DOMINANT POSITION (PENSION SCHEMES): THE PAVLOV CASE

Subject: Dominant position
Exclusivity
Undertaking
Associations of undertakings

Industry: Occupational pension schemes
(Some implications for other industries)

Parties: Pavel Pavlov et al
Stichting Pensioenfonds Medische Specialisten
Netherlands Government (intervener)
French Government (intervener)
Greek Government (intervener)

Source: Judgment of the Court of Justice of the European Communities in Joined Cases C-180/98 to C-184/98 (Pavel et al v SPMS), dated 12 September, 2000

(Note. At first sight, it may seem strange that the question whether an occupational pension scheme fund should be treated as an undertaking for the purposes of the rules on competition; and stranger still that participants in the scheme should claim that their compulsory membership of the scheme should constitute an infringement of those rules. Nevertheless, although the participants lost their case, it was a close run thing: some of their substantial pleas were upheld. The more general interest of the case lies in the close examination by the Court of what constitutes an undertaking; what constitutes an economic activity; what degree of exclusivity can legitimately be conferred by the State on a given supplier of services; and whether a dominant position in this context necessarily leads to an abuse. Under each of these headings, the Court reviews all the relevant case-law and expands their interpretation.

For the purposes of the judgment, the Court rehearses the facts at great length; but, in the report which follows, the facts are summarised as concisely as possible and the law is set out almost in full. The legal question of the admissibility of the action is summarised. The judgment refers to Articles 85, 86 and 90, of the EC Treaty: these are now Articles 81, 82 and 86.)

The Facts

[Three questions were raised in five actions brought by five medical specialists, Messrs Pavlov, Van der Schaaf, Kooyman, Weber and Slappendel against Stichting Pensioenfonds Medische Specialisten (Pension Fund for Medical Specialists, hereinafter "the Fund") concerning the refusal of Mr Pavlov and the other applicants to pay contributions to the Fund on the ground, in particular,

that compulsory membership of the Fund, by virtue of which the contributions were claimed from them, is contrary to Articles 85, 86 and 90 of the Treaty.

Compulsory membership derived from the Netherlands Law of 29 June 1972 on Compulsory Membership of an Occupational Pension Scheme, hereinafter "the BprW". Under Article 27 of the BprW, failure to take up membership of a compulsory scheme attracts penalties; and Article 31 of the BprW provides that occupational pension funds may issue binding enforcement orders for the purpose of recovering arrears of contributions. The Fund is a non-profit-making body and any surpluses are distributed to pensioners and members in the form of increases in their pension rights.]

46. Mr Pavlov and the other applicants submitted in the proceedings that compulsory membership of the Fund was contrary to a number of provisions of the EC Treaty.

47. The national court notes that, by judgments of 22 October 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has already referred to the Court a question concerning the compatibility with Community law of compulsory membership of an occupational pension scheme, but that the Court did not answer that question in its judgment (Joined Cases C-430/93 and C-431/93 (*Van Schijndel and Van Veen*)).

48. It was in those circumstances that the Cantonal Court, Nijmegen, stayed proceedings and referred to the Court the following questions for a preliminary ruling:

1 Given the aims of the BprW as described above ..., is an occupational pension fund, membership of which has been made, pursuant to and in accordance with the BprW, compulsory for all, or for one or more specified groups of members of a profession, with that compulsory membership having the legal effects ... entailed by that Law, to be regarded as an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty establishing the European Economic Community?

2 If so, is the fact of making membership of the occupational pension scheme for medical specialists ... 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?

[Paragraph 49 is formal. Paragraphs 50 to 56 concern the admissibility of the proceedings, challenged by the Greek government on the grounds that the information provided was insufficient. The Court point out that the information provided in orders for reference must not only be such as to enable the Court to

provide a useful answer but must also give the governments of the Member States and other interested parties an opportunity to submit observations; the Court cited, inter alia, Case C-67/96 (*Albany*), paragraph 39, and Joined Cases C-115/97, C-116/97 and C-117/97 (*Brentjens*), paragraph 38. The Greek government's challenge was dismissed and the proceedings declared admissible. The Court then went on to answer the three questions before it, though not in the same order in which they had been submitted.]

The second question

57. By its second question, which it is appropriate to consider first, the national court is asking essentially whether Article 5 of the EC Treaty (now Article 10) and Article 85 of that Treaty prohibit a Member State's public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

58. To answer the second question, it is necessary to consider first of all whether a decision taken by a liberal profession's representative body to set up, for the members of that profession, a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession is contrary to Article 85 of the Treaty.

59. It must be observed at the outset that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted those who drafted the Treaty to provide expressly in Article 85(2) of the Treaty that agreements or decisions prohibited under that provision are to be automatically void.

60. Next, it should be observed that, in the *Brentjens* case and in Case C-219/97 (*Drijvende Bokken*), the Court held that a decision taken by an organisation representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all workers in that sector does not fall within the scope of Article 85 of the Treaty.

61. The Fund, the Netherlands Government and the Commission, the latter in alternative argument, submit that there is no significant difference between the national rules governing the sectoral pensions which were at issue in *Albany*, *Brentjens* and *Drijvende Bokken* and those governing the occupational pension schemes at issue in the main proceedings. The reasons which led the Court in those earlier cases to hold that a decision by an organisation representing employers and workers to set up a sectoral pension fund and to request the public authorities to make membership of that fund compulsory did not fall within the scope of Article 85 of the Treaty also hold good with regard to a similar decision

emanating, as in the present cases, from the members of a liberal profession, and take such a decision outside the scope of Article 85 of the Treaty, even if the members of the profession are not acting within the context of a collective agreement.

[In paragraphs 62 to 66, the Court refers to the way in which the Fund, the Netherlands Government and the Commission, expand the foregoing point.]

67. It should be borne in mind that, at paragraphs 64, 61 and 51 respectively of the judgments in *Albany, Brentjens* and *Drijvende Bokken*, the Court held that agreements concluded in the context of collective bargaining between employers and employees and aimed at improving employment conditions are not, by reason of their nature and purpose, to be regarded as falling within the scope of Article 85(1) of the Treaty.

68. Such exclusion from the scope of Article 85(1) of the Treaty cannot be applied to an agreement which, while being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees.

69. On this point, it should be emphasised that the Treaty contains no provisions, like Articles 118 and 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143) or Articles 1 and 4 of the Agreement on social policy, encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question.

70. That being so, Article 85(1) of the Treaty must be interpreted as meaning that a decision taken by the members of a liberal profession to set up a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all the members of that profession does not, by reason of its nature or purpose, falls outside the scope of that provision.

71. Therefore, it is necessary to ascertain whether the conditions for application of Article 85(1) of the Treaty are fulfilled and, first of all, whether or not the representative body in question in the main action, namely the LSV, is an association of undertakings.

[In the context of this case, the medical specialists' profession is 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), referred to here as the LSV.]

72. In this connection, it should be pointed out that, on the date on which the LSV applied to the public authorities to make membership of the Fund compulsory, that organisation was made up solely of self-employed medical specialists.

73. Thus it is necessary to consider whether those independent medical specialists are undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

74. The Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed (see, in particular, Case C-41/90 (*Höfner and Elser*), paragraph 21, Joined Cases C-159/91 and C-160/91 (*Poucet and Pistre*), paragraph 17, Case C-244/94 (*Fédération Française des Sociétés d'Assurance*), paragraph 14, *Albany*, paragraph 77, *Brentjens*, paragraph 77, and *Drijvende Bokken*, paragraph 67).

75. It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity: Case 118/85 (*Commission v Italy*), paragraph 7, and Case C-35/96 (*Commission v Italy*), paragraph 36).

76. In the present cases, the medical specialists who are members of the LSV provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.

77. The self-employed medical specialists who are members of the LSV therefore carry on an economic activity and are thus undertakings within the meaning of Articles 85, 96and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, Case C-35/96 (*Commission v Italy*), paragraphs 37 and 38).

78. Nevertheless, the Commission contends that, when they are contributing to their own supplementary pension scheme, the medical specialists are not acting as undertakings within the meaning of Community competition law. A medical specialist who sets up a supplementary pension for himself is, the Commission submits, acting as an end user and the decision he takes in that context falls outside the scope of the competition rules. Such a decision can, it says, be compared to a decision to make investments on the financial markets or to purchase a holiday home.

79. It should be observed in response to that contention that the fact that a self-employed medical specialist pays contributions to a supplementary occupational pension scheme is closely linked to the practice of his profession. The medical specialist's membership of such a scheme stems from the practice of his profession. The supplementary occupational pension scheme at issue in the main proceedings, which covers all members of the profession, allows its members to

set aside part of their professional income in order to guarantee themselves, and on certain conditions, a surviving spouse or child, a certain level of income after they have ceased practising.

80. The link between the payment of contributions by every self-employed medical specialist to the same supplementary occupational pension scheme and professional practice is also especially close for the reason that the scheme is characterised by a high degree of solidarity between all medical practitioners. That is evidenced, in particular, by the fact that contributions are not linked to risk, the fact that all members of the profession must be accepted into the scheme without a prior medical examination, the fact that, in the event of disability, the fund assumes payment of contributions in order to maintain the accrual of pension rights, the fact that retroactive pension rights are granted to members who were already practising when the scheme came into effect and the fact that pension payments are index-linked so as to maintain their value.

81. In those circumstances, medical specialists cannot be regarded as acting as final consumers when they make contributions to their own supplementary pension scheme.

82. It must therefore be concluded that, when they decided, through the LSV, to contribute collectively to a single occupational pension fund, medical specialists were acting as undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

Association of undertakings

83. The next question to be examined is, therefore, whether the LSV is to be regarded as an association of undertakings for the purposes of the provisions just mentioned.

84. The Fund argues that it would be discriminatory to treat the LSV as an association of undertakings and not other professional organisations, such as the Netherlands Bar Association, which are governed by a public-law statute and which, as such, have regulatory powers.

85. Suffice it to say in this regard that the fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. So, the legal framework within which an association decision is taken and the legal definition given to that framework by the national legal system are irrelevant as far as the applicability of the Community rules on competition and, in particular, Article 85 of the Treaty, are concerned: Case 123/83 (*BNIC v Clair*), paragraph 17, and Case C-35/96 (*Commission v Italy*), paragraph 40.

86. Nor, contrary to what the Fund maintains, can the LSV be taken outside the scope of Article 85 of the Treaty by the fact that its main task is to protect the interests of medical specialists, and in particular their income, which is made up

in part by supplementary pensions, in negotiations with the Netherlands authorities concerning the cost of medical services.

87. Admittedly, a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 85 of the Treaty where that body is composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria: Case C-96/94 (*Centro Servizi Spediporto v Spedizioni Marittima del Golfo*), paragraphs 23 to 25, and Case C-35/96 (*Commission v Italy*), paragraphs 41 to 44.

88. However, that is not the situation in the present cases, for at the time when the LSV decided to set up the Fund and to apply to the public authorities for a decision making membership compulsory, it was composed exclusively of self-employed medical specialists, whose economic interests it defended.

89. That being so, the LSV must be regarded as an association of undertakings within the meaning of Articles 85, 86 and 90 of the Treaty.

Prevention, restriction or distortion of competition

90. It is therefore necessary to consider, secondly, whether a decision by the members of a liberal profession to set up a pension fund responsible for the management of a supplementary pension scheme and to apply to the public authorities for a decision making membership of the fund compulsory for all members of that profession has as its object or effect the prevention, restriction or distortion of competition within the common market.

91. It is settled case-law that, in defining the criteria for the application of Article 85(1) of the Treaty to a specific case, account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions: Case C-399/93 *(Oude Luttikhuis and Others)*, paragraph 10).

92. In this respect, it must be borne in mind that a decision of the kind just mentioned means that all the members of a profession arrange their supplementary pension with one body and under the same conditions, except for their basic pension, which they may freely obtain from any authorised insurance company.

93. The conclusion must be that such a decision, which standardises in part the costs and supplementary pension benefits of medical specialists, restricts competition as far as concerns one cost factor of specialist medical services, inasmuch as one of its effects is that those medical practitioners do not compete with one another to obtain less costly insurance for that part of their pension.

94. However, as the Advocate General observes, ... the restrictive effects of such a decision on the specialist medical services market are limited.

95. The decision in question produces restrictive effects only in relation to one cost factor of the services offered by self-employed medical specialists, namely the supplementary pension scheme, which is insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. The cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists.

96. Furthermore, it should be observed that the implementation of a supplementary pension scheme managed by a single fund allows self-employed medical specialists to share the risks insured against whilst achieving economies of scale in the management of contributions and payment of pensions and in the investment of assets.

97. It follows from the foregoing that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme does not appreciably restrict competition within the common market.

98. As for the request, made to the public authorities by an organisation representing the members of a profession, to make membership of the occupational pension fund it has set up compulsory, it is made under a scheme identical to those existing under the national law of a number of countries concerning the exercise of regulatory authority in the social domain. Such regimes are designed to promote the creation of supplementary pensions of the second type and include a number of safeguards whose observance the competent Minister must ensure, so that a request by the members of a profession for membership to be made compulsory cannot constitute an infringement of Article 85(1) of the Treaty.

99. That being so, it must be held that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the profession, is not contrary to Article 85(1) of the Treaty.

100. Thus, for the same reasons, a decision by the Member State in question to make membership of such a fund compulsory for all members of the profession is not contrary to Articles 5 and 85 of the Treaty either.

101. The answer to be given to the second question must therefore be that Articles 5 and 85 of the EC Treaty do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

The first question

102. By its first question, which it is appropriate to consider secondly, the national court asks essentially whether a pension fund responsible for managing a supplementary pension scheme set up by a profession's representative body and of which membership has been made compulsory by the public authorities for all

members of that profession is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

103. According to the Fund and the governments which have submitted observations pursuant to Article 20 of the EC Statute of the Court of Justice, such a fund does not constitute an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. In this connection, they set forth the various characteristics of the occupational pension fund and of the supplementary pension scheme which it manages.

[In paragraphs 104 to 106, they make three points: first, that compulsory membership, for all members of a profession, of a supplementary pension scheme, or at least of the most important part of that scheme, has an essential social function in the pension system applicable in the Netherlands; secondly, that the occupational pension fund is non-profit-making; and thirdly, that the occupational pension fund operates on the basis of the principle of solidarity.]

107. On that basis, the Fund and the governments who have submitted observations maintain that the Fund is a body entrusted with the management of a social security scheme, like that involved in *Poucet and Pistre*, cited above, but unlike the body at issue in *Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche*, cited above, which was held to be an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

108. As was pointed out in paragraph 74 of the present judgment, in the context of Community competition law, the Court has held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

109. The Court also held, at paragraph 19 of its judgment in *Poucet and Pistre*, cited above, that that concept did not include bodies entrusted with the management of certain compulsory social security schemes, based on the principle of solidarity. First of all, under the sickness and maternity scheme forming part of the system in question, benefits were the same for all beneficiaries, even though contributions were proportional to income. Next, under the old-age pension scheme, pensions were funded by those in employment. Furthermore, statutory pension entitlements were not proportional to the contributions paid into the old-age pension scheme. Finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single body and for membership of the schemes to be compulsory.

110. In contrast, in *Fédération Française des Sociétés d'Assurance and Others*, cited above, the Court held that a non-profit-making body which managed an old-age pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. Optional membership, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid

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

111. Following the judgment in *Fédération Française des Sociétés d'Assurance and Others*, the Court held *in Albany, Brentjens* and *Drijvende Bokken* that a pension fund entrusted with the management of a supplementary pension scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, of which membership had been made compulsory by the public authorities for all workers in that sector, was an undertaking within the meaning of Article 85 et seq. of the Treaty.

112. In reaching that conclusion, the Court found that the sectoral pension funds in question in the cases mentioned in the paragraph above themselves determined the amount of the contributions and benefits, that they operated in accordance with the principle of capitalisation and that, by contrast with the benefits provided by bodies charged with the management of compulsory social security schemes of the kind in point in *Poucet and Pistre*, the amount of benefits provided by the funds depended on the performance of the investments which they made and in respect of which they were subject, like an insurance company, to supervision by the Insurance Board. Furthermore, the fact that a sectoral pension fund was in certain circumstances required or empowered to exempt undertakings from membership meant that it was carrying on an economic activity in competition with insurance companies (see *Albany*, paragraphs 81 to 84, *Brentjens*, paragraphs 81 to 84, and *Drijvende Bokken*, paragraphs 71 to 74).

113. The same is true of the occupational pension fund at issue in the case in the main proceedings.

114. The Fund itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation. Thus, the level of benefits provided by the Fund depends on the performance of the investments which it makes and in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

115. Those characteristics, together with the fact that medical specialists may opt to purchase their basic pension either from the Fund or from an authorised insurance company and the fact that the Fund has power to grant certain categories of medical specialists exemption from membership as regards the other components of the pension scheme, indicate that the Fund carries on an economic activity in competition with insurance companies.

116. It must therefore be concluded that a body such as the Fund is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

117. The fact that the Fund is non-profit-making and the solidarity aspects emphasised by the Fund and the governments which have submitted observations are not sufficient to relieve the Fund of its status as an undertaking within the meaning of the competition rules of the Treaty (see *Albany*, paragraph 85, *Brentjens*, paragraph 85, and *Drijvende Bokken*, paragraph 75).

118. It is true that the pursuit of a social objective, the above-mentioned solidarity aspects and the restrictions or controls on investments made by the Fund may render the service provided by the Fund less competitive than comparable services provided by insurance companies. Although such constraints do not prevent the activity engaged in by the Fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme (see *Albany*, paragraph 86, *Brentjens*, paragraph 86, and *Drijvende Bokken*, paragraph 76).

119. The answer to the first question must therefore be that a pension fund, such as that in question in the main proceedings, which itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

The third question

120. By its third question, the national court asks essentially whether Articles 86 and 90 of the Treaty preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

121. It is clear from the answer given to the first question that, as far as the provision of the basic pension is concerned, the Fund constitutes an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty and operates in competition with insurance companies. As regards that part of the supplementary pension scheme, the Fund does not therefore enjoy any exclusive right within the meaning of Article 90(1) of the Treaty.

122. On the other hand, a decision by the public authorities to make membership of the Fund compulsory as far as it concerns the second part of the pension scheme, which includes the indexation mechanism, retroactive pension rights, the continuing accrual of pension rights in the event of a member's disability and additional survivors' benefits necessarily implies the grant to the Fund of an exclusive right to collect and administer the contributions paid with a view to creating those rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights of the kind referred to in Article 90(1) of the Treaty have been granted by the public authorities.

Dominant position on the market

123. That being so, it is necessary to establish whether the Fund occupies a dominant position on a substantial part of the common market.

124. On this point the Fund and the Netherlands Government submit that the Fund does not occupy a dominant position within the meaning of Article 86 of the Treaty. The market for supplementary pensions for self-employed medical specialists in the Netherlands is not a market for services distinct from the market in the Netherlands for all supplementary pensions.

125. In this regard it is sufficient to note, as the Commission has quite rightly pointed out, that granting the Fund the exclusive right to manage the second part of the supplementary occupational pension scheme for medical specialists in the Netherlands means that those medical specialists are precluded from arranging that part of their pension scheme with another insurer.

126. The Fund therefore has a legal monopoly in the supply of certain insurance services in a professional sector of a Member State and thus on a substantial part of the common market. In that respect it must 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*), paragraph 14, and Case C-18/88 (*GB-Inno-BM*), paragraph 17).

127. However, the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses: *Höfner and Elser*, cited above, paragraph 29; Case C-260/89 (*ERT*), paragraph 37; *Merci Convenzionali Porto di Genova*, cited above, paragraphs 16 and 17; Case C-323/93 (*Centre d'Insémination de la Crespelle*), paragraph 18; and Case C-163/96 (*Raso and Others*), paragraph 27). As is clear from paragraph 31 of the judgment in *Höfner and Elser*, there is an abusive practice contrary to Article 90(1) of the Treaty, in particular, where a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which the undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind.

128. There is no evidence in the case-file forwarded by the national court or in the written and oral observations made by the Fund, the governments which have submitted observations and the Commission, that the Fund, merely by exercising the exclusive rights granted to it, would be led to abuse its dominant position or that the pension services offered by the Fund might not meet the needs of medical specialists.

129. It should be observed in this regard that Mr Pavlov and the other applicants had not expressed any desire to arrange their supplementary pensions with an insurance company; they argue that they do not belong to the Fund, but instead belong to another occupational pension fund, membership of which had also been made compulsory.

130. The answer to be given to the third question must therefore be that Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

Costs

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

Court's ruling

The Court hereby rules:

1. Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude public authorities from making membership of an occupational pension fund compulsory at the request of a profession's representative body.

2. A pension fund, such as that in question in the main proceedings, which itself determines the amount of the contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85 of the Treaty and 86 and 90 of the EC Treaty (now Articles 82 and 86).

3. Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession. ■

Stop Press: The Commission has imposed a fine of €43m on Opel Motors for sales restrictions. A Full report will appear in the October issue.