# OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 11 November 2010[1]

## I — Introduction

1. The present reference for a preliminary ruling, which essentially concerns the interpretation of Articles 81 EC, 82 EC and 86 EC, has been made in an action between the provident society AG2R Prévoyance ('AG2R') and a traditional bakery business, Beaudout Père et Fils SARL ('Beaudout') concerning the latter's refusal to join the compulsory scheme for supplementary reimbursement of healthcare costs offered by AG2R in respect of the traditional bakery sector in France. [2]

2. Although the present case is set against the background of relatively copious case-law on whether the Treaty's competition rules can be applied to bodies entrusted with managing social protection schemes, its main focus lies, to my mind, in the light which it may shed on the interpretation to be given to the concept of an 'undertaking' for the purposes of Articles 81 EC and 82 EC.

## II — Relevant legislation

### A — *French legislation*

3. In France, reimbursement of the costs incurred in the event of illness or accident is covered in part by the basic social security scheme. The portion of the costs which remains payable by the insured party may be reimbursed in part by a supplementary health insurance scheme. Almost 93 % of those residing in France are considered to be covered

1 — Original language: French.

2 — It should be noted that three other references for preliminary rulings from the Tribunal d'instance de Dax (Dax District Court) (France), concerning the interpretation of the EC Treaty's competition rules and having as their background similar disputes between AG2R and businesses in the French traditional bakery and pastry-making sector, are currently pending before the Court (Joined Cases C-97/10 to C-99/10 *AG2R Prévoyance*). Furthermore, as the reference for a preliminary ruling predates the entry into force of the Treaty on the Functioning of the European Union, reference will be made to the provisions of the EC Treaty.

by a supplementary healthcare insurance scheme. [3]

4. Persons employed within a given occupational sector may join such a supplementary scheme pursuant to a sectoral agreement or a collective agreement signed by the employers' and employees' respective representatives, in accordance with Article L. 911-1 of the French Social Security Code.

5. Article L. 912-1 of that code lays down the arrangements for compulsory affiliation to a supplementary healthcare scheme. That article states that where the occupational or inter-occupational agreements mentioned in Article L. 911-1 provide for a pooling of the risks for which they arrange cover with one or more of the bodies mentioned in Article 1 of Law No 89-1009 of 31 December 1989 strengthening the cover offered to insured persons against certain risks, or with one or more of the institutions mentioned in Article L. 370-1 of the Insurance Code, which the undertakings subject to those agreements are therefore obliged to join, those agreements are to contain a clause setting out the circumstances in which and the frequency with which the detailed arrangements for the pooling of risks may be reviewed. The frequency of the review may not exceed five years.

6. Article L. 912-1 of the Social Security Code states further that, where the agreements mentioned in its first paragraph apply to an undertaking which, prior to the date on which they come into effect, has joined or signed a contract with a body other than that provided for by the agreements for the purpose of insuring against the same risks with an equivalent level of cover, the second paragraph of Article L. 132-23 of the French Labour Code applies.

7. Article L. 132-23, second paragraph, of the Labour Code states that, where sectoral agreements or occupational or inter-occupational agreements become effective within the undertaking concerned subsequent to the conclusion of existing negotiated agreements, the provisions of the latter agreements are to be amended accordingly.

8. Under Article 1 of Law No 89-1009, as amended by Law No 94-678 of 8 August 1994, to which Article L. 912-1 of the Social Security Code refers, provident operations can be implemented only by insurance companies,

3 — See French Ministry of Labour, Solidarity and Public Service, Directorate for Research, Study, Analysis and Statistics ('DREES'), *Les contrats les plus souscrits auprès des complémentaires santé en 2007*, études et résultats, No 698, August 2009, p. 2, accessible at: http://www.travail-solidarite.gouv.fr/etudes-recherche-et-statistiques,898/publications,904/etudes-et-resultats,920/no-698-les-contrats-les-plus,10202.html.

provident societies governed by the Social Security Code or Rural Code and mutual insurance associations.

9. Provident societies are subject to the provisions of Title 3 of Book IX of the Social Security Code. Under Article L. 931-1 of that code, those societies are non-profit-making legal persons governed by private law which are administered jointly by corporate members (undertakings which have signed a contract with that body) and participating members (affiliated employees and former employees of corporate members). Their purpose is to provide cover for the risks of accident- and sickness-related physical injury. Articles L. 931-4 to L. 932-5 of the Social Security Code govern the formation, method of operation and dissolution of provident societies and the operations that they are authorised to carry out. In particular, those societies must be approved by the national authority responsible for prudential supervision [4] and are subject to statutory and regulatory obligations on provisioning [5] and solvency margins. [6]

4 — Articles L. 931—5 to L. 931–8–1 of the Social Security Code.

5 — See, inter alia, Articles R. 931-10-12 to R. 931-10-16 of the Social Security Code concerning both technical commitments and technical provisions for provident societies operating in the field of 'non-life' insurance.

6 — See, inter alia, Articles R. 931-10-3 to R. 931-10-5 of the Social Security Code concerning the solvency margin of provident societies operating in the field of non-life insurance.

B — *The addendum to the national collective agreement*

10. On 24 April 2006, the trade union of master bakers and the various trade unions representing employees in the sector concluded an addendum to the national collective agreement of 19 March 1978 extended to cover the traditional bakery and pastry-making businesses ('the national collective agreement'), by virtue of which a scheme for 'supplementary reimbursement of healthcare costs' in the traditional bakery sector was established ('the addendum').

11. The addendum applies to all undertakings falling within the scope of the national collective agreement and is introduced for the benefit of all employees of those undertakings with one month's service in the same undertaking. According to its preamble, the addendum addresses, inter alia, the objective of the pooling of occupational risks which, on the one hand, makes it possible to overcome the difficulties encountered in particular by some of the smaller undertakings in the profession in establishing supplementary social protection, and, on the other hand, ensures access to the collective guarantees, without any regard, in particular, to age or state of health.

12. Under Article 4 of the addendum, all measures and costs ongoing over the period of cover which have been subject to reimbursement and to an individual breakdown of the basic social security scheme under the legislation on 'sickness', 'accidents at work/

occupational diseases' and 'maternity', as well as the measures and costs not paid for by that scheme, to which express reference is made in the table of guarantees annexed to the addendum, [7] are to be covered by the supplementary scheme.

13. According to Article 5 of the addendum, contributions for 2007 and 2008 were EUR 40 per month per employee in terms of the general scheme. [8] Half of those contributions, which must be reviewed after the second year of application of the scheme, are paid by the employer.

14. Article 13 of the addendum provides that AG2R is designated insurer for the supplementary scheme, is governed by the Social Security Code as a provident society and comes under the supervisory authority responsible for insurers and mutual insurance associations. That article also states that the detailed organisational rules governing the scheme for the pooling of risk are to be reviewed by the national joint committee for the sector during a meeting to be held within five years of the date of entry into force of the addendum.

15. Article 14 of the addendum, the 'clause de migration' ('transfer clause'), sets out the requirement for the undertakings concerned to join the supplementary scheme for reimbursement of healthcare costs by the date of entry into force of the addendum. That article provides that the mandatory nature of that measure applies also to undertakings which have already entered into a supplementary healthcare contract with another insurer with identical or better cover than that provided for in the addendum.

16. The addendum entered into force on 1 January 2007, in accordance with Article 16 thereof.

17. By decree of 16 October 2006, [9] and in the light of the requests from the signatory organisations for the scope of the addendum to be extended, the Minister for Employment, Social Cohesion and Housing extended the effects and penalties laid down by the addendum, making its provisions compulsory, to cover all traditional bakery and pastry-making businesses established in France.

7 — The annex provides a detailed list of a series of items of cover including hospitalisation on medical and surgical grounds, medical procedures, dental treatment, ophthalmic costs, spa treatment, maternity and preventive procedures.

8 — That amount was EUR 32 in respect of the Alsace-Moselle scheme. According to the information provided by the interested parties, that amount was reduced as from 1 January 2008 to EUR 28 (see Article 2 of Addendum No 2 of 12 November 2007, annexed to the written observations of the French Government).

9 — Decree extending the scope of an addendum to the national collective agreement for bakery and pastry-making (traditional undertakings) (*JORF* of 25 October 2006, p. 15787).

**III — The factual background to the dispute in the main proceedings and the question referred for a preliminary ruling**

18. Beaudout has been affiliated to the insurance company ABELA by virtue of a supplementary health insurance scheme since 10 October 2006.

19. Refusing to join the scheme provided by AG2R, Beaudout was summonsed at the request of that insurer to appear before the Tribunal de grande instance de Périgueux (Périgueux Regional Court), before which AG2R sought an order requiring Beaudout to regularise its affiliation to the scheme and to pay the contributions overdue since the date of entry into force of the addendum, that is to say, since 1 January 2007.

20. As an incidental plea, Beaudout has challenged the lawfulness of the addendum.

21. Having rejected a number of Beaudout's arguments concerning the addendum's compatibility with national law, the referring court endeavoured to compare the circumstances of the case before it with those which led to the Court's judgment of 21 September 1999 in *Albany*. [10]

22. Finding that, unlike the pension fund at issue in *Albany*, affiliation to which was compulsory subject to exemptions, no exemption was possible according to the interpretation given to Article L. 912-1 of the Social Security Code and Article 14 of the addendum, the referring court ruled that the *Albany* judgment could not be applied *mutatis mutandis* to the facts before it in the present case. The referring court also established that AG2R 'appears to occupy a dominant position in the sector concerned – bakery and pastry-making – and appears … manifestly unable to satisfy the demands of the market for that type of activity'.

23. The Tribunal de grande instance de Périgueux (France) has therefore stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Are a provision making affiliation to a scheme for supplementary healthcare compulsory, as provided for under Article L. 912-1 of the French Social Security Code, and the addendum, made compulsory by the public authorities at the request of the organisations representing employers and workers in a given sector, which provides for affiliation to a single body, designated to manage a supplementary healthcare scheme, without any possibility for undertakings in that sector to be granted a waiver of the affiliation obligation, in compliance with Articles 81 EC and 82 EC, or are they such as to place the designated body in a dominant position constituting an abuse?'

10 — Case C-67/96 [1999] ECR I-5751.

## IV — Procedure before the Court

24. In accordance with Article 23 of the Statute of the Court of Justice, written observations were submitted by the parties to the main proceedings, the German and French Governments and the European Commission.

25. Those interested parties, with the exception of the German Government, which did not wish to be represented there, and the Kingdom of Belgium also set out their views at the hearing on 30 September 2010.

## V — Analysis

### A — *Preliminary observations*

26. It is apparent from the wording of the question referred for a preliminary ruling, which is the premiss on the basis of which the question is raised, that the arrangements making affiliation to the supplementary healthcare scheme at issue in the main proceedings compulsory, which stem from *French laws and regulations*, do not allow *any* exemption from affiliation for the benefit of the undertakings operating in the traditional bakery and pastry-making sector in France.

27. That premiss leads me to make the following two sets of comments concerning national law and European Union law respectively.

28. As regards the observations on national law, it follows from the premiss referred to in point 26 of this Opinion, on which basis the referring court proceeds, that that court appears to take the view, as does AG2R in the reasoning which it adduced before that court, that a *measure amending* the agreements pre-dating the conclusion of compulsory affiliation arrangements, such as that at issue in the main proceedings, mentioned in Article L. 132-23, second paragraph, of the Labour Code, must be construed as requiring undertakings in the French traditional bakery and pastry-making sector to dispense with their pre-existing cover and, accordingly, to utilise the 'clause de migration', provided for in the addendum, by becoming affiliated to AG2R. [11]

29. Moreover, the referring court also seems to accept that this obligation imposed on undertakings operating in the sector concerned

11 — That interpretation seems to stem from a judgment from the social chamber of the French Cour de Cassation (Court of Cassation) of 10 October 2007 to which AG2R alluded in the proceedings before the referring court and which that interested party attached to the written observations which it has submitted to the Court.

is also valid in national law, not only where the pre-existing agreements insured against the same risks with an equivalent level of cover, as provided for in Article L. 912-1 of the Social Security Code, but also, as the case may be, where the cover offered would have been better. [12] Of course, it is not for the Court to call into question the interpretation of national law adopted, even implicitly, by the referring court.

30. Concerning the comments on European Union law, while the referring court has restricted its question to the interpretation of Articles 81 EC and 82 CE, the express reference made to French laws and regulations, including the reference in the very wording of the question referred, must, to my mind, lead the Court to include Articles 10 EC and 86 EC in its consideration of and answer to that question.

31. Indeed, the referring court is, without a shadow of a doubt, prompted to assess not only the conduct of an undertaking in the light of Articles 81 EC and 82 EC but also, and in particular, the compatibility, with those Treaty provisions, of legislative and regulatory measures adopted by a Member State, such as Article L. 912-1 of the Social Security Code and the ministerial decree extending the scope of the addendum to cover all French traditional undertakings operating in the bakery and pastry-making sector.

32. First, Article 10 EC, read in conjunction with Article 81 EC, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings. [13] Secondly, Article 86(1) EC requires, inter alia, Member States, in respect of undertakings to which they have granted special or exclusive rights, neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, and prohibits them therefore from leading those undertakings to abuse their dominant position within the terms of Article 82 EC.

33. Furthermore, nothing precludes the Court from providing all the elements of interpretation of European Union law which may be of assistance to the national court without the latter having referred to them expressly in its reference for a preliminary ruling, having regard in particular to the grounds contained

12 — In the main action, Beaudout appears to contend that the addendum is contrary to Article L. 912-1 of the Social Security Code since the 'clause de migration', laid down in Article 14 of that addendum, may be activated where the contract concluded with an insurer, prior to extension by the public authorities of the pooling scheme at issue, offers better cover than that provided by that scheme, which, it claims, is true of the insurance taken out with ABELA on 10 October 2006.

13 — See, inter alia, Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14; *Albany*, paragraph 65; Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 65; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, paragraph 55; and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 34.

in the decision by the referring court and in view of the subject-matter of the dispute. [14]

B — *The interpretation of Articles 10 EC and 81 EC in the context of the arrangements making affiliation to a supplementary healthcare scheme compulsory*

34. In this instance, it is apparent from the grounds of the decision to refer that the referring court has to establish whether, first, arrangements making affiliation to a supplementary healthcare scheme compulsory, as these are inferred from Article L. 912-1 of the Social Security Code, read in conjunction with Article 14 of the addendum to the national collective agreement, are contrary to Articles 10 EC and 81 EC and, secondly, a body such as AG2R, to which undertakings belonging to a given sector of activities and a given territory are required to become affiliated by reason of the exclusive right granted to it, without any possibility of exemption, is led to abuse its dominant position.

35. Rewording the question in the manner set out above on the basis of the grounds of the decision to refer, the question will therefore be considered below in each of the two parts which have just been highlighted.

36. Like the interested parties which have submitted observations to the Court, with the exception of Beaudout, I take the view that an agreement such as that at issue in the main action and the measure by which the scope of that agreement was extended to cover all French traditional bakeries fall outside the scope of Articles 10 EC and 81 EC.

37. In this regard, it is important to bear in mind, first, that the Court held, in its above judgments in *Albany*, *Brentjens'* and *Drijvende Bokken*, that it follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of social-policy objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the EC Treaty (now Article 81(1) EC). [15]

38. In the present case, as regards the nature of the agreement at issue in the main action, it should be noted that that agreement was

14 — See to this effect, inter alia, Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 25 and 26, and Case C-115/08 *CEŽ* [2009] ECR I-10265, paragraph 81 and the case-law cited there.

15 — Judgments in *Albany* (paragraphs 59 and 60), *Brentjens'* (paragraphs 56 and 57) and *Drijvende Bokken* (paragraphs 46 and 47).

concluded in the form of an addendum to a collective agreement and is the result of collective bargaining between the organisations representing employers and those representing workers.

39. As to its purpose, like the agreement at issue in the case which gave rise to the judgment in *van der Woude*, [16] the agreement in point in the main proceedings establishes, within the traditional bakery sector, a supplementary healthcare scheme which contributes to improving the working conditions of employees, not only by ensuring that they have the necessary means to meet medical expenses but also by reducing the costs which, in the absence of a collective agreement, would have had to be borne by the employees themselves. On this latter point, I should like to note that, under the addendum, the contributions paid by the employees are set at a flat rate, irrespective of the benefits provided, and one half of those contributions is paid by the employers.

40. Secondly, the fact that the agreement at issue in the main proceedings makes no provision for an exemption from affiliation to the supplementary scheme which it establishes does not appear, in my view, to have any bearing on the inapplicability of the prohibition laid down in Article 81(1) EC, since neither the nature nor the purpose of the agreement at issue in the main proceedings is altered by the absence of such a clause.

41. Moreover, I observe that, in the above judgments in *Albany*, *Brentjens'* and *Drijvende Bokken*, which concerned the compulsory affiliation of undertakings from a given sector of activities to a supplementary pension scheme, with a possibility of exemption, the Court attached no special weight to the existence of that exemption from affiliation in its interpretation of Article 81(1) EC.

42. Nor did the Court take the view that it had to alter its consideration of the nature and purpose of the agreement concluded between management and labour in the *van der Woude* judgment, even though the matter in issue there was a collective labour agreement which required the employers in a given sector to pay a contribution under a supplementary healthcare insurance scheme to a specified insurer, without, therefore, there being any possibility of exemption from affiliation to that body or to the insurer designated by that body. [17]

43. Choosing to focus solely on the nature and purpose of the agreements in question,

16 — Case C-222/98 [2000] ECR I-7111, paragraph 25.

17 — See paragraphs 26 and 27 of the judgment in *van der Woude* and points 24 to 26 and 31 of the Opinion of Advocate General Fennelly in that case.

the Court has, therefore, clearly departed on this matter from the Opinion delivered by Advocate General Jacobs in *Albany*, *Brentjens'* and *Drijvende Bokken*; he had taken the view, not without some reservations, that only collective agreements on core subjects of collective bargaining, such as wages and working conditions, which did not (directly) affect third parties or third markets could fall outside the scope of the prohibition laid down in Article 81(1) EC. [18] From that point of view, Advocate General Jacobs found that the fact that, in *Albany*, *Brentjens'* and *Drijvende Bokken*, the collective agreement did not comprise any real *exclusionary effects* for insurers other than the pension fund designated by management and labour, by reason in particular of the existence of the clause providing for exemption from affiliation, made it possible to exclude that agreement from the scope of Article 81(1) EC. [19] As to compulsory affiliation, owing to the intervention of the Netherlands Minister, that was an issue worthy of a separate assessment.

44. It is therefore correct to take the view, as the Commission submits in its written observations, that, in determining whether a collective agreement establishing a supplementary healthcare scheme coupled with compulsory affiliation is caught by Article 81(1) EC, the Court in its case-law ascribes no relevance to the detailed arrangements governing that compulsory affiliation, even if such an obligation were to stem from the collective agreement itself.

45. Accordingly, in the present case, for the purpose of assessing whether the agreement at issue falls within the scope of the prohibition under Article 81(1) EC, there is no need whatsoever to consider whether the compulsory affiliation stems solely from Article 14 of the addendum or from the application of that clause in conjunction with Article L. 912-1 of the Social Security Code.

46. Thirdly, and finally, as regards the decision adopted by the public authorities on 16 October 2006 to extend the scope of the agreement at issue in the main proceedings to cover all undertakings operating in the relevant sector of activities so as to make that agreement compulsory for those undertakings, at the request of management and labour, it also follows from the above judgments in *Albany*, *Brentjens'* and *Drijvende Bokken* that a decision of that kind cannot be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforcing their effects in disregard of Articles 10 EC and 81 EC since, in particular and as I have already pointed out, that type of agreements between the two sides of industry falls outside the scope of the prohibition laid

18 — See points 193 and 194 of the Joined Opinion delivered in *Albany*, *Brentjens'* and *Drijvende Bokken*.

19 — See point 281.

down in Article 81 EC. [20] The Member States are therefore free to make that agreement compulsory for persons who are not bound as parties to that agreement. [21]

47. I therefore propose that the first part of the question referred be answered to the effect that, in the first place, arrangements for affiliation to a supplementary healthcare scheme, which provide for affiliation to a single body without any possibility for the undertakings concerned to be exempted from affiliation, are not caught by the prohibition laid down in Article 81(1) EC and, secondly, Articles 10 EC and 81 EC do not preclude the decision by the public authorities to make compulsory, at the request of the organisations representing employers and workers in a given sector of activities, an agreement which is the result of collective bargaining and provides for affiliation to a supplementary healthcare scheme for all undertakings within the sector concerned.

20 — See, to that effect, the judgments in *Albany* (paragraphs 66 and 68), *Brentjens'* (paragraphs 66 and 68) and *Drijvende Bokken* (paragraphs 56 and 58).

21 — Judgments in *Albany* (paragraph 66), *Brentjens'* (paragraph 66) and *Drijvende Bokken* (paragraph 56).

C — *The interpretation of Articles 82 EC and 86 EC in connection with the grant of an exclusive right to the body responsible for the supplementary healthcare scheme, without any possibility of an exemption from affiliation, and the possible abuse of a dominant position*

48. The exception to the application of the prohibition laid down in Article 81(1) EC, which is apparent from the analysis conducted above in the light of the case-law of the Court, does not extend to Article 82 EC.

49. Accordingly, even though in the judgments in *Albany, Brentjens'* and *Drijvende Bokken*, as well as in that in *Pavlov and Others*, [22] the Court found that the prohibition under Article 81(1) EC could not be applied to the agreements at issue in those cases because of their nature and their purpose, it none the less took the view that the funds responsible for managing the supplementary pension schemes set up by those agreements were undertakings for the purposes of the competition rules of the Treaty which had an exclusive right conferring on them a dominant position over a substantial part of the common market, within the terms of Article 82 EC, but which were entrusted with the

22 — Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.

operation of a service of general economic interest for the purposes of Article 86(2) EC. [23]

50. Therefore, in order to provide a meaningful answer to the second part of the question referred by the Tribunal de grande instance de Périgueux, it is appropriate to determine, having regard to the documents in the case, whether the body responsible for the supplementary healthcare scheme in the main proceedings is an undertaking, for the specific purposes of Article 82 EC, which may be placed in a dominant position which it would abuse if the conditions for the application of Article 86(2) EC were not met.

1. Status as an undertaking, for the purposes of the Treaty competition rules, of a body managing a supplementary healthcare scheme such as AG2R

51. As regards AG2R's status as an undertaking, the referring court appears to accept that this body has all the necessary characteristics, referring, by analogy, to the relevant passages of the grounds of the judgment in *Albany*.

52. However, the interested parties which have submitted observations to the Court have conflicting views on this matter. While the parties to the main proceedings do not call into question AG2R's status as an undertaking, the German Government considers that the referring court has provided insufficient information to resolve that issue. For its part, the French Government submits that the referring court has failed properly to verify AG2R's status as an undertaking and further alleges that, in light of the distinctions between the supplementary healthcare scheme for which that body is responsible and the pension fund at issue in the case giving rise to the judgment in *Albany*, it is not possible, from a mere reading of that judgment, to define AG2R as an undertaking, for the purposes of the competition rules of the Treaty. Lastly, the Commission expresses the view – albeit in a qualified manner – that, further than affording specific consideration to the supplementary healthcare scheme entrusted to AG2R by the addendum to the national collective agreement in the main action – in which respect it appears difficult to draw a distinct conclusion in the light of the criteria identified by the case-law of the Court – account should be taken of the general legal framework of which provident operations in France form a part and from which it should be inferred that a body such as AG2R offers its services in competition with insurance companies and therefore corresponds to the designation of an 'undertaking' for the purposes of Article 82 EC.

53. Although, for my part and for the reasons set out below, I concur on the whole with the analysis on the substance of the matter

23 — See, respectively, the judgments in *Albany* (paragraphs 87, 92, 111 and 123), *Brentjens'* (paragraphs 87, 92, 111 and 123) and *Drijvende Bokken* (paragraphs 77, 82, 101 and 113), and that in *Pavlov and Others* (paragraphs 119, 126 and 130).

presented by the Commission in its written observations as well as at the hearing before the Court, the divergent positions adopted by the interested parties to my mind raise a general procedural issue, that is to say, that concerning the possibility of reviewing before the Court the legal characterisation of the facts (and not their assessment) [24] by the referring court.

54. I note in this regard that the referring court – probably in view of the concurrence of the parties to the main proceedings on this matter – has not expressed any doubts regarding AG2R's classification as an 'undertaking' for the purposes of Article 82 EC.

55. However, in those circumstances, it could be argued that the referring court has disposed of the matter – which would explain why it has disclosed only very few matters of fact and of law necessary to make that classification – and, consequently, does not ask the Court about it, since that matter is considered not to be in dispute for the purpose of the present proceedings. [25]

56. Conversely, and as the French Government and the Commission appear to envisage, such a legal classification conceivably should not deprive the Court of its duty to provide an interpretation of European Union law which makes it possible either to invalidate or to reinforce such a legal classification, *a fortiori* where, as in the main action, such classification (as an undertaking for the purposes of the Treaty rules on competition) constitutes a condition for application of the rules of European Union law (Articles 82 EC and 86 EC) in respect of which the referring court is seeking an interpretation.

57. To my mind, preference must be given to that second solution. Just as the Court cannot be bound by the interpretation of European Union law adopted by a national court in a reference for a preliminary ruling, [26] nor should it, in principle, dispense with an assessment of whether a legal classification made by a national court in relation to a concept of European Union law, in this instance the concept of an undertaking for the purposes of the Treaty rules on competition, is correct.

24 — After all, in accordance with the case-law on the division of powers between the Court and the national courts in the context of the preliminary-ruling procedure, assessment of the facts in the main action is a matter for the exclusive jurisdiction of the referring court; see, inter alia, Case C-282/00 *RAR* [2003] ECR I-4741, paragraph 47, Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 22, and Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 62.

25 — See, by analogy, in relation to State aid, the judgment in *Fallimento Traghetti del Mediterraneo* (paragraph 26).

26 — Following the approach adopted in Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I-839, paragraphs 29 to 40, in which the Court rebutted the premiss underlying the questions referred by the national court for a preliminary ruling. That premiss consisted in an incorrect interpretation of a provision of secondary European Union legislation that the national court considered to be applicable to the facts in the main proceedings. See also my Opinion in that case (points 18, 19 and 35 to 57).

58. Having considered the procedural aspects, it is necessary to observe that, in the context of competition law, the Court has repeatedly held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. [27] In this connection, the Court defines an economic activity as any activity consisting in offering goods or services on a given market. [28]

59. In the context of social security, the Court has established two main criteria for determining whether or not the activity in which the body or bodies responsible for the various schemes concerned is/are engaged is economic in nature. The Court examines, first, whether the scheme at issue applies the principle of solidarity and, secondly, the extent to which that scheme is subject to control by the State. [29] If the scheme applies the principle of solidarity and is under State control, the body in charge of managing the scheme will be considered not to be engaged in an economic activity and will therefore fall outside the scope of Articles 81 EC and 82 EC.

60. The Court has accordingly held that some bodies charged with managing statutory sickness insurance and old-age insurance schemes which merely apply the law and cannot influence the amount of the contributions, the use of assets or the fixing of the level of benefits are engaged in an activity which is based on the principle of national solidarity and is entirely non-profit-making. [30]

61. Similarly, the Court has held that the absence of any direct link between the contributions paid by the insured persons and the benefits granted by a body entrusted with the management of a statutory scheme providing cover against accidents at work, and the fixing by the State of the amount of benefits to be granted and contributions to be paid must lead to the conclusion that that body fulfils an exclusively social function, not an economic one. [31]

62. By contrast, in situations where schemes supplementary to the basic scheme were at issue, including situations in which those schemes displayed some of the characteristics of the schemes which pursue an exclusively social objective, [32] the bodies entrusted with their management were considered to

27 — See, inter alia, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17; Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I-4013, paragraph 14; *Albany*, paragraph 77; *Pavlov and Others*, paragraphs 74 and 108; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 46; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46; and *Kattner Stahlbau*, paragraph 34.

28 — See, inter alia, *Pavlov and Others*, paragraph 75, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22.

29 — See, in this regard, inter alia, *Poucet and Pistre*, paragraphs 8 to 15; Case C-218/00 *Cisal* [2002] ECR I-691, paragraphs 37 to 46; *AOK Bundesverband and Others*, paragraphs 47 to 57; and *Kattner Stahlbau*, paragraphs 43 to 68.

30 — See *Poucet and Pistre*, paragraphs 15 and 18. See also, to the same effect, *AOK Bundesverband and Others*, paragraphs 52 to 56.

31 — See *Cisal*, paragraphs 42, 43 and 45.

32 — See *AOK Bundesverband and Others*, paragraph 49.

be undertakings within the meaning of the Treaty rules on competition.

63. Thus, in the judgment in *Fédération française des sociétés d'assurance and Others*, the Court held that a non-profit-making body managing an optional old-age insurance scheme supplementing a basic compulsory scheme which operated according to the principle of capitalisation and the benefits of which depended solely on the amount of the contributions paid had the characteristics of an undertaking for the purposes of Articles 81 EC and 82 EC. In that regard, it is important to observe that neither the pursuit of a social purpose nor the requirements of solidarity, including the requirement that the contributions must not be linked to the risks incurred, without prior selection of the persons insured, nor the other rules relating, in particular, to the restrictions to which the managing body was subject in making its investments were considered to be sufficient to deprive the activity of the body at issue of its economic nature. [33]

64. Similarly, in *Albany*, which, it will be recalled, concerned a non-profit-making, supplementary sectoral pension fund based on a system of compulsory affiliation and applying a solidarity mechanism to determine the amount of the contributions to be paid and the level of the benefits to be granted, the Court observed that the fund itself determined the amount of the contributions and of the benefits, operated in accordance with the principle of capitalisation and was subject to supervision by the insurance board, in the same way as an insurance company. The Court noted further that the sectoral pension fund concerned was, in some cases, required or entitled to exempt undertakings from affiliation, which implied that it was engaged in an economic activity in competition with insurance companies. [34]

65. What lessons can be drawn from that case-law for the present case?

66. First, the Court appears to draw a clear dichotomy between, on the one hand, 'basic' statutory schemes the managing bodies for which have always, thus far, been considered not to be engaged in an economic activity and, on the other hand, supplementary schemes which are optional or made compulsory by the public authorities, the various bodies responsible for the management of which have been treated as undertakings within the terms of the Treaty rules on competition.

67. Secondly, there can be no doubt that the fact that a body managing a supplementary healthcare scheme, such as that here at issue in the main proceedings, is non-profit-making and is managed jointly by the two sides of industry, and/or the fact that the scheme

33 — See *Fédération française des sociétés d'assurance and Others*, paragraphs 9 and 17 to 20.

34 — *Albany*, paragraphs 81 to 85. See also the judgments in *Brentjens'* (paragraphs 81 to 85), *Drijvende Bokken* (paragraphs 71 to 75) and *Pavlov and Others* (paragraphs 114 and 115).

for which it is responsible has a social purpose, which is demonstrated in particular in the preamble to the addendum, is irrelevant for the purposes of excluding the notion that a given activity is economic in nature.

68. By contrast, and thirdly, it is clear from the case-law of the Court that the crucial factor in terms of ascertaining the extent to which the principle of solidarity is applied, the designation of the body and the management of the essential elements of the scheme both being subject to State control, appears to be the freedom enjoyed by the body in question to determine the level of contributions and the value of the benefits provided. [35]

69. First, as regards the principle of solidarity, this means, according to the Court, that benefits granted to insured persons are not strictly proportionate to the contributions paid by them. [36]

70. In the main action, it is apparent from the documents in the case that the benefits guaranteed by the supplementary healthcare scheme are fixed by a list, annexed to the addendum, setting out the benefits offered as a supplement to those guaranteed by the compulsory basic social security scheme. Furthermore, Article 5 of the addendum fixes the amount of contributions for the first two years of operation of the scheme on a uniform and flat-rate basis for all members, irrespective of their state of health or age, that is to say, at EUR 40 per employee and per month, half of which amount is paid by the employers. [37] Under that article, after the second year of application of the scheme, the amount of the contribution is to be reviewed by the parties signatories to the addendum, on the basis of the results of the scheme and the trends in healthcare expenditure as well as the relevant legislation and rules.

71. As the Commission rightly stated in its written observations, there is thus no direct link between the benefits provided and the amount of the contributions paid.

72. Furthermore, the fact that employers make a 50 % contribution to the health cover of their employees appears to embody a principle of solidarity between employers and employees as well as between employers within the actual sector of activities concerned, in line with the objective of the pooling of occupational risks referred to in the preamble to the addendum. In addition, as the French Government demonstrated in its written observations, and subject to verification by the referring court, realisation of the principle of

35 — See, to that effect, *Cisal*, paragraph 43, and *Kattner Stahlbau*, paragraph 65.

36 — See, inter alia, *Cisal*, paragraph 44, and *Kattner Stahlbau*, paragraph 65.

37 — As already pointed out, that amount was EUR 32 in respect of the Alsace-Moselle scheme in 2007, reduced to EUR 28 as from 2008.

solidarity appears to have been enhanced by various amendments to the addendum under which, first, the successors of a deceased employee are to retain for one year the agreed cover enjoyed by that employee, the corresponding contribution being borne by the scheme itself [38] and, secondly, employees who are made redundant and may be covered by the compulsory unemployment insurance scheme are to retain the agreed cover for a maximum period of 9 months, the cover being financed by the contributions paid by the undertakings and the persons in active employment who are affiliated to the supplementary healthcare scheme. [39] Such solidarity, to my mind, entails the redistribution of income for the benefit of those who, without that scheme, would probably be deprived of supplementary cover, bearing in mind their financial resources and/or their state of health. Furthermore, subject to verification by the referring court, it would seem that AG2R has no discretion either to fix or to review the amount of the contributions, that task falling exclusively to management and labour, in the light of the results of the scheme and other more general factors, or as regards the value of the benefits provided.

73. The body managing the supplementary healthcare scheme is therefore, in my view, in a clearly different situation to that of the pension fund at issue in the judgment in *Albany*, which, it should be recalled, itself determined the amount of the contributions and benefits.

74. In addition, unlike in the situation forming the basis of that judgment, AG2R is not entitled to grant an exemption from affiliation to an undertaking already insuring its employees with a rival provident society, a factor which was analysed in *Albany*, as supporting the economic nature of the activity in which the pension fund at issue in that case was engaged.

75. Consequently, as regards application of the principle of solidarity, the situation arising in the main action here appears to be more akin to the cases which gave rise to the abovementioned judgments in *Poucet and Pistre*, *AOK Bundesverband and Others*, *Cisal* and *Kattner Stahlbau*, in which the bodies entrusted with managing the various statutory social protection schemes concerned were considered, having regard to the elements of fact and of law disclosed to the Court, not to be undertakings within the meaning of the Treaty rules on competition.

76. Admittedly, unlike the situations underlying the cases giving rise to those four judgments, the amount of the contribution to be paid under the supplementary healthcare scheme at issue in the main proceedings here is not fixed on the basis of the income of the individual members. However, that characteristic, as the Commission has pointed

38 — See Article 1 of Addendum No 2 of 12 November 2007 to the addendum.

39 — See Article 2 of Addendum No 5 of 21 July 2009 to the addendum. A similar characteristic had been underlined in *Poucet and Pistre*, at paragraph 10, as regards the compulsory statutory sickness and maternity scheme in France.

out in its written observations, does not indicate any lesser degree of solidarity; on the contrary, it would appear to be attributable to the fact that the scheme set up consists in reimbursing real costs and not in providing income substitution.

77. Secondly, the fact remains that, unlike the position in *Poucet and Pistre*, *Cisal*, *AOK Bundesverband and Others* and *Kattner Stahlbau*, the State, inter alia, plays no part in designating the body entrusted with managing the supplementary healthcare scheme and that, in the light of the relevant French legislation, a body such as AG2R competes in particular with insurance companies.

78. It should be pointed out here that, on the one hand, where, as in the main action, management and labour have chosen to pool the risks at the level of a particular sector of activities, they are not in any way required to designate a provident society, such as AG2R, as the body managing such a scheme. [40] After all, under Article 1 of Law No 89-1009, as amended by Law No 94-678, to which Article L. 912-1 of the Social Security Code refers, provident operations can be carried out both by insurance companies governed by the Insurance Code and by mutual insurance associations. Therefore, where management and labour have opted to entrust the management of the supplementary healthcare scheme to a provident society, this is the result of a free choice between various potential providers. [41] Therefore, it is by no means inconceivable that the selection of a body is based not only on management-related considerations, such as joint management in a provident society, but also on financial and economic considerations, all of which may suggest that such a body sets itself up as a provider of services for social partners seeking, through collective bargaining, to secure supplementary healthcare cover for employees in a given sector of activities. [42]

79. On the other hand, it also follows from the relevant provisions of the Social Security

40 — No more than the latter is required by law to manage a supplementary healthcare scheme.

41 — It should be noted that in this instance selection of the provider apparently was not preceded by a call for tenders. That might, should the matter arise, raise the issue of management and labour being subject to the principles of transparency and non-discrimination in the choice of body to be entrusted with managing supplementary social protection schemes, such as the scheme at issue in the main proceedings. However, this issue is not the subject-matter of the reference for a preliminary ruling.

42 — Thus, according to the abovementioned study of the French Ministry of Labour, Solidarity and Public Service, in 2007 42% of the collective contracts for supplementary health cover, whether compulsory or optional, were offered by mutual insurance associations, 38% by provident societies and 20% by insurance companies. Although those data appear to show that insurance companies find the management of supplementary healthcare schemes less attractive than the management of individual contracts (27%), those companies none the less accounted for one fifth of the market in 2007.

Code, mentioned at point 9 of this Opinion, that provident societies, like AG2R, must be approved by the national authority responsible for prudential supervision and are subject to statutory and regulatory obligations on provisioning and the solvency margin, in the same way as insurance companies, including and especially when they are designated to manage a supplementary scheme like that at issue in the main action.

80. Accordingly, even if a supplementary healthcare scheme such as that at issue in the main proceedings indisputably applies the principle of solidarity, the above considerations, to my mind, argue in favour of attributing the status of an undertaking, within the terms of the Treaty rules on competition, to the body managing a scheme of that kind, such as a provident society like AG2R.

2. The dominant position occupied by a body managing a supplementary healthcare scheme, such as AG2R, and its possible abuse

81. On this issue, the questions raised by the referring court relate in essence to ascertaining whether AG2R was led to abuse its dominant position by reason of the fact that it manages a supplementary healthcare scheme to which affiliation is compulsory, without any possibility of exemption, and the scope of which was extended by the public authorities to cover all French traditional bakery and pastry-making businesses.

82. In this regard, it is clear from the judgments in *Albany*, *Brentjens'* and *Drijvende Bokken*, and in *Pavlov and Others,* that the decision by the public authorities to make affiliation to a sectoral pension fund compulsory necessarily implies granting to that fund an exclusive right to collect and administer the contributions paid with a view to accruing pension rights, which means that that fund must therefore be regarded as an undertaking to which exclusive rights have been granted by the public authorities, of the kind referred to in Article 90(1) of the EC Treaty (now Article 86(1) EC). [43]

83. That assessment can certainly be extended to the circumstances of the case in the main proceedings.

84. Indeed, compulsory affiliation to the supplementary healthcare scheme at issue in the main action, which, according to the referring

43 — Judgments in *Albany* (paragraph 90), *Brentjens'* (paragraph 90), *Drijvende Bokken* (paragraph 80) and *Pavlov and Others* (paragraph 122).

court, occurs pursuant to Article L. 912-1 of the Social Security Code and the provisions of the addendum, and pursuant to the decision by the public authorities to extend the scope of such affiliation to all undertakings in the traditional bakery and pastry-making sector in France confer on the body responsible for managing such a scheme the exclusive right to collect the contributions with a view to setting up supplementary cover for healthcare costs incurred by the employees of that sector. That body may therefore be considered to be an undertaking enjoying exclusive rights within the terms of Article 86(1) EC.

85. As to that undertaking occupying a dominant position within the terms of Article 82 EC, I should also point out that in the four judgments cited at point 82 of this Opinion the Court held, in line with well-established case-law, that an undertaking which has a statutory monopoly in a substantial part of the common market may be regarded as occupying a dominant position. [44]

86. Although the referring court provides no information whatsoever on the definition of the relevant product market, this being an issue which, moreover, appears to be the subject of dispute, [45] it must none the less be accepted that, like the situation of the pension funds underlying those four judgments, a provident society, such as AG2R, which has a statutory 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, must be regarded as occupying a dominant position within the meaning of Article 82 EC. [46]

87. However, the Court has repeatedly held that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC. A Member State will be in breach of the prohibitions laid down by those two provisions only, on the one hand, where the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant

44 — See *Albany* (paragraph 91), *Brentjens'* (paragraph 91), *Drijvende Bokken* (paragraph 81) and, to this effect, *Pavlov and Others* (paragraph 126).

45 — Accordingly, as the Commission maintains, it is necessary to examine, with a view to assessing whether AG2R might occupy a dominant position, whether the market of products at issue must be confined to contracts for the reimbursement of healthcare costs for the traditional bakery and pastry-making sector (as Beaudout contends) or whether, by contrast, it should be defined more broadly, for example, as the French market in contracts for supplementary healthcare schemes, or indeed even as the French market in provident schemes.

46 — See, by analogy, *Albany* (paragraph 92), *Brentjens'* (paragraph 92), *Drijvende Bokken* (paragraph 82) and *Pavlov and Others* (paragraph 126). I note that, according to case-law, the territory of a Member State may constitute a substantial part of the common market: see, in this respect, *inter alia* Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 28, *Höfner and Elser*, paragraph 28, and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 30.

position or, on the other hand, where such rights are liable to create a situation in which that undertaking is led to commit such abuses. [47]

88. In creating a situation in which the provision of services is limited when the undertaking to which it grants an exclusive right on a given market is manifestly unable to satisfy demand prevailing on that market and when the effective pursuit of the activities on that market by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void, [48] the conduct of a Member State has accordingly been regarded as infringing Article 82 EC, second sentence under (b), [49] and Article 86(1) EC by unduly promoting the limiting of production or of the markets.

89. In this regard it is relevant to point out that the referring court appears directly to infer AG2R's clear inability to satisfy demand prevailing on the market from its having no possibility whatsoever to grant an exemption from affiliation to the supplementary healthcare scheme, as provided for in Article L. 912-1 of the Social Security Code. [50]

90. In the light of the question referred to the Court, which relates specifically to the possible abuse of a dominant position, whether that assessment of fact can be regarded as definitive appears doubtful, *a fortiori* as it is not supported by any other reasoning.

91. It is, admittedly, plausible that some undertakings in the French traditional bakery and pastry-making sector may wish to continue to insure their employees with other insurers, as is indeed the case for Beaudout, or even to offer to their employees healthcare cover other than that provided by the body managing the supplementary scheme designated by the addendum.

47 — See, inter alia, *Höfner and Elser* (paragraph 29), *Albany* (paragraph 93), *Brentjens'* (paragraph 93), *Drijvende Bokken* (paragraph 83), *Pavlov and Others* (paragraph 127) and *MOTOE* (paragraph 49).

48 — Case of abuse consisting in limiting production, markets or technical development to the prejudice of consumers.

49 — See *Höfner and Elser*, paragraph 31. See also *Job Centre*, paragraph 35, Case C 258/98 *Carra and Others* [2000] ECR I 4217, paragraph 13, and *Pavlov and Others*, paragraph 127.

50 — See paragraphs 19 and 20 of the judgment making the reference to the Court: ' … Article L. 912-1 of the Social Security Code does not allow for the possibility of such a waiver. In those circumstances, … AG2R appears to occupy a dominant position in the sector concerned … and appears, in that context, manifestly unable to satisfy the demands of the market …'

92. However, the fact that those undertakings are unable to entrust the management of such a supplementary healthcare scheme to an insurer other than AG2R [51] or to approach a different body, even on an individual basis, and the resulting restriction of competition derive directly from the exclusive right conferred on the provident society responsible for managing that scheme. [52]

93. Ultimately, the measure prohibiting the body managing the scheme from granting exemptions from affiliation appears to be consistent both with the award of an exclusive right and with the application of a high degree of solidarity.

94. I should also point out, that, in *Albany, Brentjens'* and *Drijvende Bokken*, the Court examined the detailed arrangements relating to exemptions from affiliation to the pension scheme at issue in those cases only for the purpose of ascertaining whether the discretion accorded in that respect to the pension fund in certain circumstances might lead it to abuse its dominant position. [53]

95. I should like to add that the fact that, in the cases giving rise to those three judgments, the Kingdom of the Netherlands in some instances required the pension fund to grant exemptions to undertakings in a given occupational sector which ensured a level of cover that was at least equivalent to that which their employees would have received if they had joined that pension fund, cannot entail the consequence that such a requirement must also be imposed in another Member State. After all, in view of the margin of discretion enjoyed by the Member States in organising their social security systems, [54] it is incumbent on them, in my view, to consider, in view of the particular features of their respective national systems of healthcare cover, the conditions enabling them to ensure the level of cover that they aim to guarantee in a given sector by compulsory affiliation to a supplementary healthcare scheme, also having regard to the degree of solidarity that they intend to maintain within that sector.

96. It is indeed correct that, as I have already noted at point 29 of this Opinion, the referring court appears to accept that the 'clause de migration', that is to say, the prohibition of exemption from affiliation, applies also in accordance with national law to undertakings which, prior to the extension of the scope of the addendum by the public authorities, had entered into contracts with other insurers for

51 — I should point out that, under the addendum, and in accordance with Article L. 912-1 of the Social Security Code, management of the supplementary healthcare scheme at issue in the main proceedings is, however, entrusted to AG2R only for an initial period of five years.

52 — See, by analogy, *Albany* (paragraph 97), *Brentjens'* (paragraph 97) and *Drijvende Bokken* (paragraph 87).

53 — See *Albany* (paragraphs 112 to 121), *Brentjens'* (paragraphs 112 to 121) and *Drijvende Bokken* (paragraphs 102 to 111).

54 — See, inter alia, *Poucet and Pistre* (paragraph 6), *Albany* (paragraph 122), *Brentjens'* (paragraph 122) and *Drijvende Bokken* (paragraph 112).

possibly better cover than that provided by the supplementary healthcare scheme.

97. In this regard, the French Government is not entirely convincing in the argument which it puts forward in its written observations to the effect that compulsory affiliation to the scheme managed by AG2R by no means precludes undertakings from signing up for additional supplementary insurance if they wish to give their employees better conditions of cover. After all, taking out such supplementary healthcare cover would of course become more costly for the undertakings from the sector concerned than affiliation to an alternative scheme which would be made possible if there was a possibility of exemption from affiliation for the undertakings already providing for their employees cover that is better than that offered by the scheme managed by AG2R.

98. The fact none the less remains that there is no information in the documents before the Court to support Beaudout's contention, reiterated at the hearing before the Court, that the cover offered by the insurance taken out on 10 October 2006 was better than that provided under the scheme managed by AG2R.

99. Moreover, the task that would fall, not to the Court, but to the referring court of comparing the cover offered by the insurance company, on the one hand, and the cover provided under the scheme managed by AG2R, on the other hand, would be all the more difficult as it would have to take into account all the cover offered and not only specific isolated benefits.

100. In any event, the German and French Governments and the Commission rely on Article 86(2) EC to rule out the possibility of abuse. In particular, those interested parties take the view that the grounds set out in paragraphs 102 to 111 of the *Albany* judgment, can be transposed in full to AG2R's situation in the main proceedings here.

101. I am inclined to concur with that assessment.

102. As regards, first, the task of general economic interest ostensibly assigned to a body such as AG2R, it must be borne in mind that, in allowing derogations to be made from the general rules of the Treaty on certain conditions, Article 86(2) EC seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the European Union's interest in ensuring compliance with the rules on

competition and the preservation of the unity of the common market. [55]

103. Therefore, when defining the services of general economic interest which they entrust to certain undertakings, Member States are entitled to take account of objectives pertaining to their national policy and to endeavour to attain those objectives by means of obligations and constraints which they impose on such undertakings. [56]

104. In like manner to the approach adopted by the Court with regard to the supplementary pension scheme at issue in *Albany*, I find that there is sufficient support for the view that the supplementary healthcare scheme managed by AG2R performs an essential social function and, as such, can come under the category of services of general economic interest within the meaning of Article 86(2) EC.

105. On the one hand, that scheme has introduced a high degree of solidarity, which has the characteristics already referred to at points 70 to 72 of this Opinion and thus allows cover of the health costs for a specific occupational category in which low incomes could constitute an obstacle to access to healthcare, in particular because of the growing phenomenon, underlined by the Commission, of treatment fees exceeding the tariffs subject to reimbursement by the basic compulsory scheme. On the other hand, particular constraints imposed by the law affect a provident society such as AG2R. Thus, as the French Government has pointed out, and subject to verification by the referring court, such a society can neither suspend cover nor terminate an undertaking's membership for failure to pay the contributions pursuant to Article L. 932-9, fifth paragraph, of the Social Security Code. Furthermore, the cover continues to exist, pursuant to Article L. 932-10 of that Code, in the event of safeguard, insolvency-protection or liquidation proceedings in respect of an undertaking within the sector concerned.

106. That being so, secondly, it follows from the case-law that it is not necessary, in order for the conditions for the application of Article 86(2) EC to be met, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to its obligations and constraints, or that maintenance of those rights is necessary to enable the holder of them to perform the tasks of

55 — See, to that effect, Case 202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12, Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 55, and *Albany*, paragraph 103.

56 — See, to that effect, Case C-159/94 *Commission* v *France*, paragraph 56, and *Albany*, paragraph 104.

general economic interest assigned to it under economically acceptable conditions. [57]

107. The argument set forth by Beaudout, to the effect that the introduction of a mechanism which authorises exemptions from affiliation would not in any way jeopardise the financial balance of the body responsible for managing the supplementary healthcare scheme established by the addendum and extended by the public authorities, cannot therefore be accepted.

108. On the contrary, it is conceivable that, if the exclusive right of the body responsible for managing the supplementary healthcare scheme were removed, in particular through the introduction of a system of exemption from affiliation to the benefit of other insurers, as Beaudout would like to see happen, that body would be forced to take responsibility for an increasing share of 'bad risks', thereby giving rise to an increase in the amount of the contributions payable under that scheme, [58] with the result that it would no longer be able to perform the task assigned to it under economically acceptable conditions.

109. By reason of the high degree of solidarity of the supplementary scheme established by the addendum and extended by the public authorities, the 'clause de migration' – or, in other words, the absence of an exemption from affiliation – ensures that the principle of solidarity is not compromised, by securing healthcare cover for all employees in that sector, which is characterised by small and medium-sized undertakings which would not necessarily be able to offer a comparable level of protection to their employees on an individual basis. [59]

110. Furthermore, as the French Government has highlighted in its written observations, in the absence of such a 'clause de migration', the bodies liable to manage such a scheme would be dissuaded from supplying supplementary healthcare benefits if they were forced to insure against a majority of 'bad risks' while the 'good risks' would continue to be covered by third-party undertakings. The objectives pursued by management and labour in establishing such a scheme, based on the pooling of occupational risks, would thus be compromised.

111. I therefore take the view that the exclusive right granted to a body entrusted with the management of a supplementary healthcare scheme such as that at issue in the main proceedings can be justified on the basis of Article 86(2) EC.

57 — See, inter alia, Case C-159/94 *Commission* v *France*, at paragraphs 95 and 96, and *Albany*, paragraph 107.

58 — See, by analogy, *Albany*, paragraph 108.

59 — According to the information provided by the French Government, more than 90% of French bakeries have fewer than 10 employees.

112. In those circumstances, I propose that the Court's reply to the second part of the question referred for a preliminary ruling should be to the effect that Articles 82 EC and 86 EC do not preclude the public authorities from conferring on a provident society, such as that in the case in the main proceedings, the exclusive right to manage a supplementary healthcare scheme within a given sector of activities, without the undertakings of that sector having the possibility to obtain an exemption from affiliation to that scheme.

## VI — Conclusion

113. In the light of the foregoing considerations, I propose that the question referred by the Tribunal de grande instance de Périgueux should be answered as follows:

1. Arrangements for affiliation to a supplementary healthcare scheme, which provide for affiliation to a single body, without any possibility for the undertakings concerned to be exempted from affiliation, do not come within the scope of the prohibition laid down in Article 81(1) EC. Articles 10 EC and 81 EC do not preclude the decision of the public authorities to make compulsory, at the request of the organisations representing employers and workers within a given sector of activities, an agreement which is the result of collective bargaining and which provides for affiliation to a supplementary healthcare scheme for all undertakings within the sector concerned.

2. Articles 82 EC and 86 EC do not preclude the public authorities from conferring on a provident society, such as that in the case in the main proceedings, the exclusive right to manage a supplementary healthcare scheme within a given sector of activity, without the undertakings of that sector having the possibility to obtain an exemption from affiliation to that scheme.