moreover, in *Poucet and Pistre*, cited above, the Court held that that concept didnot encompass organisations charged with the management of certain compulsorysocial security schemes, based on the principle of solidarity. Under the sicknessand maternity scheme forming part of the system in question, the benefits were thesame for all beneficiaries, even though contributions were proportional to income;under the pension scheme, retirement pensions were funded by workers inemployment; furthermore, the statutory pension entitlements were not proportionalto the contributions paid into the pension scheme; finally, schemes with a surpluscontributed to the financing of those with structural financial difficulties. That

solidarity made it necessary for the various schemes to be managed by a singleorganisation and for affiliation to the schemes to be compulsory.

79.

In contrast, in *Fédération Française des Sociétés d'Assurance*, cited above, the Courtheld that a non-profit-making organisation which managed a pension schemeintended to supplement a basic compulsory scheme, established by law as anoptional scheme and operating according to the principle of capitalisation, was anundertaking within the meaning of Article 85 et seq. of the Treaty. Optionalaffiliation, application of the principle of capitalisation and the fact that benefitsdepended solely on the amount of the contributions paid by the beneficiaries andon the financial results of the investments made by the managing organisationimplied that that organisation carried on an economic activity in competition withlife assurance companies. Neither the social objective pursued, nor the fact thatit was non-profit-making, nor the requirements of solidarity, nor the other rulesconcerning, in particular, the restrictions to which the managing organisation wassubject in making investments altered the fact that the managing organisation wascarrying on an economic activity.

80.

The question whether the concept of an undertaking, within the meaning of Article85 et seq. of the Treaty, extends to a body such as the sectoral pension fund atissue in the main proceedings must be considered in the light of thoseconsiderations.

81.

The sectoral pension fund itself determines the amount of the contributions andbenefits and that the Fund operates in accordance with the principle ofcapitalisation.

82.

Accordingly, by contrast with the benefits provided by organisations charged withthe 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 Funddepends on the financial results of the investments made by it, in respect of whichit 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 theGuidelines for exemption from affiliation, a sectoral pension fund is required togrant exemption to an undertaking where the latter has already made available toits workers for at least six months before the request was lodged on the basis ofwhich affiliation to the fund was made compulsory, a pension scheme granting themrights 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 alsoentitled to grant exemption to an undertaking which provides its workers with apension scheme granting them rights at least equivalent to those deriving from thefund, provided that, in the event of withdrawal from the fund, compensationconsidered reasonable by the Insurance Board is offered for any damage sufferedby 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 proceedingsengages in an economic activity in competition with insurance companies.

85. In those circumstances, the fact that the fund is non-profit-making and themanifestations of solidarity referred to by it and the intervening governments arenot sufficient to deprive the sectoral pension fund of its status as an undertakingwithin the meaning of the competition rules of the Treaty.

86. Undoubtedly, the pursuit of a social objective, the abovementioned manifestationsof solidarity and restrictions or controls on investments made by the sectoralpension fund may render the service provided by the fund less competitive thancomparable services rendered by insurance companies. Although such constraintsdo not prevent the activity engaged in by the fund from being regarded as aneconomic activity, they might justify the exclusive right of such a body to managea supplementary pension scheme.

87. The answer to the first question must therefore be that a pension fund chargedwith the management of a supplementary pension scheme set up by a collectiveagreement concluded between organisations representing employers and workersin a given sector, to which affiliation has been made compulsory by the publicauthorities for all workers in that sector, is an undertaking within the meaning ofArticle 85 et seq. of the Treaty.

The third question

88. By its third question, the national court seeks essentially to ascertain whetherArticles 86 and 90 of the Treaty preclude the public authorities from conferring ona pension fund an exclusive right to manage a supplementary pension scheme ina given sector.

89. The Netherlands Government contends that the order making affiliationcompulsory has the sole effect of requiring workers in the sector concerned to beaffiliated to the Fund. The order does not, in its view, confer on the Fund anexclusive right in the area of supplementary pensions. Nor does the Fund hold adominant 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 makeaffiliation to a sectoral pension fund compulsory, as in this case, necessarily impliesgranting to that fund an exclusive right to collect and administer the contributionspaid with a view to accruing pension rights. Such a fund must therefore beregarded as an undertaking to which exclusive rights have been granted by thepublic 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 whichhas 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 anexclusive right to manage a supplementary pension scheme in an industrial sectorin a Member State and, therefore, in a substantial part of the common market, maytherefore be regarded as occupying a dominant position within the meaning ofArticle 86 of the Treaty.

93. It must not be forgotten, however, that merely creating a dominant position bygranting exclusive rights within the meaning of Article 90(1) of the Treaty is not initself incompatible with Article 86 of the Treaty. A Member State is in breach ofthe prohibitions contained in those two provisions only if the undertaking inquestion, merely by exercising the exclusive rights granted to it, is led to abuse itsdominant position or when such rights are liable to create a situation in which thatundertaking is led to commit such abuses (*Höfner and Elser*, cited above, paragraph29; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 37; *Merci ConvenzionaliPorto di Genova*, cited above, paragraphs 16 and 17; Case C-323/93 *Centred'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. Albany contends in that connection that the system of compulsory affiliation to thesupplementary pension scheme managed by the Fund is contrary to the combinedprovisions of Articles 86 and 90 of the Treaty. The pension benefits available fromthe Fund do not, or no longer, match the needs of the undertakings. The benefitsare too low, are not linked to wages and, consequently, are generally inadequate. Employers have therefore to make other pension arrangements. The system ofcompulsory affiliation deprives those employers of any opportunity of arranging forcomprehensive pension cover from an insurance company. Pension arrangementsspread over a number of insurers would increase administrative costs and reduceefficiency.

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

96. In the present case, it is important to note that the supplementary pension schemeoffered by the Fund is based on the present norm in the Netherlands, namely thatevery worker who has paid contributions to that scheme for the maximum periodof affiliation receives a pension, including the State pension under the AOW, equalto 70% of his final salary.

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

98.

It is therefore necessary to consider whether, as contended by the Fund, theNetherlands Government and the Commission, the exclusive right of the sectoralpension fund to manage supplementary pensions in a given sector and the resultantrestriction of competition may be justified under Article 90(2) of the Treaty as ameasure necessary for the performance of a particular social task of generalinterest with which that fund has been charged.

99.

Albany contends that compulsory affiliation to the sectoral pension fund is notnecessary to ensure an adequate level of pension for workers. That aim could beattained by minimum requirements for pensions, to be laid down either by the twosides of industry at the instigation of the public authorities or directly by the latter. Collective employment agreements frequently include an obligation on employersto provide a minimum pension scheme, whilst leaving them free to establish apension fund for their own undertaking, to join a sectoral pension fund or to makearrangements with an insurance company.

100.

According to Albany, the fact that members pay 'average contributions likewisedoes not justify compulsory affiliation. First, neither the BPW nor the ordermaking affiliation compulsory requires a system based on such contributions. Second, a number of sectoral pension funds to which affiliation is not compulsoryoperate perfectly well on the basis of 'average contributions.

101.

As regards acceptance of all workers in the same area of activity without a priormedical examination so that 'bad risks cannot be refused, Albany observes thatin practice the pension insurance contracts concluded with insurers require theemployer to declare all his workers and an obligation on the insurer to accept anyworker 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 interestare subject to the rules on competition in so far as the application of such rulesdoes not obstruct the performance, in law or in fact, of the particular tasks assignedto them.

103.

In allowing, in certain circumstances, derogations from the general rules of theTreaty, Article 90(2) of the Treaty seeks to reconcile the Member States' interestin using certain undertakings, in particular in the public sector, as an instrument ofeconomic or fiscal policy with the Community's interest in ensuring compliance withthe 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 CaseC-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 beprecluded, when determining what services of general economic interest theyentrust to certain undertakings, from taking account of objectives pertaining to theirnational policy or from endeavouring to attain them by means of obligations andconstraints 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 anessential social function within the Netherlands pensions system by reason of thelimited amount of the statutory pension, which is calculated on the basis of theminimum statutory wage.

106.

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

107.

Next, it is not necessary, in order for the conditions for the application of Article90(2) of the Treaty to be fulfilled, that the financial balance or economic viabilityof the undertaking entrusted with the operation of a service of general economicinterest should be threatened. It is sufficient that, in the absence of the rights atissue, it would not be possible for the undertaking to perform the particular tasksentrusted to it, defined by reference to the obligations and constraints to which itis subject (*Commission* v *Netherlands*, cited above, paragraph 52) or thatmaintenance of those rights is necessary to enable the holder of them to performtasks of general economic interest which have been assigned to it undereconomically 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 forall workers in a given sector were removed, undertakings with young employees ingood health engaged in non-dangerous activities would seek more advantageousinsurance terms from private insurers. The progressive departure of 'good□ riskswould leave the sectoral pension fund with responsibility for an increasing share of'bad□ risks, thereby increasing the cost of pensions for workers, particularly thosein small and medium-sized undertakings with older employees engaged indangerous activities, to which the fund could no longer offer pensions at anacceptable cost.

109.

Such a situation would arise particularly in a case where, as in the mainproceedings, the supplementary pension scheme managed exclusively by the Fund

displays a high level of solidarity resulting, in particular, from the fact thatcontributions do not reflect the risk, from the obligation to accept all workerswithout a prior medical examination, the continuing accrual of pension rightsdespite exemption from the payment of contributions in the event of incapacity forwork, the discharge by the Fund of arrears of contributions due from an employerin the event of insolvency and the indexing of the amount of pensions in order tomaintain their value.

110.

Such constraints, which render the service provided by the Fund less competitivethan a comparable service provided by insurance companies, go towards justifyingthe 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 makeit impossible for it to perform the tasks of general economic interest entrusted toit under economically acceptable conditions and threaten its financial equilibrium.

112.

Referring to *GB-Inno-BM,* cited above, Albany considers, however, that the factthat the Fund fulfils a dual role, as manager of the pension scheme and as theauthority vested with the power to grant exemptions, might give rise to arbitraryexercise of the power of exemption.

113.

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

114.

In paragraph 25 of that judgment, the Court stated that the vesting in such acompany of powers both to authorise or refuse the connection of telephones to thenetwork and to lay down the technical standards to be met by such equipment andverify whether devices not manufactured by it conformed with the specificationsadopted by it was tantamount to conferring upon it the power to determine at willwhich terminal equipment might be connected to the public network, therebyplacing 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 fromaffiliation, a sectoral pension fund is required to grant an exemption to anundertaking where the latter has already made available to its workers for at leastsix months before the request was lodged on the basis of which affiliation to thefund was made compulsory, a pension scheme granting them rights at leastequivalent to those which they would acquire if affiliated to the fund.

117.

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

118.

Next, under Article 1 of the Guidelines for exemption from affiliation, a sectoralpension fund is entitled to grant an exemption to an undertaking which providesits workers with a pension scheme granting them rights at least equivalent to thosederiving from the fund, provided that, in the event of withdrawal from the fund,compensation considered reasonable by the Insurance Board is offered for anydamage suffered by the fund, from the actuarial point of view, as a result of thewithdrawal.

119.

The provision thus enables a sectoral pension fund to exempt from the obligationof affiliation an undertaking which provides its workers with a pension schemeequivalent to the one managed by it if such an exemption does not threaten itsfinancial equilibrium. Exercise of that power of exemption involves an evaluationof complex data relating to the pension schemes involved and the financialequilibrium 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 exemptionsinvolve for the financial equilibrium of a sectoral pension fund and, therefore, forperformance of the social task entrusted to it, a Member State may consider thatthe 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, onan objection to a requirement to pay contributions must subject to review thedecision of the fund refusing an exemption from affiliation, which enables them atleast to verify that the fund has not used its power to grant an exemption in anarbitrary manner and that the principle of non-discrimination and the otherconditions for the legality of that decision have been complied with.

122.

Finally, as regards Albany's argument that an adequate level of pension for workerscould be assured by laying down minimum requirements to be met by pensionsoffered by insurance companies, it must be

emphasised that, in view of the socialfunction of supplementary pension schemes and the margin of appreciationenjoyed, according to settled case-law, by the Member States in organising theirsocial security systems (Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph16; *Poucet and Pistre*, cited above, paragraph 6; and Case C-70/95 *Sodemare andOthers* [1997] ECR I-3395, paragraph 27), it is incumbent on each Member Stateto consider whether, in view of the particular features of its national pensionsystem, 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 apension fund.

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

Costs

124. The costs incurred by the Netherlands, German, French and Swedish Governmentsand the Commission, which have submitted observations to the Court, are notrecoverable. Since these proceedings are, for the parties to the main proceedings,a step in the proceedings pending before the national court, the decision on costsis a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Kantongerecht, Arnhem, byjudgment of 4 March 1996, hereby rules:

1. Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC),Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do notprohibit a decision by the public authorities to make affiliation to asectoral pension fund compulsory at the request of organisationsrepresenting employers and workers in a given sector.

2. A pension fund charged with the management of a supplementary pensionscheme set up by a collective agreement concluded between organisationsrepresenting employers and workers in a given sector, to which affiliationhas been made compulsory by the public authorities for all workers in thatsector, is an undertaking within the meaning of Article 85 et seq. of theTreaty.

3. Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) do notpreclude the public authorities from conferring on a pension fund theexclusive right to manage a supplementary pension scheme in a givensector.

Rodríuez Iglesias

Puissochet

Hirsch

Jann

Moitinho de Almeida

Gulmann

Murray

Edward

Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

1: Language of the case: Dutch.