Opinion of Advocate General Jacobs delivered on 23 March 2000

Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten

Reference for a preliminary ruling: Kantongerecht Nijmegen – Netherlands

Compulsory membership of an occupational pension scheme - Compatibility with competition rules - Classification of an occupational pension fund as an undertaking

Joined cases C-180/98 to C-184/98

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Opinion of the Advocate-General

I – Introduction

1. In the present cases, referred by the Kantongerecht (Cantonal Court) Nijmegen, the Court is asked to give a ruling on questions concerning the compatibility of the Netherlands system of compulsory affiliation to professional pension schemes with the competition rules of the EC Treaty. Those questions arise in the context of proceedings brought by several medical specialists challenging orders issued by the Netherlands medical specialists' professional pension fund demanding payment of contributions to its supplementary pension scheme.

2. The Community law issue is essentially whether the Netherlands rules on compulsory affiliation to professional supplementary pension schemes infringe either Articles 5 and 85 of the EC Treaty (now Articles 10 and 81 EC) or Articles 90(1) and 86 of the EC Treaty (now Articles 86(1) and 82 EC). As regards Articles 5 and 85 a preliminary question is whether and if so under what conditions decisions of professional associations in the context of the setting up of a compulsory professional pension scheme might be contrary to Article 85(1). As to Articles 90(1) and 86 the preliminary question is whether a body such as the fund at issue is to be classified as an undertaking for the purposes of the competition rules of the Treaty.

3. The questions referred and their legal and procedural context are basically identical with the last three questions referred to the Court by the Hoge Raad in Van Schijndel. In that case, however, in view of the answers to the other questions, the Court did not have to consider the substantive questions of competition law.

4. The present cases also raise issues similar to those addressed recently in Albany, Brentjens, and Drijvende Bokken, and the Court decided to suspend proceedings in the present cases until it gave judgment in those earlier cases. In order to avoid repetition I will refer extensively to the Opinion and the three judgments in those cases. When drawing analogies it must however be kept in mind that those cases concerned sectoral pension funds which were set up on the basis of collective agreements between management and labour and which provided supplementary pensions to employees in a certain sector of industry, whereas the present cases concern a pension fund set up by members of a profession which provides pensions to the members of that same profession.

II - National background

5. It will be recalled that the system of pensions in the Netherlands is based on three pillars:

- First, there is a statutory basic pension, granted by the State under the Algemene Ouderdomswet (General law on old-age pensions, hereinafter the AOW) and the Algemene Nabestaanden Wet (General law on survivors' benefits, hereinafter the ANW). That first pillar pension is intended to provide the whole population with a flat-rate benefit which is a certain percentage of the minimum wage. The benefit is reduced for any year in which an individual has not been insured. Participation is compulsory.

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

- Finally, the first two elements of pension income may be complemented by concluding individual pension or life insurance contracts on a voluntary basis (third pillar).

6. The present cases are concerned with a second-pillar pension fund providing supplementary pensions to the members of a profession, namely to medical specialists. The fund in question is in many respects similar to the Stichting Pensioenfonds voor Fysiotherapeuten (Physiotherapists' Pension Fund) at issue in Van Schijndel.

7. Funds of this type are in the first place governed by the Wet betreffende verplichte deelneming in een beroepspensioenregeling (Law on Compulsory Affiliation to a Professional Pension Scheme, hereinafter the BprW) of 29 June 1972. That law is to a certain extent modelled on the Wet betreffende verplichte deelneming in een

bedrijfspensioenfonds (Law on Compulsory Affiliation to a Sectoral Pension Fund, hereinafter the BPW) of 17 March 1949, which was at issue in the abovementioned cases, Albany, Brentjens, and Drijvende Bokken. The other applicable rules are the statutes and regulations of those funds.

1. The Law on Compulsory Affiliation to a Professional Pension Scheme

8. Under Article 1(1)(b) of the BprW a beroepsgenoot (member of a profession) is a natural person who exercises in a given professional sector the profession corresponding to that sector.

9. Under Article 2(1) of the BprW, the Minister for Social Affairs may upon application by one or more organisations deemed by him to be sufficiently representative of the members of a profession render affiliation to a professional pension scheme (beroepspensioenregeling) set up by members of that profession compulsory for all or certain groups of persons belonging to the profession concerned. The professional organisation's application to the Minister must be published beforehand and interested parties may comment. Before taking his decision the Minister may consult the Social and Economic Council (Sociaal-Economische Raad) or the Insurance Board (Verzekeringskamer).

10. Under Article 2(2) such a professional pension scheme may take one of three forms:

(a) A professional pension fund is set up which acts as sole implementing body (uitvoeringsorgaan) of the pension scheme.

(b) The members of the profession are required to comply with the rules of the pension scheme by means of individual insurance contracts to be concluded at their choice either with the professional pension fund mentioned under (a) where the pension scheme allows that possibility or with a duly authorised insurer.

(c) A part of the pension scheme takes the form under (a) and the remaining part the form under (b).

11. It appears from the file that both medical specialists and general practitioners have opted for form (c) in respect of their relatively large professional pension schemes. The other 10 professional schemes take form (a).

12. Under Article 2(3) of the BprW affiliation may be made compulsory only where a legal person (rechtspersoon) is set up which acts

(a) either as pension fund implementing the pension scheme,

(b) or as surveillance body making sure that the members of the profession comply with the obligation to insure themselves under Article 2(2)(b) of the BprW,

(c) or partly as pension fund, partly as surveillance body.

13. Compulsory affiliation entails for all persons concerned the obligation to comply with the statutes and regulations of the competent legal person. There are sanctions for infringement of that obligation. The professional pension funds can issue enforceable orders for recovery of unpaid contributions.

14. The competent Minister has the power to end compulsory affiliation. Compulsory affiliation ends automatically where the financial basis of the fund or the statutes and regulations of the legal person are modified unless the competent Minister declares that he has no objections to the modifications.

15. A number of requirements must be complied with before the Minister can make affiliation compulsory. Members must for example have been informed in time of the professional organisation's intention to apply for a decision making affiliation compulsory, the scheme must have a sound financial basis set out in a reasoned actuarial note, and the statutes and regulations of the legal person must comply with the requirements of the BprW and must sufficiently safeguard the interests of affiliated and other interested persons.

16. Article 8(1) of the BprW specifies several issues which have to be dealt with in the statutes and regulations of the legal person, such as for example the definition of the profession to which the pension scheme applies, the governance of the legal person, the rights and obligations of affiliated persons, and the attitude to adopt with regard to persons who on moral grounds object to any form of insurance.

17. Article 8(2) specifies supplementary issues to be addressed in the statutes and regulations of the legal person where it acts as a pension fund managing the pension scheme. Such issues are for example the composition of the revenues and investments of the fund.

18. Article 8(3) empowers the Minster to adopt guidelines (richtlijnen) as regards the issues enumerated in the first two paragraphs. He has adopted such guidelines in respect of the attitude to be taken with regard to persons who on moral grounds object to any form of insurance. Such persons will be exempted from participation in a professional pension scheme if they can show that they do not have recourse to any kind of insurance.

19. Articles 9 and 10 of the BprW determine the manner in which a professional pension fund has to administer the collected funds. In principle pension funds must transfer the risk linked to the pension commitments or reinsure it by means of agreements with insurance companies (Article 9). By way of exception a fund may administer and invest the collected capital itself at its own risk where it has presented to the competent surveillance bodies a management plan and actuarial note explaining the way it proposes to handle the actuarial and financial risk and where the Insurance Board has given its approval (Article 10).

20. The accounts of a fund which administers the collected contributions itself must show that its capital and income suffice to cover its pension obligations. Professional pension funds must present reports to the Insurance Board at regular intervals giving a complete picture of the financial situation of the fund and showing that the fund complies with all legal requirements. The Insurance Board exercises permanent control over the different supplementary pension funds in the Netherlands.

21. Under Article 26 of the BprW the Minister may grant in individual cases exemptions from a series of rules of the BprW. He may for example grant exemption from compulsory affiliation. The exemption may be limited in time or subject to conditions.

22. According to the Netherlands Government a ministerial exemption may be granted only where in the specific circumstances of the case a systematic application of the BprW would disproportionately prejudice individual interests and where the fund concerned has not provided for appropriate alternative solutions. None the less, an application for a ministerial exemption is not to be regarded as a remedy against any decision of the fund concerned refusing to grant an exemption from compulsory affiliation.

23. Exemptions under Article 26 of the BprW are not available on merely moral or public interest grounds. Before taking the decision the Minister generally hears the Insurance Board. In practice applications for an exemption on the basis of Article 26 of the BprW have only rarely been lodged and none have yet been granted. An appeal can be lodged against the Minister's decision under the general rules of Netherlands administrative law.

24. According to the explanatory notes on the draft of the BprW, that law is intended to allow retirement income to reflect the general rise in income levels, to enable younger members of the profession concerned to contribute, by means of a system of technical average contributions or variants thereof, to the greater cost of providing for older members and to provide for the attribution of pension rights in respect of periods prior to the entry into force of the rules. The attainment of those objectives by means of a common set of rules was possible only if [those rules] apply, in principle, to all members of the profession concerned.

25. As regards freedom of competition the Netherlands Government stated in the parliamentary debate that:

... the administration of the sectoral pension funds is directed towards achieving the best possible pension regime, from a social point of view, for the entire group of participants (young and old). In the Government's view it is not conceivable for the situation to be different with regard to professional pension funds. Like a sectoral pension fund, a professional pension fund will not be set up as a commercial institution but as an institution with a social purpose which will work in the best possible way for its affiliated members in their reciprocal social relations. Commercial considerations can therefore hardly form a starting point.

In that connection, the amount of the contributions of the members of the profession should be determined not so much by the question whether "they could perhaps find better and cheaper on the market" but rather by the degree of solidarity in the profession concerned.

26. The Government also stated:

The point of a draft framework law such as this is properly to serve the interests of the members of the profession concerned, taken as a composite group. This means that all the members of the particular branch of the profession in question should in principle be required to participate in the pension fund. If that leads to a situation in which it can be established in certain specific cases that that may not accord with the individual interests of one or more members of the profession, then that state of affairs must in principle be accepted, since every set of rules applying to a group of persons involves a restriction of the freedom of individuals.

2. The statutes and pension regulation of the Medical Specialists' Pension Fund

27. The medical specialists' profession represented by the Landelijke Specialisten Vereniging der Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (National Association of Specialists of the Royal Netherlands Society for the Promotion of Medicine, hereinafter the LSV) set up in 1973 a professional pension scheme (beroepspensioenregeling), which is governed by statutes (statuten) and a pension regulation (pensioenreglement).

28. Under the statutes the Stichting Pensioenfonds Medische Specialisten (the Medical Specialists' Pension Fund, hereinafter the Fund) was set up as a legal person within the meaning of Article 2(3)(c) of the BprW in the form of a foundation (Stichting) to operate partly as an insurer in its own right and partly as surveillance body ensuring that the members of the profession concerned insure themselves individually.

29. Affiliation to the scheme was made compulsory on the basis of Article 2(1) of the BprW by a ministerial decree issued on 18 June 1973 upon request of the LSV. With effect from 31 January 1997 the Orde van Medisch Specialisten (Medical Specialists' Order, hereinafter the OMS) has replaced the LSV in its function as representative professional organisation. About 8 000 of the 15 000 practising independent or employed medical specialists are members of the OMS.

30. Article 1(1) of the pension regulation defines members of the scheme as any medical specialist whose name is listed in the register of recognised medical specialists referred to in the internal rules of the Koninklijke Nederlandse Maatschappij tot bevordering der Geneeskunst (Royal Netherlands Society for the Promotion of Medicine), who resides in the Netherlands, who practises as a medical specialist in that country and who has not yet reached the age of 65 years.

31. Article 1(2) of the pension regulation entitles essentially two groups of medical specialists to apply for exemption from membership. Those groups are, first, medical specialists who expect to exercise in a given year their profession solely in an employment relationship in which they are covered by another pension scheme such as, for example, a scheme governed by the BPW or a scheme set up by the employer before 6 May 1972 which grants pension benefits at least equivalent to those granted by the Fund, and, secondly, self-employed medical specialists who earn revenues below a relatively low threshold.

32. Both the Netherlands Government and the Fund in their replies to written questions put by the Court state that the Fund is bound by the conditions set out in that Article. It appears therefore that exemptions on other grounds are in principle excluded.

33. As regards the relationship between the respective powers of the Minister under Article 26 of the BprW and of the Fund under Article 1(2) of the pension regulation to exempt members of the profession from compulsory affiliation, the Netherlands Government states that the main responsibility for setting up and administering the pension scheme lies with the members of the profession. The role of the public authorities is merely to set a regulatory framework and to guarantee the functioning of the system. Consequently, the Minister's power to exempt is subsidiary to the Fund's power or obligation to do so. Only in so far as the applicable rules (statutes, pension regulation, ministerial guidelines) do not empower the Fund to grant an exemption can the Minister intervene.

34. Under Article 44 of the pension regulation the management of the Fund may in special circumstances grant derogations from the pension regulation in favour of affiliated persons, if the derogation does not prejudice the rights of others. According to the Fund that hardship rule (hardheidsclausule) is to be applied in particularly inequitable situations, such as, conceivably, where a member would build up during a very short period of affiliation only minimal pension rights.

35. According to the Netherlands Government the Fund's decisions in respect of compulsory affiliation and exemptions from that obligation are subject to judicial review under general administrative law (Algemene wet bestuursrecht) despite the fact that the Fund is constituted as a private law foundation.

3. The medical specialists' pension scheme

36. The medical specialists' pension scheme, as described in detail in the pension regulation of the Fund, contains essentially the following elements:

(a) an old-age pension to be paid from the affiliated member's 65th birthday;

(b) a surviving spouse's pension of in principle 70% of the member's old-age pension as built up during the marriage to be paid to the deceased member's surviving spouse;

(c) an orphan's pension of 14% (28% where both parents are deceased) of the member's old-age pension to be paid to the deceased member's children up to their 18th year with a possible extension up to their 27th year;

(d) an indexation mechanism linking the pensions to the general rise in income level;

(e) retroactive pension rights granted in respect of periods before the existence of the scheme;

(f) in case of incapacity to exercise the profession due to invalidity, a continuing accrual of pension rights with the Fund paying the contributions due;

(g) a complementary survivor's benefit (Risicoregeling) for widows, widowers and orphans where an affiliated member dies before he reaches 65 years. The younger the deceased member, the higher the complementary survivor's benefit.

37. The different elements of the pension scheme are subject to two different insurance regimes.

38. A first part of the scheme, the so-called normpensioen (reference pension), basically comprises the old-age pension, the surviving spouse's pension and the orphan's pension (elements (a) to (c)) at their nominal value, i.e. without adapting the pension benefits to the general rise in income level in accordance with element (d)).

39. It might be helpful to give an example of the determination of the normpensioen (as the rules stood in 1998). Every year the pension scheme requires an unmarried affiliated member to build up a nominal pension entitlement of NLG 1 194.96. If that member is married he must moreover build up a supplementary entitlement of NLG 836.47. A 35-year-old unmarried medical specialist affiliated in 1998 will thus have built up in 2028 over a period of 30 years of membership a nominal yearly pension entitlement - the normpensioen - of NLG 35 848.80.

40. In respect of insurance for the normpensioen the medical specialists' profession has opted for the solution under Article 2(2)(b) of the BprW. Members of the profession are obliged to insure the normpensioen by means of an individual insurance contract but they may choose whether to conclude that contract with the Fund or with a duly authorised insurance company. Every five years affiliated members may reconsider their choice. The Fund ensures that members comply with their insurance obligation.

41. An insurance company providing the normpensioen insurance must conclude an agreement with the Fund. The Fund acts in many respects as intermediary between the medical specialists and the insurer. The Fund collects for example the contributions for the normpensioen which are then transferred to the insurer.

42. The Fund and the insurance company fix the respective premiums for the normpensioen on an actuarial basis. The premiums to be paid vary according to the age, sex and income of the affiliated member, the administrative costs of the Fund or the insurer, and the results of the investments made by the Fund or the insurer.

43. The second part of the pension scheme comprises the other abovementioned elements ((d) to (g)). Financially the most important element is the indexation mechanism (d) which by means of an adaptation coefficient determined on a yearly basis aligns pensions and pension entitlements with the rise in incomes. For example a pension entitlement of NLG 1 000 bought in 1973 was worth NLG 2 074.60 in 1998. In the abovementioned example the nominal pension entitlement of NLG 35 848.80 in 2028 will probably correspond in reality to much higher pension payments.

44. For the second part of the scheme the profession has opted for the form provided for in Article 2(2)(a) of the BprW. The Fund administers those elements. They cannot be entrusted to a private insurance company.

45. Elements (d) to (f) are financed by contributions calculated on an actuarial basis. Reserves for retroactive pension rights (element (e)) are already financed. Thus, contributions for that element are currently zero. Element (g) is financed by a fixed average yearly contribution.

46. There is no selection of risks through questionnaires or medical examination.

47. The Fund is a non-profit-making entity. Profits are distributed to pensioners and affiliated members alike by increasing their pension entitlements.

48. According to the Fund other professional pension funds in the Netherlands have been set up by pharmacists, general practitioners, veterinary surgeons, physiotherapists, dentists, midwives, advocates, independent actuaries, stockbrokers, accountants, and mooring workers in the port of Rotterdam. In the last four of those schemes only a very small number of persons participate. The scheme for advocates has a very limited scope and grants only survivors' benefits. The professional pension schemes of the general practitioners and the medical specialists are by far the biggest in terms of invested capital.

49. On 31 December 1997 the Fund had 5 951 affiliated members, 1 063 former members and 4 220 persons receiving pension payments. The latter group was composed of 1 238 widows or widowers, 185 orphans and 2 797 persons receiving old-age pensions. At the end of 1997 the invested capital of the Fund was about NLG 6 600 million.

III - The main proceedings

50. The appellants in the main proceedings, Mr Pavlov (Case C-180/98), Mr Boetie Van der Schaaf (Case C-181/98), Mr Kooyman (Case C-182/98), Mr Weber (Case C-183/98) and Mr Slappendel (Case C-184/98) are medical specialists exercising their profession in a hospital in Nijmegen.

51. It is common ground that the appellants were required to be affiliated to the Fund until the end of 1995.

52. They consider, however, that since 1 January 1996 they have been entitled to be exempted from affiliation pursuant to Article 1(2) of the Fund's pension regulation. Having modified their contractual relationship with the hospital in question, they claim since that date to have practised their profession solely in an employment relationship in which they are compulsorily affiliated to a sectoral pension scheme administered by the Bedrijfspensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (Sectoral Pension Fund for the Health Care, Clerical and Social Sector). The appellants therefore stopped paying pension contributions to the Fund.

53. The Fund denies that the appellants are practising their profession in an employment relationship. It issued enforcement orders against the appellants in respect of arrears of premiums.

54. The appellants challenged those orders before the Kantongerecht.

55. By interlocutory judgment of 13 February 1998 the Kantongerecht decided that owing to the nature of their contractual relationship with the hospital the appellants could not rely on the exemption in Article 1(2) of the Fund's pension regulation.

56. In the course of the procedure the appellants had also claimed that compulsory affiliation to the Fund was contrary to various provisions of the EC Treaty.

57. By interlocutory judgment of 8 May 1998 the Kantongerecht decided to refer to the Court the following three questions. The Kantongerecht states in the order for reference that the questions are modelled on the questions which had previously been referred by the Netherlands Hoge Raad in Van Schijndel.

(1) Given the aims of the BprW as described above ..., is a professional pension fund, membership of which has been made, pursuant to and in accordance with the BprW, compulsory for all, or one or more specified groups of members of a profession, with compulsory affiliation entailing according to the BprW the legal consequences briefly outlined above ..., to be regarded as an undertaking within the meaning of Articles 85, 86 or 90 of the Treaty establishing the European Economic Community?

(2) If so, is the fact of making membership of the professional pension scheme for medical specialists referred to [above in the order for reference] compulsory a measure adopted by a Member State which nullifies the useful effect of the competition rules applicable to undertakings, or is this the case only under certain conditions, and if so, under which?

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

IV – Admissibility

58. According to the Greek Government the questions are inadmissible. In its view, the fact that the referring court does not explain sufficiently the legislative and factual context made it de facto impossible for interested Governments to submit written submissions on the issues raised by the reference.

59. The observations submitted by the Netherlands and French Governments, by the Commission, and also by the Greek Government (in case the Court were to hold the reference admissible) show however that the information contained in the orders for reference was sufficient to enable interested parties to take a position on the questions referred. Moreover, further information was made available in the documents forwarded by the national court, the written observations and the answers given to questions raised by the Court. All that

information was included in the Report for the Hearing. Interested Governments therefore had an opportunity to develop their observations at the hearing.

60. If follows from those elements and from paragraphs 38 to 44 of the judgment in Albany that the questions referred are admissible.

V - Scope of the questions referred

61. According to the Court's analysis of the quasi-identical questions in Albany three issues have to be addressed.

62. First, are Articles 5 and 85 of the Treaty infringed where public authorities make affiliation to a professional pension fund compulsory at the request of a professional organisation representing the members of that profession? (Question 2)

63. Secondly, is a professional pension fund such as that in issue in the present case an undertaking within the meaning of Article 85 et seq. of the Treaty? (Question 1)

64. Thirdly, are Articles 90 and 86 of the Treaty infringed where a Member State sets up a system of compulsory affiliation to professional pension schemes such as the one established by the Netherlands and where within the framework of that system it makes affiliation to a particular professional pension scheme compulsory? (Question 3)

65. As in Albany, the national court's third question might be read as raising also the issue of the Netherlands system's compatibility with Article 90 read in combination with Articles 52 et seq. and 59 et seq. of the EC Treaty (now, after amendment, Articles 43 EC et seq. and 49 EC et seq.).

66. Nothing indicates, however, that the parties or the national court discussed the applicability of the rules on freedom of establishment and freedom to provide services or that the case presents a direct cross-border element. Moreover, the question is modelled on the last question in Van Schijndel. In that case the Hoge Raad expressly declined to refer a question on the fundamental freedoms of the Treaty. Therefore, the question must be interpreted as relating only to Articles 90 and 86 of the Treaty.

VI - The second question: Articles 5 and 85

67. It is common ground that in 1973 the LSV, which was then the representative professional organisation of the Netherlands medical specialists, set up the beroepspensioenregeling (professional pension scheme) described above. According to the Fund all members of the LSV were at that time self-employed medical specialists. Subsequently the LSV requested the competent Minister to make affiliation to the scheme compulsory. The Minister granted that request and issued a decree making affiliation to the scheme submitted by the LSV compulsory for all medical specialists established in the Netherlands.

68. The Kantongerecht has doubts about the compatibility of that decree with Articles 5 and 85 of the Treaty. The underlying line of reasoning might be paraphrased as follows. Medical specialists are undertakings for the purpose of the competition rules. The setting up of the beroepspensioenregeling by the LSV must be analysed as a decision of an association of undertakings within the meaning of Article 85(1). That decision restricts competition between medical specialists and competition on the pension insurance market and also affects trade between Member States. Article 85(1) is thus infringed. By making affiliation to that pension scheme compulsory the Netherlands favours the adoption of a decision contrary to Article 85(1) and/or reinforces its effects. Under the Court's case-law the decree is therefore contrary to Articles 5 and 85.

69. The Fund, the Netherlands Government and the Commission all submit that Articles 5 and 85 of the Treaty are not infringed. They put forward a variety of arguments. It is argued that Article 85(1) is not applicable ratione materiae, that there is no agreement between undertakings or decision of an association of undertakings, that competition is not restricted to an appreciable extent, that trade between Member States is not affected, that Article 5 cannot apply since Article 90(1) constitutes a lex specialis, and that in any event the Netherlands system is justified on grounds of public interest.

70. The appellants in the main proceedings have not submitted observations to the Court. In their observations the Greek and French Governments have not addressed the issue.

71. This case raises among others the issue of the relationship between the competition rules of the Treaty and the professions. Since this is the first case involving a core profession, namely doctors, and since the issue is likely to become more important in the near future it may be helpful to make some preliminary remarks before starting the analysis of Articles 5 and 85(1).

1. Competition law and the professions

72. When I speak in the present section of the professions I mean doctors, lawyers, architects and related professions.

73. From a competition law perspective the following are typical features of the markets for professional services.

74. First, the professions often hold a legal monopoly for the provision of their services (e.g. doctors for delivering health care services, advocates for pleading in courts, pharmacists for selling drugs).

75. Secondly, many professions are involved in controlling access to the profession. Where the State retains the final decision on access, members of the profession none the less, for example, fix necessary training periods, control the content of studies, or set examinations and act as examiners. Sometimes the professions are even allowed to determine themselves how many new members can enter the profession each year.

76. Thirdly, advertising is often restricted. The relevant rules are normally drawn up by the profession and enforced by disciplinary bodies or through the courts. They range from total prohibition of any form of advertising to more limited prohibitions on publicising the price or the quality of the service offered.

77. Fourthly, some professions are involved in fixing compulsory charges and fees for their services. Possible regulatory arrangements range from the fixing of minimum fees by the profession itself to the fixing of maximum fees by the State after consulting the profession concerned.

78. Finally, in many professions the possibility of exercising the profession in certain business structures is limited. Members of a profession might for example be precluded from setting up limited companies or from engaging in partnerships or employment relations with persons from another profession (e.g. lawyers and accountants).

79. Opponents of those rules argue that they constitute anti-competitive restrictions and that since they are prohibited on other markets for goods and services there is no valid reason why they should be permissible in the professions.

80. Proponents argue that the markets for professional services cannot be compared to normal markets, that competition within each profession is in reality strong, that restrictions on access and on certain business practices are necessary to guarantee a high level of quality, and that it is oversimplistic to assume that members of the professions are or should be motivated by considerations of profit alone.

81. Those conflicting viewpoints have led in many national competition law systems to intensive litigation and academic and political debate. The same is bound to happen in Community competition law.

82. The present cases are atypical in that regard because they concern a decision by a professional organisation on supplementary pensions and not on one of the abovementioned five categories of rules. The Court's judgment in the present cases will, however, contribute to defining the framework within which professional conduct and regulations will be assessed in the future. It is necessary therefore to be aware of three recurrent difficulties.

83. First, it is wrong to think of the professions as a homogeneous category of economic actors. Every profession provides complex services. The nature of those services varies not only between different professions (e.g. architects and doctors) but also within a given profession (e.g. surgeons and psychiatrists). From an international perspective apparently identical professions may in different States have undergone different types of training and provide services of different natures (architects, notaries). Those differences are evidenced by the difficulties of finding a commonly accepted definition of the professions.

84. Secondly, from an economic point of view the markets for professional services are different in two important respects from normal markets for goods and services.

85. There are, first, so-called externalities. Externalities are benefits or losses (normally to society as a whole) which are not priced. Beneficial externalities may be created for example by scientific discoveries, negative externalities by a badly drafted contract. It is obvious that high quality professional services regularly generate beneficial externalities and that the opposite will be the consequence of low quality services. Furthermore, the demand for professional services is often of a derivative nature, which means that their output (a lawyer's advice, an architect's plan) is an intermediate good in a longer production chain. The quality of those services therefore plays a crucial role as one of the decisive inputs in many sectors of a national economy. The conclusion to be drawn is that professionals not only serve their clients but also provide benefits to the wider public, which means that society has an extra interest in keeping the average quality of their services high.

86. Then, there is the important problem of so-called asymmetric information. Such an asymmetry between seller and buyer arises where the buyer cannot fully assess the quality of the product he receives. In the professions the problem is particularly acute because of the nature of their highly technical services. The consumer cannot assess the quality of those services prior to purchase by inspection (as he could for example when buying cheese), but only after consumption. Even worse, he might never fully understand whether or not the professional (e.g. doctor, architect, lawyer) provided a high quality service. That means that the incentives for professionals, who themselves determine how much attention they give to a client, either deliberately to lower quality to save time or money or to induce clients to have further recourse to their services in the absence of necessity, are high. The usal methods of overcoming or mitigating the negative effects of asymmetric information, or in other words of preventing a race to the bottom, can all be found in the professions. Access examinations are intended to guarantee a high initial standard of skills. Liability rules, the consequences of a good or a bad reputation, and certification schemes are incentives to exploit those skills to the full. Advertising is seen by some as a means of overcoming or mitigating asymmetry, whilst others claim that advertising exacerbates the problems. One conclusion to be drawn is that in order to counter the effects of asymmetry a certain level of regulation of those markets is necessary.

87. The third recurrent difficulty is of a legal nature. It flows from the relationship between State regulation and professional self-regulation. In many systems the State delegates regulatory powers to professional bodies. Those bodies may even be governed by public law. Their defence in competition litigation will often include arguments based on their relationship with the State. They will claim, for example, that the legislature expected or encouraged the conduct under scrutiny or even obliged the body to adopt it (so-called State action defence). It must also be borne in mind that in many competition law systems State measures enjoy antitrust immunity. In cases involving the professions it is therefore often necessary to establish as a preliminary point who is liable for a given conduct or rule (the State or the profession).

88. The conclusions to be drawn for the present cases and more generally for Community competition law are in my view the following.

89. Owing to the heterogeneity of the professions and the specificities of the markets on which they operate no general formula can be applied; it will be necessary to assess carefully in each case whether a given restriction of conduct leads in fact on the market in issue to a restriction of competition within the meaning of Article 85(1) of the Treaty.

90. In addition, it will have to be examined whether Article 85(3) (where applicable) can be interpreted so as to take into account concerns for the quality of professional services and its importance for society as a whole.

91. Then, it will be necessary to apply with care the rules on the respective responsibilities of the Member States and of the professions. Critical issues will be whether and under what conditions a profession can raise a State action defence and on the basis of what arguments a Member State can justify its own regulatory intervention in the competitive process within the professions.

92. I will conclude this section with the following comment. I have argued that the specific features of the markets for professional services require some kind of regulation. Opponents of professional self-regulation insist that the State or at least State-controlled regulatory bodies should regulate the professions, since there are dangers of abuses of regulatory powers. However, in economic terms again an information problem arises. The complex nature of those services and their permanent evolution through rapidly changing knowledge and technical developments make it difficult for parliaments and governments to adopt the necessary detailed and up-to-date rules. Self-regulation by knowledgeable members of the professions is often more appropriate since it can react with the necessary flexibility. The main challenge for every competition law system is therefore to prevent abuses of regulatory powers without abolishing the regulatory autonomy of the professions.

93. Against that background and in the light of the observations of the parties I turn now to the analysis of Articles 85(1) and 5 of the Treaty.

2. Applicability ratione materiae of Article 85(1)

94. According to the Fund and the Netherlands Government the medical specialists' decision to set up a professional pension scheme and to request the competent Minister to declare affiliation to the scheme compulsory falls outside the scope ratione materiae of Article 85(1). In their view, the solution adopted by the Court in Albany as regards collective agreements between management and labour on sectoral pension schemes can be transposed to the present cases. In paragraph 64 of that judgment the Court held that the agreement in question did not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty. The Commission proposes a similar solution, in the event that the Court does not accept its main line of reasoning, namely that medical specialists agreeing on supplementary pensions should be classified as consumers and not as undertakings.

95. The Fund and the Netherlands Government argue, first, that there is no significant difference between the Netherlands rules on sectoral and on professional pension schemes. 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 does not differentiate between pensions for employed and for self-employed persons. Secondly, several elements of the reasoning in Albany can be directly transposed to the present cases: Articles 3(i) and 2 of the Treaty are equally relevant, the decision in the present cases was also taken after a collective concertation, and the social purpose of the decision is identical to that in Albany.

96. I consider, first, that the judgment in Albany as it stands is clearly limited to the special case of collective agreements between management and labour on conditions of work and employment.

97. That follows already from the reasoning in paragraphs 53 to 60 of the judgment which may be summed up as follows. The Treaty and the Agreement on Social Policy encourage collective bargaining between management and labour, which suggests that that type of concertation between economic actors is in general lawful. On the other hand, it is also clear that collective agreements between employers and workers on wages and working conditions reached after collective bargaining necessarily contain certain restrictions of competition. If the Treaty encourages collective bargaining, its necessary consequences, namely certain restrictions of competition, cannot be prohibited by Article 85(1).

98. That line of reasoning is thus based on two special features of collective bargaining between management and labour, namely that it is expressly encouraged by Community law and that it necessarily entails certain restrictions of competition. Consequently the Court held in paragraphs 60 to 64 of the judgment that in order to enjoy antitrust immunity a given agreement must not only pursue a social purpose, but must also be of a particular nature, namely a collective agreement reached after collective bargaining between management and labour.

99. I consider, secondly, that that special immunity for collective agreements between management and labour cannot be extended or applied by analogy to other types of agreements or decisions. It must be recalled that Article 85(1) expressly covers all forms of concerted practices. Furthermore, in the present cases the two decisive elements of Albany are absent. Conduct of and regulations adopted by the professions do not necessarily contain restrictions of competition and no rule of the Treaty expressly encourages concertation between self-employed professionals. Consequently, the conflict between two sets of Treaty rules which necessitated in Albany an interpretation of the Treaty as a whole which is both effective and consistent does not arise.

100. In reality the Fund and the Netherlands Government are inviting the Court to create an antitrust immunity on the basis of the social purpose of an agreement alone. That is confirmed by their written submissions in which

they argued as follows. The LSV's decision pursues a social objective in that it aims to provide supplementary pensions not only to members of the profession but also to their spouses and children. Furthermore, supplementary pensions are a matter of great social importance, as has been recognised by the Community legislature's adoption of the abovementioned Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. Finally, it follows from the Court's case-law that the Member States retain competence to organise their social security systems.

101. As regards the first two of those arguments, I have already stated that in Community competition law there is no general exception for the social field. Contrary to many national competition law systems, the Community rules apply to virtually all sectors of the economy. That is because according to well-established case-law the sectors outside the scope of the competition rules must be expressly mentioned in the Treaty. The antitrust immunity for collective agreements between management and labour accepted in Albany is not incompatible with that case-law since it is based not merely on the subject-matter of those agreements but mainly on the framework in which they are concluded. Moreover, the fact that the Community pursues a certain policy, such as in the area of supplementary pensions, does not shelter that area of the economy from the competition rules. The Court has therefore consistently applied the competition rules to the social field. The best example are the judgments in Albany, Brentjens and Drijvende Bokken themselves in which the Court classified the sectoral pension funds at issue as undertakings for the purposes of Article 86 and examined the compatibility of the rules at issue with Articles 90 and 86 of the Treaty.

102. As regards the third argument, the competence of the Member States to legislate in a given field cannot affect the duty of those States (and a fortiori the duty of private actors) to comply with the prohibitions of the Treaty.

103. I conclude therefore that Article 85(1) is applicable ratione materiae.

3. Decision by an association of undertakings

104. The Fund, the Netherlands Government and the Commission contend that the LSV's decision to set up the professional pension scheme at issue and to request the competent Minister to make affiliation compulsory cannot be characterised as a decision by an association of undertakings within the meaning of Article 85(1) of the Treaty. Three distinct issues arise.

(a) Are medical specialists undertakings?

105. The first issue is whether medical specialists are to be classified as undertakings for the purposes of Article 85(1) of the Treaty when they provide medical services for remuneration.

106. It is noteworthy that none of the parties has argued that self-employed medical specialists are as such outside the scope ratione personae of the competition rules. The Fund contends, however, that employed medical specialists cannot be classified as undertakings.

107. Under the general definition the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and of the way its is financed. Since under that functional approach the legal status is irrelevant, natural persons may also be classified as undertakings. The underlying idea is that no advantage should be derived from the legal form in which an economic activity is exercised. An economic activity consists in offering goods and services on a given market. The activity in question must be capable of being carried on, at least in principle, with a view to profit.

108. Applying those principles to the professions the Court in Commission v Italy classified Italian customs agents as undertakings.

109. In that case Italy had argued that the occupation of customs agent was a liberal profession like that of lawyers, surveyors or interpreters; however, customs agents could not be regarded as undertakings because of the nature of the services which they provided and because the practice of their profession required authorisation and entailed compliance with certain conditions.

110. The Court held that the activity of customs agents had an economic character, since they offered for remuneration services consisting in the carrying out of customs clearance formalities (including complementary services in monetary, commercial and fiscal matters), and since they assumed the financial risk involved in the exercise of their profession. The fact that the activity in issue was intellectual, required authorisation and could be pursued in the absence of a substantial organisational framework could not exclude it from the scope of Article 85 of the Treaty.

111. That line of reasoning can be directly transposed to the present cases. Self-employed medical specialists deliver as independent economic actors services on the market for specialised medical services. For those services they claim and receive a remuneration from their patients. They assume the financial risks involved in that activity. The complex and technical nature of their services and the fact that the exercise of the profession is regulated cannot influence their classification for the purposes of the competition rules.

112. The classification of employed medical specialists is more difficult. In principle employees who offer labour against remuneration fall outside the scope of Article 85(1). Employed professionals are, however, not typical workers. Sometimes their pay is directly linked to the profits and losses of their employer and they do not really work under the direction of that employer. They therefore constitute one of the borderline categories envisaged in my Opinion in Albany. In the present cases it is however not necessary to take a final position on the issue because at the time of the decision under scrutiny all the LSV's members were self-employed medical specialists.

113. It follows that self-employed medical specialists, such as the members of the LSV at the material time, must be classified as undertakings within the meaning of Article 85(1) of the Treaty.

(b) Do medical specialists act as consumers or as undertakings when they set up a professional pension scheme?

114. The Commission recognises that self-employed medical specialists are engaged in an economic activity when they deliver medical services against remuneration. It contends, however, that in the present cases the medical specialists did not act as undertakings but as final consumers. The Commission equates their joint decision to set up a supplementary pension scheme with a decision to make investments on the financial markets or to purchase a holiday home. Activities of final consumption, it is said, are outside the scope of the competition rules.

115. Where natural persons are classified as undertakings it is, in my view, correct to distinguish between activities related to their economic sphere and activities related to their personal sphere. Contrary to legal persons who do not have a private life, natural persons may act in their capacity as undertakings or in their capacity as final consumers. Since Article 85 et seq. of the Treaty apply only to undertakings, natural persons acting in the latter quality are sheltered from the competition rules. It follows that professionals agreeing to organise a holiday in the Bahamas or to buy opera tickets fall outside Article 85(1) of the Treaty. On the other hand, where doctors buy medical equipment or lawyers rent offices, they are engaged in activities related to their professional activity. In that respect the competition rules should apply.

116. The question in the present cases is thus how to classify a professional's contributions to a second-pillar pension scheme in the Netherlands context.

117. The Commission argues as follows. Where an employer pays pension contributions for his employees (it is well established that those contributions are to be classified as remuneration), that payment is part of the employer's main economic activity. As regards self-employed professionals employer and employee are one person and there is thus no remuneration. Therefore the constitution of a supplementary pension for the professional himself is not an activity comparable, for example, to the purchase of new medical equipment, but an activity of personal consumption.

118. I am not fully convinced by that reasoning. In my view, one has to distinguish between professional earnings which remain and are reinvested in the sphere of a professional's undertaking and earnings which are definitely withdrawn from that sphere to be invested in the personal sphere.

119. Where a professional uses a portion of his earnings to conclude on a voluntary basis a third-pillar life assurance contract with an insurance company, the revenue in question has been withdrawn from the professional sphere and is reinvested in the personal sphere. That is confirmed by the fact that the same investment could be made with personal revenues coming for example from a vineyard belonging to the professional's family. Such an investment is therefore comparable to the purchase of a valuable painting or of a holiday home.

120. Contributions for first-pillar and second-pillar pensions are by contrast related to a professional's business sphere. It is no coincidence that the relevant schemes are called professional pension schemes (beroepspensioenregeling): affiliation to those schemes starts and ends in parallel with the exercise of the profession; all members of a profession are affiliated to the same second-pillar scheme whilst outsiders are not able to affiliate; the pension to be built up and consequently the premiums to be paid vary according to the professional revenues of the affiliated member. In the final analysis professional pension schemes provide a mechanism to spread over a longer period of time professional (as opposed to personal) earnings. Contributions to those schemes must therefore be analysed as earnings which remain within the professional sphere.

121. I conclude therefore that medical specialists agreeing on professional pensions are acting as undertakings within the meaning of Article 85(1) of the Treaty.

(c) Did the LSV act as an association of undertakings?

122. According to the Netherlands Government a professional association such as the LSV cannot be classified as an undertaking because it does not engage in an economic activity.

123. The issue in the present cases is however not whether the association acting in its own right infringed the competition rules, but whether the medical specialists acting through their association did so. The question is thus not whether the professional organisation acted as an undertaking but whether each member of the association did so.

124. The Fund argues, first, that one cannot speak of an association of undertakings where several members of the profession work as employees. Secondly, to qualify the LSV as an association of undertakings would be discriminatory since other professional organisations such as the Nederlandse Orde van Advocaten (Netherlands Bar Association) are governed by public law and have regulatory powers. Thirdly, the main task of the medical specialists' representative organisations is to defend their members' incomes in discussions with the Netherlands authorities on the charges and fees for their services. That task encompasses supplementary pensions which are part of retirement income. In the Fund's opinion, the defence of the medical specialists' economic interests obviously lies outside the scope of Article 85 of the Treaty.

125. As to the first argument, it is not necessary to decide whether a professional organisation with self-employed and employed members is an association of undertakings, since the LSV was at the material time composed exclusively of self-employed members.

126. The Fund's second argument is misconceived, since it assumes that professional bodies governed by public law and entrusted with regulatory powers are outside the scope of the competition rules. That view is incompatible with well-established case-law. The legal framework in which an association's decision is taken and the classification given to that framework by national law are irrelevant as far as the applicability of Article 85 of the Treaty is concerned.

127. The Fund's third argument is equally unfounded. The Court has recognised that the decisions of a committee or body with regulatory powers in a given sector might fall outside Article 85(1). That is however only the case where the majority of its members are representatives of the public authorities and where that committee or body must observe in its proposals public interest criteria. In the present cases, as in the customs agents case, there is nothing to suggest that the public authorities had any possibility of influencing the LSV's decision-making process and the Fund itself states that the LSV acts solely in the economic interests of the profession.

128. It follows that the LSV's decision under scrutiny must be classified as a decision of an association of undertakings.

4. Restriction of competition

129. The issue is whether the LSV's decision to set up the professional pension scheme described above and to apply to the Minister for a decree making affiliation to the scheme compulsory has as its object or effect the prevention, restriction, or distortion of competition within the meaning of Article 85(1) of the Treaty.

130. At the hearing the Fund argued that for the reasons given in my Opinion in Albany there was no such restriction of competition. The Netherlands Government and the Commission did not comment on the issue.

131. In my view, the reasoning in my Opinion in Albany can indeed be transposed to a large extent to the present cases.

132. The LSV's decision can be analysed as containing three elements which for convenience I will call respectively the substantive, the institutional and the political element.

133. Throughout the following discussion as to whether or not those three elements restrict competition it will be crucial to bear in mind that affiliation to the pension scheme under scrutiny before the Minister's intervention must be seen as merely voluntary.

(a) The substantive element: Harmonisation of the costs and benefits of supplementary pensions within the profession

134. The first element of the LSV's decision to be analysed comprises the substantive pension arrangements described in detail above. Under those arrangements each participant in the scheme has to make pension contributions of a certain amount depending on age, sex and income. In return he or she gains corresponding pension entitlements. In respect of the second part of the scheme, which is managed by the Fund alone, the ultimate costs and benefits of the insurance mechanism are necessarily identical for all participants. They are however not harmonised with regard to the normpensioen. There the final costs and benefits depend on the insurer chosen by the participant (the Fund or a commercial insurer).

135. It follows that the decision in question partly harmonises (as regards the second part of the pension) the costs of a supplementary second-pillar pension for medical specialists.

136. At first sight that harmonisation restricts competition on one cost factor in the market for medical specialists' services. Members of the profession do not compete with each other in order to get a cheaper insurance for that portion of their pension revenue.

137. However, I have argued above that the markets for professional services are different from normal markets. In addition the complex decision under scrutiny can obviously not be analysed according to the same principles as a simple horizontal price fixing agreement. In that respect I argued in my Opinion in Albany that the broad scope of application of Community competition law (in comparison with some national systems) makes it necessary to take the particular economic features of a given sector or category of agreements into account when assessing whether or not competition is restricted. That is the reason why in cases involving special sectors of the economy or special categories of agreements the Court has gone beyond the mere identification of restrictions of conduct of individual traders and has made an overall assessment of the effects on competition of the agreement in issue. Consequently, in the present cases a realistic analysis (including economic arguments) of the restrictive effects of the decision under scrutiny is necessary.

138. It follows from such an analysis that the theoretical restriction of competition just described has in reality insignificant effects on the market for medical specialists' services and is therefore not appreciable within the meaning of the Court's case-law.

139. That is, first, because only a cost factor and not a price factor is harmonised. Competition is obviously less affected where all professionals have to pay for example the same telephone tariffs than where they charge identical fees.

140. Secondly, in comparison to other cost factors the costs of the pension scheme are in reality unimportant. It must be borne in mind that the pension contributions to be paid cannot be equated to the costs of the pension insurance. In order to assess the real costs one has also to take into account the pension entitlements gained in return for the contributions. In the case of a non-profit scheme, such as the scheme of the medical specialists, real costs are generated only by management costs of the fund and by unprofitable placements of the collected contributions.

141. Thirdly, the cost factor in question is remote from the services market. The final remuneration for services of medical specialists will be influenced by many more immediate and important cost factors. Competition would for example be more affected if all doctors of a given specialisation were to buy the same expensive machine.

142. Fourthly, medical specialists provide (as do almost all professionals) non-homogeneous personalised services. That means that each doctor's services have different qualities and properties. Medical specialists can moreover greatly influence the quality of their services (for example by spending more time on a case).

Consequently, even if costs for their services were rigid, competition on the basis of quality would normally be vigorous.

143. I accordingly conclude that the substantive element of the decision does not restrict competition to an appreciable extent.

(b) The institutional element: Setting-up of a legal person to monitor compliance with and to manage the pension scheme

144. The LSV decided, secondly, to set up a legal person (the Fund) to operate partly as insurer in its own right and partly as surveillance body making sure that the participating medical specialists insure the normpensioen. The insurance activities comprise the insurance of the normpensioen and the insurance of the second part of the scheme. With regard to the former, participants can choose between the Fund and a private insurer; with regard to the latter the Fund is the only insurer.

145. The setting-up of the Fund is to be analysed as an institutionalised form of voluntary horizontal cooperation between self-employed medical specialists.

146. Like cooperation between undertakings in accounting or tax consultancy matters, the setting-up of a common fund allows the medical specialists involved to spread the insured risks and to achieve economies of scale with regard to the administration of pension contributions and payments or custodial arrangements.

147. On the other hand, the cooperation on pension administration covers a field which is not directly concerned with the services medical specialists provide. It takes place in a field as remote from the services market as joint accounting.

148. Accordingly, the pro-competitive effects of that institutionalised management cooperation are much stronger than any (theoretical) anti-competitive effects. The setting-up of the Fund, like the setting-up of an agricultural cooperative association, improves efficiency. As such it is not caught by Article 85(1).

149. The restriction on members leaving the scheme is the consequence of the Minister's decree making affiliation compulsory which will be analysed below. The rule under which members may change the insurer of the normpensioen only every five years is a justified ancillary restriction intended to secure members' loyalty and a certain stability in the Fund's and the insurer's membership.

150. As regards the exclusionary effects of a voluntary professional pension fund for insurance companies, the principle of freedom of contract permits medical specialists to entrust the management of their pensions to a scheme controlled by the representatives of the profession instead of concluding (group) insurance contracts with a commercial insurer. In any event, insurance companies have the possibility of competing with the Fund to insure the normpensioen. Problems for insurance companies are caused only by the fact that all medical specialists are affiliated to the scheme, which means that even professionals who want to insure themselves with a private insurer are not allowed to do so. That effect is however caused by the Minister's decree to be assessed below.

151. It follows that the institutional arrangements as such do not restrict competition.

(c) The political element: Application to the Minister

152. The LSV decided, thirdly, to request the competent Minister to render affiliation to the scheme compulsory for all medical specialists established in the Netherlands.

153. The reasoning on the parallel issue in my Opinion in Albany applies here. It follows that the application to the Minister as such does not restrict competition.

154. Consequently, none of the three elements of the LSV's decision restricts competition to an appreciable extent. It is therefore not necessary to discuss the decision's effects on trade between Member States.

155. I accordingly conclude that the LSV's decision to set up the professional pension scheme in issue and to apply to the competent Minister for a decree making affiliation to the scheme compulsory does not infringe Article 85(1) of the Treaty.

5. The relationship between Articles 5 and 85(1)

156. The issue is whether the Netherlands authorities infringed Articles 5 and 85(1) of the Treaty where at the request of the LSV they made affiliation to the pension scheme compulsory for all medical specialists established in the Netherlands.

157. Article 5(2) of the Treaty, which provides that Member States shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, requires Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. It is thus forbidden for a Member State to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85, or to reinforce their effects.

158. According to the Court's case-law, a State measure of this kind is illegal only if there is a link with anticompetitive conduct on the part of undertakings.

159. In the present cases, the Minister's decision to make affiliation to the Fund compulsory obliged medical specialists who did not want to become members of the LSV or make supplementary pension arrangements to join the pension scheme in issue. The decree in question therefore reinforced the effects of the LSV's decision to set up the scheme.

160. However, under the Court's case-law as it stands the decree is not contrary to Articles 5 and 85 of the Treaty, since the LSV's decision itself did not restrict competition to an appreciable extent and was consequently compatible with Article 85(1).

161. I must confess that I do not find that case-law with its automatic link between the legality of a private and a Member State's measure very satisfactory in cases such as the present one: the LSV's decision is not caught by Article 85(1) because any restrictive effects are the result of subsequent State intervention; that State intervention in turn is not caught by Article 5 because the LSV's decision as such is not restrictive enough. Therefore, neither the concertation between medical specialists nor the State measure in question can be challenged under Community competition law although the Minister could not have restricted competition without prior concertation by economic actors.

162. I have argued above that in every competition law system the rules defining the respective responsibilities of the State and the professions are of crucial importance if that system wants to strike the right balance between the prevention of anticompetitive practices and the preservation of regulatory autonomy in the professions.

163. In cases such as the present ones it would thus be more satisfactory to accept a prima facie infringement justifiable on public interest grounds. In my view, measures taken by Member States comply with Article 5(2) where, although they reinforce the restrictive effects of a concertation between undertakings, they are taken in pursuit of a legitimate and clearly defined public interest objective and where Member States actively supervise that concertation. In some cases Article 90(2) may also be applicable. In the present cases there can be little doubt that the decree rendering affiliation compulsory would be justified on social grounds.

164. A similar solution should also apply if the Court were to decide that the LSV's decision restricted competition to an appreciable extent, affected trade between Member States and therefore infringed Article 85(1). Under the Court's existing case-law it seems that the decree under scrutiny would automatically have to be declared contrary to Articles 5 and 85. However, even where concertation between private actors (for example in social or environmental matters) analysed in isolation restricts competition within the meaning of Article 85(1), the State might have legitimate reasons to reinforce and officialise on public interest grounds the effects of that concertation.

165. Accordingly, the conclusion in the present cases, whether or not on the basis of the existing case-law and whether or not the LSV's decision restricted competition to an appreciable extent, should in my view be that Articles 5 and 85 are not infringed.

VII - The first question: Classification of the Fund as undertaking

166. At issue is whether a professional pension fund such as the Fund is an undertaking within the meaning of the competition rules of the Treaty. It must therefore be established whether the activities of the Fund are of an economic nature.

167. At the hearing the Fund and the Commission argued that the Fund was an undertaking. The Netherlands Government expressed doubts whether the reasoning of the judgment in Albany could be transposed to the present cases. In Albany the Court held that the Netherlands sectoral pension funds were undertakings. The French and Greek Governments contend that the Fund's activities are not of an economic nature.

168. The Fund has three different functions within the medical specialists' pension scheme.

169. First, with regard to the normpensioen, it is one potential provider of pension insurance services to the members of the scheme who have chosen to insure the normpensioen with the Fund.

170. Secondly, also with regard to the normpensioen, it supervises compliance with the affiliation requirement by members who have chosen to insure that part of the scheme with an insurance company.

171. Thirdly, with regard to the second part of the pension scheme (indexation, retroactive pension rights, invalidity regime, complementary survivors benefit) it acts as an insurer with an exclusive right.

172. As regards the first function the Fund is manifestly engaged in an economic activity in competition with insurance companies and acts in that respect as an undertaking.

173. As regards the surveillance activity over insurance contracts concluded by affiliated professionals with private insurers, the Fund is, in my view, engaged in an activity in the exercise of public authority; that activity is comparable to the antipollution surveillance with which a private company was entrusted in the port of Genova in Cali and with Eurocontrol's activities in SAT. No entity could possibly engage in that kind of activity of its own initiative with a view to profit.

174. The Fund's role in respect of the second part of the pension scheme is more difficult to classify.

175. The following elements are not directly relevant for the classification: the Fund is non-profit-making, it pursues a social objective, and the investments the Fund can make are restricted and controlled. As the Court held in Albany, those constraints might partly justify the exclusive right of the Fund to manage that part of the pension scheme. They do not, however, prevent the activity engaged in by the Fund from being regarded as an economic activity.

176. By contrast, the degree of solidarity within a pension scheme may be relevant. That is because a pension scheme can be characterised by so many important elements of solidarity that as a matter of principle no insurer can offer that type of insurance on the market.

177. In the present cases the second part of the scheme contains several important elements of professional solidarity, namely an indexation mechanism, retroactive pension rights, an invalidity regime and complementary survivors' benefits. Moreover, no selection of risks through medical examinations takes place.

178. Ultimately, however, the following elements of the scheme lead to the conclusion that even with regard to that second part the Fund is to be classified as undertaking: the risk elements in question (including the indexation mechanism) are financed according to the capitalisation principle; the Fund determines contributions and benefits autonomously and according to actuarial principles. Consequently, the amount of the benefits provided by the Fund depends on its administrative costs and the financial results of the investments made by it; a State guarantee against the risks flowing from bad investments does not seem to exist. Finally, the Fund is subject to the supervision of the Insurance Board which also controls insurance companies.

179. The capitalisation principle and control by the insurance board are indicators that the insurance in question is at least potentially an activity in which a normal insurer might engage. The autonomy of the Fund and the risks connected to its investments entail the risk of conduct which the competition rules seek to prevent. Therefore the same rationale applies again: although the constraints of solidarity listed above might partly justify the Fund's exclusive rights under Article 90(2) of the Treaty, they do not go so far as to prevent its activities from being regarded as economic activities.

180. I accordingly conclude that when insuring the normpensioen and the second part of the scheme the Fund acts as an undertaking within the meaning of the competition rules of the Treaty.

VIII - The third question: Articles 90(1) and 86 of the Treaty

181. The last question is whether a Member State infringes Articles 90(1) and 86 of the Treaty where it sets up a system of compulsory affiliation to professional pension schemes such as the one established by the Netherlands and where within the framework of that system it makes affiliation to a particular professional pension scheme compulsory.

1. Applicability of Articles 90(1) and 86

182. The first question is whether the Fund is an undertaking enjoying exclusive rights within the meaning of Article 90(1).

183. With regard to the insurance for the normpensioen the Fund is an undertaking, but does not enjoy exclusive rights. Affiliated members are free to conclude insurance contracts with commercial insurers.

184. With regard to the surveillance of the insurance for the normpensioen the Fund does not act as undertaking. Article 90(1) is in that respect inapplicable.

185. With regard to the insurance for the second part of the scheme the Fund acts as an undertaking and enjoys as the only eligible insurer an exclusive right. In that respect Article 90(1) applies.

186. It could also be argued that the Fund as an interested undertaking enjoys two further exclusive rights, namely to grant exemptions from compulsory affiliation under Articles 1(2) and 44 of the pension regulation.

187. The second question is whether the Fund holds a dominant position within a substantial part of the common market.

188. The Fund argued at the hearing that the relevant product market is the market for supplementary pension insurance. Consequently, the Fund holds an exclusive right only in respect of a small part of that market, namely in respect of pensions for medical specialists.

189. However, as the Commission pointed out, where affiliation to a professional pension scheme is compulsory, other forms of insurance or other insurers are no valid substitute for insurance with the scheme. Medical specialists do not have the possibility of affiliation elsewhere. An undertaking such as the Fund which holds a statutory monopoly for the provision of certain insurance services (here the second part of the pension scheme) in a substantial part of the common market (here the Netherlands) must therefore be regarded as holding a dominant position within the meaning of Article 86 of the Treaty.

2. Infringement of Articles 90(1) and 86

190. Merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) is not in itself incompatible with Article 86. A Member State is, however, in breach of those provisions if the undertaking in question, merely by exercising the exclusive right 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.

191. Two types of rules have to be examined.

(a) The rules granting the Fund an exclusive insurance right

192. In Albany the undertakings concerned had complained about the sectoral pension funds' exclusive rights because in their view the funds in question were incapable of satisfying the demand prevailing on the market for such activities.

193. It does not follow clearly from the judgment whether the Court accepted that argument, and consequently whether the rules in question prima facie infringed Articles 90(1) and 86. In the final analysis the rules were in any event justified under Article 90(2) of the Treaty.

194. In the present cases no one has argued that the professional funds in the Netherlands provide unsatisfactory services. In contrast to Albany, the appellants in the main proceedings did not want insurance with a commercial insurer but with an alternative sectoral pension fund. Thus they do not seem to object to compulsory affiliation as such. That is perhaps confirmed by the fact that the appellants did not consider it necessary to submit observations before the Court.

195. Moreover, nothing in the legal framework described above suggests that the funds are led systematically to abuse their dominant position. On the contrary there appear to be several safeguards against abuse. Interested parties can comment on a profession's request to make affiliation to a given scheme compulsory. The Social and Economic Council and the Insurance Board are heard before affiliation is made compulsory. Subsequent changes to the scheme have to be approved by the Minister. The regulations and statutes of the Fund must respect a number of requirements. Investments are subject to restrictions and the finances of the Fund are permanently controlled.

196. Finally, the scheme chosen by the medical specialists has relatively limited restrictive effects since the Fund enjoys an exclusive right only in respect of the second part of the scheme.

197. In my Opinion in Albany I proposed to leave the question of a prima facie infringement of Articles 90(1) and 86 to the national court because too many factual issues were still unclear. In the present cases, however, in view of the features just mentioned, I am inclined to state that there is no such infringement.

198. In the alternative any such infringement would be justified under Article 90(2) of the Treaty.

(b) The rules on exemption from compulsory affiliation

199. According to the Court's judgment in Albany a Member State may consider that the power of exemption should be granted to the concerned pension fund alone. The conflict of interest inherent in the dual role as manager of the scheme and as the authority vested with the power to grant exemption was justified or mitigated by the special knowledge of the Fund, the freedom of choice of the Member States to organise such a matter according to their priorities, and the possibility of judicial review.

200. If that case-law is to stand, that reasoning can be directly transposed to the present cases and more specifically to the two exemption possibilities in Articles 1(2) and 44 of the pension regulation of the Fund. It has also to be kept in mind that in the present cases medical specialists have a further - at least theoretical - possibility of asking for a ministerial exemption under Article 26 of the BprW.

201. I accordingly conclude that a Member State does not infringe Articles 90(1) and 86 of the Treaty where it sets up a system of compulsory affiliation to professional pension schemes such as the one established by the Netherlands and where within the framework of that system it makes affiliation to a particular professional pension scheme compulsory.

IX – Conclusion

202. The questions referred by the Kantongerecht Nijmegen should therefore in my opinion be answered as follows:

(1) Articles 5 and 85 of the EC Treaty (now Articles 10 and 81 EC) are not infringed where, at the request of a professional organisation representing the members of a given profession, a Member State makes affiliation to a professional pension scheme compulsory for all members of that profession.

(2) A professional pension fund such as the Netherlands Medical Specialists' Pension Fund acts in respect of the insurance of the normpensioen and of the second part of the medical specialists' pension scheme as an undertaking within the meaning of the competition rules of the EC Treaty.

(3) Articles 90(1) and 86 of the EC Treaty (now Articles 86(1) and 82 EC) are not infringed where a Member State sets up a system of compulsory affiliation to professional pension schemes such as the one set up by the Netherlands and where within the framework of that system it makes affiliation to a pension scheme such as the Netherlands medical specialists' pension scheme compulsory.