OPINION OF ADVOCATE GENERAL JACOBS

delivered on 13 September 2001 [1]

1. The Tribunale (District Court) Vicenza asks the Court to determine whether a body such as the Italian Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (National Institute for Insurance against Accidents at Work, 'INAIL') which operates the national regime of compulsory insurance against accidents at work and occupational diseases constitutes an undertaking so as to make the EC competition rules applicable. In the affirmative, the referring court asks whether in a context such as the Italian one compulsory affiliation of craft workers to the INAIL infringes those rules, specifically Articles 86 and 82 EC.

2. The present case is the first to concern the relationship between the competition rules and a national regime of compulsory insurance against accidents at work and occupational diseases. The issues raised are none the less similar to those addressed in *Poucet*, [2] *FFSA*, [3] *Albany*, *Drijvende Bokken* and *Brentjens* [4] and *Pavlov*, [5] which concerned mainly old-age pension schemes. Essentially the central question is whether the scheme, albeit statutory, shares basic features with a private insurance scheme and is therefore subject to the competition rules, or whether it differs fundamentally from private schemes, in particular because it is predominantly characterised by social solidarity, and is therefore not subject to those rules.

National background

Origins of the current system

3. The Italian system of compulsory insurance against accidents at work and occupational diseases has its roots in the last quarter of the 19th century. At that time the growing number of victims of industrial accidents (or their heirs in the case of a fatal accident) could rely only on the ordinary

1 — Original language: English.

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

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

4 — Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'* [1999] ECR I-6025 and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

5 — Joined Cases C-180/98 to C-184/98 *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

rules of civil liability. They could therefore only obtain damages from the employer if his fault could be established. Many accidents at work were however the result of *force majeure* or even negligence on the part of the victim and could thus not give rise to damages. Moreover, even where the accident was the consequence of the employer's negligence, victims found it difficult to prove such negligence or refrained from bringing proceedings in order not to put their employment at risk.

4. In that situation it was generally felt that workers and their families should enjoy better social protection against the negative economic consequences of injuries which occur as a result of or in connection with dangerous manual work. It was also felt that the risk of an accident at work (occupational risk) should in principle be borne by the employer who benefits from the work giving rise to the risk.

5. It quickly became clear however that mere modifications of the rules governing civil liability — e.g. a shift of the burden of proof, a special regime of contractual liability or a regime of strict liability — on the one hand, were insufficient to protect those victims who had caused the accident through their own negligence and, on the other, imposed in some cases too great a burden on employers.

6. The mechanism ultimately chosen to overcome those difficulties was a system of insurance against accidents at work financed exclusively by the employer who would in exchange be relieved of his civil liability. Such a system constituted for both employers and employees a compromise solution in that

— employees did not receive full reparation of all damage caused by an accident, but received insurance benefits related to their earnings before the accident even where they had caused the accident themselves, and

— employers had to pay insurance premiums even in respect of the risk of an accident caused by the victim, but were in exchange relieved of their civil liability and thus of the obligation to grant full compensation where their fault was established. [6]

6 — See, for a detailed description both of the historical background and the current regime, F. De Compardi, P. Gualtierotti, *L'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali, diritto e procedura*, second edition, Giuffré Editore, Milano, 1999, pages 3 to 14.

7. Insurance was initially optional, but became obligatory in 1898.[7] Thereafter the employer still had a free choice of insurer. In 1933 the legislature conferred on the INAIL the exclusive right to operate the insurance scheme.[8]

The current system of compulsory insurance against accidents at work and occupational diseases and the role of the INAIL

8. Today it follows from Article 38 of the Italian constitution that workers (lavoratori) are entitled to the provision of, and insurance for, means adjusted to their daily needs *inter alia* in case of accident (infortunio) or sickness (malattia). Under the fourth paragraph of that Article those and similar tasks are to be carried out by bodies and institutions set up or integrated into the State. According to the fifth paragraph private assistance is free.

9. Most of the detailed legislative provisions governing compulsory insurance against accidents at work and occupational diseases are contained in Decree No 1224 of the President of the Republic of 30 June 1965, *Testo unico delle disposizioni per l'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali* (Single text of the provisions concerning the compulsory insurance against accidents at work and occupational diseases),[9] as amended, to which I will refer as *Testo unico* or *T.U.* Important new provisions have been introduced by Legislative Decree No 38 of 23 February 2000. The main proceedings however concern periods before those new provisions entered into force and I will therefore not take them into account.

10. The *Testo unico* distinguishes between the industrial sector (Articles 1 to 204) and the agricultural sector (Articles 205 to 290), which is subject to a special regime. As regards the industrial sector — which is the one at issue in the present case — it follows from Article 1 of the *T.U.* that insurance is compulsory for all those who engage in activities considered by the legislature to involve risk (e.g. activities carried out through machines). Under Article 4(3) craft workers (artigiani) who are habitually engaged in a manual activity in their respective undertakings are among the persons covered by the insurance. Under Article 9 employers are required to insure their employees, firms are required to insure their members and self-employed craft workers are required to insure themselves where they are engaged in one of the activities involving risk listed in Article 1 and where the person to be covered by the insurance is mentioned in Article 4.

7 — Law No 80 of 17 March 1898.

8 — Royal Decree No 264 of 23 March 1933 which was converted into Law No 860 of 29 June 1933. At that time the INAIL was known as the INFAIL.

9 — GURI of 13 October 1965, No 257, supplemento ordinario.

11. Under Article 126 of the *T.U.* the system of compulsory insurance against accidents at work and occupational diseases in the industrial sector is to be operated by the INAIL. [10]

12. The INAIL is a public law body with legal personality and operational autonomy. [11] It has special powers to verify whether employers comply with their obligations and whether victims of accidents at work and occupational diseases follow their treatment. [12] Not only does it operate the insurance regime, it is also involved in other activities such as accident prevention (e.g. through information campaigns), the operation of specialised data banks on accidents at work, several initiatives concerning the rehabilitation and reintegration of victims (e.g. through a prosthesis centre and a network of mobility rehabilitation centres) and social assistance. According to Article 55 of Law No 88 of 9 March 1989 designed to 'restructure' the INAIL, [13] the INAIL is to be classified as a public service-providing body and is subject to supervision by the Ministry of Employment and Social Security. That law provides also that the INAIL must perform the functions attributed to it in accordance with 'sound economic and business practice' (criteri di economicità e di imprenditorialità), adjusting its organisation on its own initiative to the requirement of efficient and timely collection of contributions and payment of benefits, and managing its movable and immovable assets in such a manner as to optimise income. The same end must be pursued by the Government in the monitoring and supervision of the INAIL.

Insurance benefits

13. The main economic benefits granted by the INAIL under the insurance scheme in the industrial sector are

— a daily allowance in case of temporary incapacity for work;

— a monthly pension in case of permanent incapacity for work;

— a monthly pension for survivors and a lump sum for funeral expenses in case of death.

10 — Under Article 127 of the *Testo unico* some limited categories of employees in the industrial sector (e.g. employees of the national railway operator) are to be insured with other bodies which operate also as legal monopolies in their fields. Under Article 256 of the *Testo unico* persons working in agriculture are to be insured with the INAIL.

11 — Article 1 of Royal Decree No 1280 of 28 September 1933 (GURI of 13 October 1933, No 239).

12 — The INAIL points in that regard to Articles 21, 26, 95, 106, 138 of the *T.U.*

13 — GURI No 60 of 13 March 1989, supplemento ordinario.

14. The entitlement to the daily allowance is recognised in case of an accident or disease entailing absence from work longer than three days. The allowance is paid as of the fourth day after the accident or the occurrence of the disease up to the moment of recovery. For the first 90 days the allowance amounts to 60% and thereafter to 75% of the average daily earnings during the 15 days prior to cessation of work.

15. The amount of the monthly pension in case of permanent incapacity for work is a certain percentage of the earnings for the year preceding the termination of work. The percentage in question is determined on the basis of the degree of permanent incapacity for work and a further factor fixed in the *T.U.* As regards the earnings for the year preceding the termination of work, Article 116(3) of the *T.U.* provides that only earnings between a certain maximum and minimum may be taken into account. The maximum corresponds to a national average remuneration fixed by ministerial Decree increased by 30% and the minimum to the same average remuneration less 30%. In 1999 the relevant Decree set for example the maximum and minimum annual earnings to be taken into account at around EUR 19 850 and EUR 10 690 respectively.

16. The level of the pension for survivors is a certain percentage (e.g. 50% for the surviving spouse) of the victim's earnings before the accident or the disease. Those earnings are to be determined according to the same principles as described in the previous paragraph.

17. The levels of those three benefits are adjusted periodically in line with increases in average earnings.

18. According to the principle of automatic payment of benefits (Article 67 of the *T.U.*) insurance cover is guaranteed for the person concerned even if the employer has failed to comply with its obligations to give notice of the relevant employment relationship and/or to pay the insurance contributions. It appears that under a law of 1997 the automatic payment of benefits is in principle no longer available for the self-employed as from 1 January 1998. Since the main proceedings concern periods before the change of the legislation, I will not take that change into account.

Insurance contributions

19. Insurance benefits are financed through contributions paid by employers or by the self-employed who are covered by compulsory insurance.

20. The scheme in the agricultural sector works according to the redistribution method: for each year the INAIL collects the contributions necessary to cover the expenditure (allowances, pensions) which it expects to arise in the course of the year (Article 262 of the *T.U.*). The contributions due are fixed by ministerial decree (Article 257 of the *T.U.*). If there is a significant deficit, State financing appears to be guaranteed (Article 263 of the *T.U.*).

21. As regards the industrial sector Article 39(2) of the *T.U.* provides for a system of so-called 'underlying capital redistribution' (ripartizione dei capitali di copertura): contributions for each year must be determined so that they will cover all anticipated charges resulting from accidents occurring during the year which include both the short-term benefits and the capital value of long-term pensions to be paid in relation to those accidents. For the calculation of the capital values of pensions the INAIL must submit actuarial tables for approval by the competent minister (Article 39(1) of the *T.U.*). The funds collected in order to cover the capital value of future pensions constitute a technical reserve. That reserve must be managed by the INAIL in order to obtain the benefits necessary for financing pensions and allowances without any prejudice to the stability of those funds. It is not clear whether the periodical adjustments of insurance benefits in line with increases in average earnings [14] are financed essentially through profits obtained through investments made with the technical reserve for pensions [15] or from increases in current contributions. [16] It seems likely that the adjustments in question are financed through a combination of both elements. [17]

22. Under Article 41 of the *T.U.* contributions in respect of employees are calculated as a certain percentage of their remuneration. [18] That percentage (tasso) depends on the average risk of the activity of the undertaking for which they work. The percentage so determined may be modified for individual undertakings (tasso specifico aziendale) if those undertakings can prove that by virtue for example of safety measures the risk of their activities is lower than the nationwide average.

23. The calculation of insurance contributions for self-employed craft workers is governed by Article 42 of the *T.U.* and for the period at issue in the main proceedings by a Ministerial Decree of 21 June 1988. [19] Activities of self-employed craft workers are classified in 10 different risk categories. For each risk category special unitary premiums (premi speciali unitari) are established. Those special unitary premiums are

14 — See above at paragraph 17.

15 — F. De Compardi, P. Gualtierotti, op. cit. in note 6, at page 54.

16 — That appears to be the position defended by the Italian Government and the INAIL in their respective observations.

17 — See Achille D'Arenzo, *Particolarità e caratteristiche delle modalità di finanziamento nell' assicurazione contro gli infortuni sul lavoro*, Rivista degli infortuni e delle malattie professionali, 1997, I, 631.

18 — The detailed rules are to be found in a Ministerial Decree of 18 June 1988 (GURI of 30 June 1988, No 152, supplemento ordinario).

19 — GURI of 29 June 1988, No 151.

based on the theoretical risk of the activity in question and the earnings declared by the craft worker in question.

24. It appears from the *T.U.* and the documents before this Court that for the calculation of contributions all earnings above the legal minimum wage are taken into account.

25. Under Articles 41 and 42 of the *T.U.* the levels of insurance contributions both for employees and for self-employed craft workers are approved (approvato) by ministerial decree on the basis of a resolution (delibera) of the INAIL. The INAIL has submitted to the Court a letter from the competent minister of 1981 in which the minister refused to approve the resolution of the INAIL concerning new special unitary premiums for craft workers and invited the INAIL to reconsider the proposed tariffs in order to make the necessary adjustments.

Some statistics

26. It follows from statistics published by the INAIL [20] that in 1999 it spent around EUR 3 500 million on pensions in case of permanent incapacity for work, around EUR 1 000 million on pensions for survivors and around EUR 500 million on allowances in case of temporary absolute incapacity for work. For 2001 the INAIL foresees [21] revenues from insurance premiums of around EUR 6 175 million, expenses for insurance benefits of EUR 5 410 million, expenses for other measures (prevention, health care, rehabilitation) of EUR 284 million and administrative expenses of EUR 692 million.

The main proceedings and the order for reference

27. By summary order of 30 December 1998 the Pretore (Magistrate) of Vicenza required the undertaking Cisal di Battistello Venanzio & C. Sas ('Cisal di Battistello Venanzio' or 'the applicant') to pay to the INAIL in respect of its managing partner (socio accomandatario) Mr Battistello unpaid insurance contributions of ITL 6 606 890 for the period 1992 to 1996. The order stated that, according to the applicable rules, [22] Mr Battistello, in his capacity as craft worker (artigiano) engaged in manual activity in his own undertaking, should have been insured with the INAIL against accidents at work.

28. In the main proceedings before the Tribunale Vicenza, Cisal di Battistello Venanzio objects to that order. It states that Mr

20 — See the annual report for 1999 published on the web site of the INAIL.

21 — See the forecast of accounts for 2001 published on the same web site.

22 — See above at paragraph 10.

Battistello is already insured against accidents at work under a policy with a private insurance company, with effect from 1986. That insurance covers specifically his work as a self-employed craft worker who works manually with wood and uses motor-driven machines. It contends that the legislation on the basis of which it is obliged to take out insurance against the same risks with the INAIL is contrary to Community competition law in that it unjustifiably maintains a monopoly for INAIL and thus induces the latter to abuse its dominant position. The applicant observes also that according to an opinion of the Italian competition authority of 9 February 1999 [23] the activities of the INAIL do not display such elements of solidarity as to exclude the possibility that those activities are of an economic nature within the meaning of the Court's case-law.

29. The referring court states that the INAIL displays certain characteristics which are, in its view, difficult to reconcile with the concept of undertaking within the meaning of the Community competition rules. It refers in that regard to the automatic nature of benefits, compulsory affiliation itself and the absence of a profit motive. It considers none the less that characteristics which are typical for bodies engaged in an economic activity predominate. It mentions the strong nexus between risk and contributions, the duty of the INAIL to perform its functions in accordance with 'sound economic and business practice' [24] and the fact that on two occasions [25] the Italian legislature has regarded compulsory private insurance against accidents at work at least for a transitional period as a valid alternative to insurance provided by the INAIL.

30. The referring court considers also that the Italian legislation might be contrary to Articles 86 and 82 EC in that it forces self-employed craft workers to insure themselves with the INAIL even where they are already insured with a private company. Furthermore the abolition of compulsory affiliation for craft workers who are already insured elsewhere would not divert the INAIL from the performance of the other functions assigned to it by the Italian legislation.

31. The referring court decided therefore to refer the following two questions to the Court:

'Does a public non-profit-making insurance body, such as the INAIL, to which is entrusted, on the basis of sound economic and business practice, the operation as a

23 — Bollettino No 4 of 15 February 1999, at page 57.

24 — See above at paragraph 12.

25 — The Tribunale refers to Article 1 of law No 413 of 15 April 1965 which concerns craft workers and Article 8 of law No 91 of 1981 which concerns professional sports persons.

monopoly of a scheme of insurance against risks deriving from accidents at work and occupational diseases based on a system of compulsory registration which pays benefits on a partially automatic basis (providing thus insurance cover for employees, but not for self-employed persons — as from 1998) even in the event of non-payment of premiums by the employer, and calculates the premiums on the basis of the risk categories to which the insured work is assigned, constitute an undertaking within the meaning of Articles 81 et seq. EC?

If the first question is answered in the affirmative, does the fact that the abovementioned public entity calls for the payment of premiums even where the person concerned, a self-employed person (craft worker), is already insured with a private company against the same risks in respect of which he would be covered through affiliation to the abovementioned body constitute an infringement of Articles 86 and 82 EC?'

32. Written observations were submitted by Cisal di Battistello Venanzio, the INAIL, the Italian Government and the Commission which were all represented at the hearing.

Preliminary objections

33. The INAIL contends, first, that the reference is inadmissible, because the referring court's doubts are based on the fact that as from 1 January 1998 the principle of automatic payment of insurance benefits has been abolished in respect of self-employed craft workers. Since the main proceedings concern the period from 1992 to 1996 a preliminary ruling based on that amendment of the law would not have any effects in the main proceedings.

34. I consider that that contention is based on a misunderstanding of the order for reference. The change of the law in question is mentioned in the introductory section of that order which describes the national legal background and as one of several elements giving rise to the first question. [26] Where the referring court explains why the INAIL should in its view be regarded as an undertaking, it does not even mention the change in issue. [27] There are thus no indications that the referring court's doubts are 'based' on that change alone. In any event, as I have already stated, in view of the temporal scope of the main proceedings I will not take the change into account for my analysis. [28]

35. Secondly, the INAIL appears to argue that even if the Court were to answer both questions in the affirmative the national court would not be competent to set aside the national rules granting the INAIL the legal monopoly in issue. That is, first,

26 — See paragraphs 6 to 9 of the order for reference and the wording of the first question referred.

27 — Paragraphs 12 and 13 of the order for reference.

28 — See above at paragraph 18.

because — in view of the social objective and the public law status of the INAIL — Article 86(2) EC and not Article 86(1) EC should apply. Secondly, the referring court could not itself adopt the regulatory measures which would become necessary in order to guarantee effective social protection in a system with more than one insurance provider. Thirdly, it follows from Article 86(3) EC that it is not for national courts but for the Commission to ensure the application of Article 86 EC.

36. In that regard it is sufficient to point out that the question whether Article 86(2) EC applies is an issue of substance with which I will deal below and that Article 86(1) EC when applied in combination with Article 82 EC has direct effect. [29] Article 86(1) can therefore be applied by any national court and not only by the Commission.

The first question: Classification of the INAIL as an undertaking

37. With its first question the referring court asks whether a body such as the INAIL which operates the Italian regime of compulsory insurance against accidents at work and occupational diseases is to be regarded as an undertaking for the purposes of the competition rules of the EC Treaty.

38. The Court has consistently held that in the context of competition law, the concept of undertaking covers any entity engaged in an economic activity regardless of the legal status of the entity or the way it is financed. [30] The basic test is whether the entity in question is engaged in an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits. [31] As regards the classification of insurance schemes with a social objective all those submitting observations agree that the judgments in *Poucet*, *FFSA*, *Albany*, *Drijvende Bokken* and *Brentjens* and *Pavlov* [32] are of particular relevance.

39. In *Poucet* [33] the Court held that certain French bodies operating the sickness and

29 — See, for example, Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 23 of the judgment.

30 — See Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21 of the judgment.

31 — See for a fuller account of the Court's general case-law on the concept of undertaking my Opinion in *Albany*, *Drijvende Bokken* and *Brentjens*, cited in note 4, at paragraphs 311 to 314 of the Opinion; see also my recent Opinion in Case C-475/99 *Ambulanz Glöckner*, delivered on 17 May 2001, at paragraph 67.

32 — Cited in notes 2 to 5.

33 — Cited in note 2.

maternity insurance scheme for self-employed persons engaged in non-agricultural occupations and the basic pension scheme for skilled traders were not to be classified as undertakings. The Court stressed that those bodies fulfilled an exclusively social function, that their activity was based on the principle of solidarity and entirely non-profit-making and that the benefits paid were statutory benefits bearing no relation to the amount of the contribution.

40. In *FFSA* [34] the Court clarified and refined its case-law and held that a French non-profit-making organisation which operated an optional supplementary old-age insurance scheme for self-employed farmers was to be classified as an undertaking.

41. In its judgment the Court first summarised its prior ruling in *Poucet* and retrospectively attached particular importance to the following features of the entities at issue in that case: [35] the schemes had been compulsory social security schemes based on the principle of solidarity, under the sickness and maternity insurance scheme benefits had been identical for all recipients, whilst contributions had been proportionate to income, under the old-age insurance scheme retirement pensions had been financed by active workers, pension rights had been laid down by legislation and had not been proportionate to the insurance contributions paid and schemes which had been in surplus had helped finance those which had financial difficulties.

42. Then the Court went on to analyse the pension scheme at issue and emphasised that the scheme was optional, that it operated according to the capitalisation principle and that the benefits to which it conferred entitlement depended solely on the amount of contributions paid by the recipient and the financial results of the investments made by the managing body. The elements of solidarity embodied in the scheme, the pursuit of a social objective and the non-profit-making character of the scheme could not deprive the activity which it carried out of its economic character. Whilst those elements could make its services less competitive than comparable services provided by private insurance companies, they did not prevent the activity in issue from being regarded as economic activity. A separate question was whether those limitations could be relied upon for example in order to justify certain exclusive rights of the body in question.

34 — Cited in note 3.

35 — See paragraph 15 of the judgment.

43. In the three parallel judgements in *Albany*, *Drijvende Bokken* and *Brentjens* [36] and in the subsequent judgment in *Pavlov* [37] the Court confirmed the principles established in *FFSA* and held that Netherlands pension funds which provided supplementary old-age pensions respectively to employees and members of the medical specialists' profession were to be classified as undertakings. The Court emphasised the fact that the funds themselves determined the amount of contributions and benefits and that they operated in accordance with the capitalisation principle. The amount of the benefits thus depended on the financial results of the investments made. The non-profit-making character of the funds, the pursuit of a social objective, the restrictions or controls on investments and the various elements of solidarity embodied in the scheme could not deprive the funds at issue of their status as undertakings within the meaning of the competition rules but might justify their exclusive rights.

44. In the present case Cisal di Battistello Venanzio contends that in the light of that case-law the INAIL must be classified as an undertaking. The insurance services provided by the INAIL in respect of craft workers are in its view fully comparable to those provided by private insurers: insurance benefits are financed exclusively through contributions, contributions are determined on the basis of risk, there is a close link between contributions and benefits in that both are a percentage of the remuneration of the victim and the INAIL must operate the insurance scheme according to sound economic and business practice in order to maximise income. Neither the INAIL's social objective, its non-profit-making character nor the limited elements of solidarity embodied in the scheme can affect the finding that the INAIL's activities are predominantly of an economic nature.

45. The INAIL, the Italian Government and the Commission maintain that the INAIL cannot be classified as an undertaking. They argue in substance that

— the INAIL is a public-law institution which not only offers insurance but is also involved in prevention, rehabilitation and social assistance activities and is entrusted by the Italian constitution with a social mission;

— the insurance scheme which it operates cannot be compared to private insurance since for example benefits are not directly linked to contributions

36 — Cited in note 4.
37 — Cited in note 5.

— since benefits and contributions are either predetermined by law or tightly controlled by the government there is no risk of conduct which the competition rules seek to prevent;

— the insurance scheme is characterised by strong elements of solidarity (e.g. automatic payment of benefits) which a private insurer could not offer.

Some irrelevant features

46. It follows in my view from the Court's case-law and in particular from the cases set out above that the INAIL's public-law status, its non-profit-making character and the pursuit of social objectives cannot be taken into account for its classification. It is a separate question whether those features might help to justify the grant to the INAIL of exclusive or special rights under Article 86(2). They cannot however as such have a bearing on the question whether the INAIL's insurance activities should or should not be regarded as economic activities.

47. Nor can the fact that the INAIL's mission is provided for by the Italian constitution be taken into account. The competition rules must apply uniformly throughout the Community. The legal status of a given entity under national law cannot thus influence its classification.

48. The fact that the INAIL engages in parallel with its insurance activities in prevention, rehabilitation and social assistance activities is also irrelevant. The concept of undertaking is relative in the sense that a given entity might be regarded as an undertaking for one part of its activities (e.g. insurance), even where another part of its activities might fall outside the competition rules (e.g. prevention, rehabilitation, social assistance). [38] Financially the latter activities appear in any event to be much less important than its insurance activity. [39]

49. The argument that the concept of undertaking is relative applies also as regards the INAIL's special powers. [40] Whilst the INAIL may be regarded as acting in the exercise of official authority and thus outside the competition rules where it relies on those powers, the clas-

38 — See my Opinion in *Ambulanz Glöckner*, cited in note 31, paragraph 72 with further references.

39 — See above at paragraph 26.

40 — See above paragraph 12 and note 12.

sification of its insurance activities remains unaffected.

The nature of the INAIL's activities

50. The Court attaches by contrast great importance to the nature of the insurance services offered. In line with the general case-law on the concept of undertaking it must therefore be examined whether the insurance services provided by the INAIL are such that they could at least in principle be provided by a private insurer.

51. Cisal di Battistello Venanzo relies on Article 55 of Law No 88 of 9 March 1989 under which the INAIL must operate the insurance scheme according to 'sound economic and business practice' and must try to 'maximise income'. In its view that rule shows the entrepreneurial nature of the INAIL.

52. I am not convinced by that argument. Most public authorities will have to operate according to the principle of good administration which will include the obligation to minimise costs and, where appropriate, to maximise income for example through the efficient collection of administrative fees. A legal obligation to cut costs and to maximise income is therefore not sufficient alone to indicate that the activities of the INAIL are of an economic nature.

53. The INAIL and the Italian Government argue, first, that the insurance scheme offered by the INAIL is atypical because

— benefits are paid even where the victim was negligent,

— the scheme guarantees the provision of means of subsistence determined on the basis of the victim's earnings instead of granting compensation for damage,

— benefits cover not only immediate and direct damage but also more indirect economic consequences of an accident.

54. I cannot see why the three elements invoked are atypical for insurance. Those features merely distinguish the insurance scheme in issue from an alternative outcome under the ordinary rules of civil liability. Insurance against accidents at work was introduced precisely to overcome the disadvantages of those rules. [41] It must also be borne in mind that in several Member States (compulsory) insurance against accidents at work financed by employers is provided by private insurers. [42]

55. The INAIL, the Italian Government and the Commission argue, secondly, that the benefits paid by the INAIL are financed either fully (in the agricultural sector) or at least partly (in the industrial sector) according to the redistribution principle.

56. In my view, a pension scheme operated according to the redistribution principle could not be offered by a private insurer since nobody would be prepared to finance the current pensions of others without the guarantee that the next generation would do the same. [43]

57. For similar reasons the insurance operated by the INAIL in the agricultural sector does not appear to be an activity in which a private insurer could engage. Workers currently active in the agricultural sector appear to finance current pensions directly without being sure that there will be in the future a similar number of workers in that sector who will be able to finance their pensions in case of an accident at work or an occupational disease. The fact that the State seems to guarantee the financing of the scheme in case of deficit and directly fixes the level of contributions are further indications that the insurance provided in that sector cannot be viewed as an economic activity within the meaning of the Court's case-law. [44]

58. It must however be recalled that in the industrial sector benefits are financed fully through contributions and contributions are calculated in order to cover all anticipated charges (including the long-term pension liabilities) resulting from the accidents predicted to occur during the year. Higher benefits in line with increases in average earnings appear to be financed partly through investments made with the technical reserve and partly through increases in contributions. The general financing philosophy underlying the scheme in the industrial sector thus appears to be not very different from that which would be used by a private sector insurer.

41 — See above at paragraphs 3 to 6.

42 — See for example the Belgian system at issue in Case C-206/98 *Commission* v *Belgium* [2000] ECR I-3509.

43 — See my Opinion in *Albany*, cited in note 4, at paragraph 338 of the Opinion.

44 — See above at paragraph 20.

59. The INAIL and the Italian Government argue, thirdly, that contributions are not systematically proportionate to risk because certain specific risks (for example the risks related to asbestos or noise) are partly borne by other sectors.

60. I accept that such a partial redistribution of risks adds an element of solidarity between sectors. The financing side of the scheme appears none the less predominantly to reflect a risk-based insurance logic. Under the provisions summarised above contributions both for employees and for the self-employed are in general calculated only on the basis of the risk linked to the activity in which the undertaking in question engages and the earnings of the insured. As regards employees there is even an analysis of the concrete risk in each undertaking in order to calculate a specific rate of contributions. The financing side of the scheme appears therefore to operate according to a similar philosophy as for example a private car insurer which weights the premium according to the level of risk.

61. The INAIL, the Italian Government and the Commission contend, fourthly, that on an individual level benefits are not directly linked to contributions.

62. It is in my view indeed an essential feature of private insurance that contributions and benefits are linked not only on an aggregate level (the sum of benefits must be financed by the sum of contributions) but also on an individual level. An insured (or a third party paying contributions in respect of the insured) will be disposed to pay contributions only if he can expect in exchange the payment of benefits which are related to the amount of contributions paid. In a free market no private undertaking could for example operate a health insurance scheme in which contributions were related to earnings, whilst benefits were identical for all insured. [45]

63. It will be recalled that in the present case both the benefits paid by the INAIL and the contributions are determined on the basis of earnings. [46] From a legal point of view there is thus no direct connection between contributions and benefits.

64. Cisal di Battistello Venanzio argues however that in actuarial and economic terms it does not make any difference whether the provisions of the law at issue link contributions and benefits directly or via a common third factor on the basis of which they are both calculated. In both cases higher or lower contributions will be mathematically related to proportionately higher or lower benefits.

45 — See for the importance of that argument the judgment in *Poucet* as summarised in *FFSA*, above at paragraph 41.

46 — See respectively paragraphs 22 and 23 and paragraphs 14 to 16.

65. On the basis of similar reasoning the Italian competition authority has found that the INAIL's activities are fully comparable to those of a private insurer in that

— there is a direct link between contributions and benefits because both are calculated as a percentage of the same variable, namely the victim's earnings,

— contributions are related to risks, and

— benefits are financed entirely through contributions.

66. I have one important doubt as regards that reasoning. It will be recalled that for the calculation of pension benefits only annual earnings between a given maximum and minimum — an average nationwide salary increased and decreased by 30% respectively — are to be taken into account, whereas for the calculation of contributions all earnings above the legal minimum wage are relevant. It might therefore well be that an employer has to pay high contributions in respect of an employee with a high salary, but that the employee in question will not be entitled to correspondingly high pension benefits because his earnings exceed the maximum earnings fixed by decree. It might conversely be that rather low contributions calculated on the basis of the legal minimum wage trigger benefits related to earning which correspond mathematically to a considerably higher wage, namely the national average wage less 30 %. The existence of a maximum and a minimum of earnings to be taken into account for the calculation of pension benefits means that the scheme offered by the INAIL lies somewhere in the middle of a spectrum: at one end of the spectrum are schemes in which contributions and benefits are fully proportionate and at the other end are schemes in which contributions are related to earnings, whilst benefits are identical for all.

Elements of solidarity forming part of the scheme

67. Under the Court's case-law the elements of solidarity present in the rules governing the activities of the body in question are relevant. Those elements may be so fundamental and predominant that as a matter of principle no private insurer can offer that type of insurance on the market. On the other hand, they may not go so far as to prevent its activities from being regarded as economic activities. In the latter case the question often arises whether those elements might however help to justify exclusive or special rights granted to the body in question.

68. In that regard the INAIL, the Italian Government and the Commission point essentially to the principle of automatic payment of benefits, according to which insurance benefits are paid even where the employer has failed to pay the contributions due.

69. I accept that this principle is an important element of solidarity which contributes to the protection of all employees against the economic consequences of an accident at work or an occupational disease. The greater the number of employment relationships which are not declared to the authorities or the greater the extent to which employers default on their contributions, the greater the weight which that principle will have. It means in practice that employers and self-employed who comply with their obligation to contribute have to pay also for all those who do not comply.

70. It must however also be borne in mind that the principle of automatic payment is just one feature of the scheme in issue and that it does not directly form part of the scheme's core rationale, namely to guarantee employees earnings-related insurance cover against accidents at work and occupational diseases even where the employer's fault cannot be established and in exchange to relieve employers of their civil liability. Moreover the Italian competition authority rightly notes that automatic payment of benefits could also be guaranteed through a fund managed by the State or an auxiliary body. It will be recalled that in the field of obligatory car insurance a common fund guarantees the payment of insurance benefits even where the car causing the accident is not insured.

The autonomy of the INAIL

71. Under the case-law set out above it must finally be examined whether it is the INAIL which determines the level of contributions and benefits. The underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent. Schemes in which the levels of benefits and contributions are fixed by the legislature fall outside the scope of the competition rules.

72. The INAIL, the Italian Government and the Commission argue, first, that the level of benefits is fixed by the *T.U.* and thus by law. Those benefits have to be paid independently of the financial results of the investments of the INAIL. In contrast to the schemes under scrutiny in *Albany* or in *Pavlov*, benefits are not determined on the basis of contributions but contributions are determined on the basis of benefits.

73. In my view the fact that benefits are determined by law cannot in itself remove

the INAIL from the scope of the competition rules. In several sectors of the economy the legislature determines in advance obligatory (minimum) characteristics of the services or goods to be supplied by undertakings. As long as the undertakings concerned can compete for example on the price of those goods or services they continue to be engaged in an economic activity.

74. The INAIL, the Italian Government and the Commission insist, secondly, on the fact that the level of contributions must be approved by the competent Minister through decree. The Commission considers therefore that not only the benefits but also the contributions are determined by law.

75. Cisal di Battistello Venanzio maintains that according to the wording of the *T.U.* it is the INAIL which has to decide by resolution about the tariffs in question, whilst the competent Minister has only the power to give or withhold his approval.

76. On the basis of the documents submitted to this Court it appears to me that the power to fix the levels of the contributions lies in practice ultimately with the Government. The provisions on the levels of contributions in respect of both employees and the self-employed are published in the form of ministerial decrees in the official journal of the Italian republic. Those decrees are not merely formal approvals of rules adopted by a separate and independent regulatory body but are enacted as normal legislation issued by the Government. Furthermore, the INAIL has submitted to the Court by way of example a letter in which the competent Minister refused to approve new tariffs for craft-workers. On the basis of concrete figures the Minister criticises *inter alia* the fact that in the textile sector craft-workers have to pay much higher premiums than employers for their employees and requests the INAIL to submit a new proposal with the necessary amendments.

Conclusion on the classification as undertaking

77. Insurance schemes with a social objective take a variety of forms ranging from State social security schemes operating predominantly according to the principle of solidarity at one end of the spectrum to schemes with only isolated elements of solidarity operated by commercial insurers at the other. The task of classifying intermediate schemes is a question of degree which requires analysis of a series of criteria. I find the scheme operated by the INAIL particularly difficult to classify.

78. As stated above the Italian competition authority considers on the basis of its expert knowledge of the national legal background that the insurance services

provided by the INAIL are 'fully comparable' to those of a private insurer. That is in the authority's view because contributions are related to risk, benefits are financed entirely through contributions and there is a direct link between contributions and benefits.

79. In the light of the admittedly limited information before this Court I reach the opposite result for essentially two reasons.

80. First, the link between contributions and benefits via the victim's earnings appears in my view to be too indirect to be comparable to the link which is typical for private insurance. I consider in particular that no private insurer could offer on the free market a scheme in which for the calculation of pension benefits only earnings in a relatively narrow range between a given minimum and maximum were taken into account, whilst for the calculation of contributions all earnings above the minimum wage were relevant. The scheme appears to provide medium-range pensions even where high or low contributions have been paid. By virtue of that redistributive element it acts in my view more as a social security scheme which guarantees basic social protection for all those who form part of the scheme than as an insurer which grants benefits proportionate to the contributions paid by the individual person insured.

81. Secondly, it appears to me that levels of both benefits and contributions are ultimately determined by the State. The levels of benefits are fixed in the *T.U.* The levels of contributions are enacted by ministerial decree and thus by ordinary Government legislation. They seem to be determined also in practice by the competent Minister who appears to make full use of his powers to approve or refuse to approve the tariffs proposed by the INAIL. Since the INAIL does not appear to control the two central elements of the scheme it cannot be regarded as an independent entity which is itself engaged in an economic activity.

82. I accordingly conclude that a body which operates a national system of compulsory insurance against accidents at work and occupational diseases under conditions such as those applying to the Italian Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro cannot be regarded as an undertaking for the purposes of the competition rules of the EC Treaty.

In the alternative: Articles 86 EC and 82 EC

83. By its second question the referring court asks in essence whether in a context such as the Italian one compulsory insurance of craft workers against accidents at

work and occupational diseases with the INAIL infringes Articles 86 and 82 EC.

84. The referring court asks that question however only in the event that the INAIL is to be classified as an undertaking. Since I consider that the INAIL cannot be classified as an undertaking and since the parties submitted only limited observations on the second question, I will address the issues raised only in the alternative and only briefly.

85. Cisal di Battistello Venanzio submits that the Italian legislation infringes Articles 86(1) and 82 EC on the ground that the insurance provided by the INAIL does not correspond to the needs of the affiliated undertakings. [47] Adequate protection of workers could in its view be achieved through compulsory insurance with private insurers on which certain minimum requirements could be imposed.

86. The INAIL, the Italian Government and the Commission maintain that there is no indication of an infringement of Article 86(1) EC read in conjunction with Article 82 EC. In any event the exclusive right of the fund is justified by virtue of Article 86(2) EC.

87. It is common ground that the INAIL enjoys an exclusive right within the meaning of Article 86(1) EC as regards insurance against accidents at work and occupational diseases and that it operates as a legal monopoly in Italy and thus holds a dominant position in a substantial part of the common market within the meaning of Article 82 EC.

88. It is well established case-law that merely creating a dominant position by granting exclusive rights is not in itself incompatible with Article 86(1). Articles 86(1) and 82 EC are however infringed where a Member State creates either a conflict of interest which induces the undertaking in question to abuse its dominant position [48] or a situation in which the undertaking is manifestly not in a position to satisfy demand. [49]

89. Since there are no indications of a conflict of interest within the meaning of the Court's case-law, it must be examined whether the INAIL is manifestly and systematically unable to satisfy demand.

47 — The applicant refers to the judgment in *Höfner*, cited in note 30.

48 — See for example Case C-260/89 *ERT* [1991] ECR I-2925, Case C-163/96 *Raso and Others* [1998] ECR I-533 and Case C-202/88 *France* v *Commission* [1991] ECR I-1223.

49 — See, for example, *Höfner*, cited in note 30 and Case C-55/96 *Job Centre* [1997] ECR I-7119.

90. The applicant — if I understand its observations correctly — complains mainly about the fact that only earnings below a given maximum are taken into account for the calculation of pension benefits. That obliges craft-workers such as Mr Battistello to contract supplementary private insurance in order to obtain insurance benefits which are truly related to his earnings prior to the accident.

91. I consider that there is nothing wrong with a State scheme which guarantees means of subsistence related to a national average wage whilst supplementary coverage has to be obtained through private insurance. Such combinations of obligatory basic public protection with voluntary supplementary private protection are a common feature in many Member States.

92. In its opinion referred to above the Italian competition authority also mentions the following problems: tariffs and risk categories for the calculation of contributions are in its view not sufficiently adapted to the changing nature of the activities concerned, contributions in the industrial sector are artificially high in order to subsidise the loss-making scheme in the agricultural sector and the insurance provided by the INAIL does not cover the full extent of potential civil liability of employers which forces the latter to subscribe supplementary private insurance in respect of those risks.

93. Since none of those submitting observations has raised or discussed those issues I cannot express a view on them. If therefore the INAIL were to be considered, contrary to my view, to be an undertaking, it would be for the national court to assess whether there were any concrete indications that Italy has created a situation in which the INAIL on the one hand enjoys a monopoly but on the other is manifestly unable to satisfy demand. In doing so it would have to analyse whether any concrete or potential abuses by the INAIL were the *direct consequence* of the framework created by the legislature, whether the system was *manifestly* inadequate and whether the legislature overstepped the *margin of appreciation* which it must necessarily have in that field. [50]

94. The next issue is whether or not the grant to the INAIL of the exclusive right to operate the Italian system of compulsory insurance against accidents at work and occupational diseases would in any event be justified under Article 86(2) EC.

95. In that regard it is common ground that the INAIL is entrusted with a service of

50 — See my Opinion in *Albany*, cited in note 4, paragraphs 412 to 414.

general economic interest within the meaning of Article 86(2) EC. It would therefore be necessary only to assess whether abolishing the exclusive right of the INAIL would obstruct the performance, in law or in fact, of the particular tasks assigned to the INAIL.

96. Cisal di Battistello Venanzio argues that the INAIL's monopoly is not necessary to guarantee the constitutionally required social protection of workers. The same results could in its view be achieved through compulsory insurance with private insurers on which certain minimum legal requirements could be imposed. The principle of automatic payment of benefits could be maintained through the establishment of a State fund.

97. The INAIL, the Italian Government and the Commission maintain that the abolition of the exclusive right would lead to a departure of the 'good risks' to private insurers whereas the 'bad risks' would remain with the INAIL.

98. Whilst that line of argument appears at first sight to be in keeping with the Court's reasoning in *Albany*, I consider that the Court should not express a definitive view on that issue in the present case since too many important points concerning the factual and legal background are unclear. In my view the danger of a departure of only the good risks seems to be much smaller than in *Albany* because in the present case contributions are in any event related to risk. The final assessment, if necessary, should therefore be left to the referring court.

99. As regards that final assessment the INAIL, the Italian Government and the Commission rightly stress however that insurance against accidents at work and occupational diseases fulfils an essential social function and that the Member States enjoy a margin of appreciation in organising their systems of social security. It is therefore in principle incumbent on each Member State to consider whether — in view of the particular features of the national legal context — a regime with several private insurers subjected to certain legal minimum requirements would still enable it to ensure the level of insurance which it seeks to guarantee. [51]

100. I accordingly conclude that if the INAIL were to be classified as an undertaking it would be for the referring court to establish whether the INAIL is manifestly not in a position to satisfy demand and whether the grant of the exclusive right is justified under Article 86(2) EC.

51 — See *Albany*, cited in note 4, paragraph 122 of the judgment.

Conclusion

101. For the above reason the questions referred should in my view be answered as follows:

A body which operates a national system of compulsory insurance against accidents at work and occupational diseases under conditions such as those applying to the Italian Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro cannot be regarded as an undertaking for the purposes of the competition rules of the EC Treaty.