JUDGMENT OF THE COURT (Third Chamber)

5 March 2009 *

In Case C-350/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Sächsisches Landessozialgericht (Germany), made by decision of 25 July 2007, received at the Court on 30 July 2007, in the proceedings

Kattner Stahlbau GmbH

v

Maschinenbau- und Metall- Berufsgenossenschaft,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, A. Ó Caoimh (Rapporteur), J. Klučka, U. Lõhmus and P. Lindh, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Kattner Stahlbau GmbH, by R. Mauer, Rechtsanwalt,

— Maschinenbau- und Metall- Berufsgenossenschaft, by H. Plagemann, Rechtsanwalt,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and O. Weber, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 EC and 50 EC and Articles 81 EC, 82 EC and 86 EC.

2 The reference was made in the context of proceedings brought by Kattner Stahlbau GmbH ('Kattner') against Maschinenbau- und Metall- Berufsgenossenschaft (Employers' liability insurance association in the mechanical engineering and metal sector, 'MMB') regarding the compulsory affiliation of Kattner to MMB in respect of statutory insurance against accidents at work and occupational diseases.

National legal framework

3 In Germany the statutory insurance scheme in respect of accidents at work and occupational diseases is governed by Book VII of the Code of Social Law (Sozialgesetzbuch VII), in the version resulting from the Law of 7 August 1996, (BGBl. 1998 I, p. 1254, 'SGB VII'), which entered into force on 1 January 1997. Paragraph 1 of SGB VII provides that the purpose of that insurance is:

'(1) to prevent, by all appropriate means, accidents at work and occupational diseases, together with all health risks associated with work, and

(2) on the occurrence of accidents at work or occupational diseases, to restore, by all appropriate means, the health and the capacity to work of insured persons and to provide financial compensation to insured persons or their dependants.'

4 The order for reference and the observations submitted to the Court show that the scheme is based, in particular, on the following elements.

Compulsory affiliation

5 Within the framework of the said scheme, all undertakings must be affiliated, in respect of insurance against accidents at work and occupational diseases, to the Berufsgenossenschaft (employers' liability insurance association) that covers their sector and their geographical area. The various employers' liability insurance associations have the status of non-profit bodies governed by public law. According to the German Government and the Commission of the European Communities, 25 employers' liability insurance associations operate at present. Each employers' liability insurance association has several branches, reflecting the relevant sectors of activity.

Contributions

6 Paragraph 152(1) of SGB VII, entitled 'Apportionment of liability', provides:

'Contributions shall be determined following the expiry of the calendar year in which claims for contributions have, in principle, arisen, on the basis of an apportionment of liability. Such an apportionment must cover the requirements of the preceding year,

and shall include contributions which are necessary to provide an appropriate reserve. Apart from that, contributions may be levied only in order to provide funds for working capital.'

7 Paragraph 153 of the SGB VII, entitled 'Basis of calculation', provides:

'1. Contributions shall, save as otherwise provided below, be calculated by reference to funding requirements (liability in respect of apportionments), the wages and salaries of the insured persons and the categories of risk.

2. The wages and salaries of the insured persons shall be taken as the basis of contribution up to the amount of their maximum annual earnings.

3. Regulations may provide that there is to be a minimum basis of calculation, by reference to the minimum annual wage or salary for insured persons who have completed their 18th year. If the insured persons were not employed during the entire calendar year or were not employed on a full-time basis, a corresponding percentage of that amount shall be taken as the minimum basis.

4. In calculating contributions, the accident risk in the undertaking may be disregarded in whole or in part, to the extent that expenditure in respect of pensions, death benefits and compensation:

(1) is based on damage or injury caused by insured risks in those undertakings when that damage or injury has ceased or been extinguished prior to the fourth year preceding the year in which contributions fall to be apportioned, or

(2) is based on damage or injury caused by insured risks which first occurred or first became apparent prior to the fourth year preceding the year in which contributions fall to be apportioned.

The total amount of expenditure which, in accordance with the first sentence of this subparagraph, is allocated to undertakings without reference being made to the level of accident risk may not exceed 30% of the total expenditure in respect of pensions, death benefits and compensation. The implementing provisions shall be determined by regulation.'

8 Paragraph 157 of SGB VII, entitled 'Scale of risks', provides:

'1. Undertakings responsible for providing accident insurance cover shall, acting autonomously, draw up a scale of risks. That scale of risks shall specify categories of risk so that contributions may be levied on a graduated basis. …

2. The scale of risks shall be divided into tariff positions, setting out categories of persons exposed to risk by reference to a risk comparison based on generally accepted insurance principles. …

3. Categories of risk shall be calculated by reference to the relationship between benefits paid and wages or salaries.

…'

9 According to Kattner, Paragraph 161 of SGB VII allows employers' liability insurance associations to lay down a uniform minimum contribution in their statute.

10 Paragraph 176(1) of SGB VII, entitled 'Adjustment obligation', provides:

'To the extent that

(1) the pension liability cost of an employers' liability insurance association is more than 4.5 times greater than that of the average pension liability cost of employers' liability insurance associations,

(2) the pension liability cost of an employers' liability insurance association which allocates at least 20% and not more than 30% of its expenditure on pensions, death benefits and compensation under Paragraph 153(4) to undertakings without reference being made to the level of accident risk is more than three times greater than the average pension liability cost of employers' liability insurance associations, or

(3) the compensation liability cost of an employers' liability insurance association is more than five times greater than the average compensation liability cost of employers' liability insurance associations,

the employers' liability insurance associations shall apportion the excess costs among themselves. Where the amount to be paid by way of adjustment under subparagraph (1)(2) exceeds the amount which the employers' liability insurance association apportions to undertakings without reference being had to the level of accident risk in accordance with subparagraph (1)(2), it shall be restricted to the latter amount.'

Benefits

11 Employees can draw benefits from the employers' liability insurance association directly, without the employer having to incur civil liability (Paragraphs 104 to 109 of SGB VII).

12 The list of benefits and the conditions that must be fulfilled for granting them are set out in Paragraphs 26 to 103 of SGB VII. The right to claim those benefits arises irrespective of the employer's ability to pay contributions. According to Paragraph 85 of SGB VII, only salaries between a set minimum and a set maximum are taken into consideration for the purpose of calculating benefits.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Kattner is a German private limited company which was established on 13 November 2003; since it began trading on 1 January 2004, the company has been active in steel construction and the manufacture of staircases and balconies.

14 On 27 January 2004, MMB informed Kattner that, under the provisions of SGB VII, MMB was the competent statutory provider of insurance against accidents at work and occupational diseases for Kattner and that, therefore, the latter had been registered as a member of MMB and, moreover, had been assigned risk categories.

15 By letter of 1 November 2004, Kattner, which intended to take out private insurance against the relevant risks, gave notice of cancellation of its compulsory affiliation to MMB with effect from the end of 2004.

16 On 15 November 2004, MMB informed Kattner that, since MMB was the competent statutory provider of insurance against accidents at work and occupational diseases for Kattner, opting out or cancelling the affiliation was legally impossible and that, therefore, Kattner's request had to be declined. MMB confirmed that decision on 20 April 2005.

17 On 21 November 2005, the Sozialgericht Leipzig (Leipzig Social Court) dismissed the action brought by Kattner.

18 Kattner brought an appeal before the Sächsisches Landessozialgericht (Higher Social Court of the Land of Saxony) and submitted before that court, first of all that compulsory affiliation to MMB restricts the freedom to provide services laid down in Articles 49 EC and 50 EC. In this respect, Kattner submitted a proposal by a Danish insurance company prepared to insure Kattner against accidents at work, occupational diseases and accidents on the way to and from work, on the same terms as MMB. Moreover, the benefits provided by the Danish company are the same as those provided under the German statutory scheme at issue in the main proceedings. Further, Kattner submits that MMB's position as exclusive provider infringes Articles 82 EC and 86 EC. According to Kattner, there are no overriding grounds of public interest to justify the monopoly of German providers of insurance against accidents at work and occupational diseases in their respective fields.

19 In its order for reference, the Sächsisches Landessozialgericht explains that there are fundamental differences between the scheme at issue in the main proceedings and the Italian statutory insurance scheme in respect of accidents at work and occupational

diseases at issue in Case C-218/00 *Cisal* [2002] ECR I-691), so that the guidance given by the Court in *Cisal* does not enable it to respond to all the questions that arise in the case before it.

20 According to the referring court, first, it is doubtful whether MMB is a body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases. In this respect, an essential difference between the Italian and the German schemes stems from the fact that the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) (National Institute for Insurance against Accidents at Work) involved in the *Cisal* case is a monopoly, whereas the German scheme is structured as an oligopoly. Moreover, MMB is not entrusted with the management of a scheme providing compulsory insurance but rather provides such insurance itself. MMB's management activity is essentially similar to that of commercial entities, in particular to that of insurance companies.

21 Moreover, the referring court takes the view that compulsory affiliation to the German scheme in respect of accidents at work and occupational diseases is not essential for the financial equilibrium of the scheme or for the application of the principle of solidarity. Given that the level of contributions is the result of rules adopted independently by each employers' liability insurance association and that the scope of activity of such an association may be changed, the formation of sectoral or territorial monopolies which do not bear any relation to risk results in the same risk being subject to different tariffs, depending on arbitrarily created risk categories. In addition, there is no provision capping contribution rates in relation to high risks. Moreover, the minimum income from employment that may be taken into account to calculate contributions pursuant to Paragraph 153(3) of SGB VII is not determined by that provision in a binding manner, but can instead be laid down in an insurer's statute. The maximum income from employment referred to in Paragraph 153(2) of SGB VII, which is taken into account both for the calculation of benefits and of contributions, is likewise determined by the insurers' statutes, in accordance with, respectively, Paragraphs 81 et seq. of SGB VII and Paragraph 153(2) of SGB VII. Finally, most benefits depend on the level of income from employment of the insured person. It follows that the German scheme at issue in the main proceedings makes no arrangements for redistribution based on a socio-political objective.

22 In those circumstances, the Sächsisches Landessozialgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is [MMB] an undertaking within the meaning of Articles 81 [EC] and 82 EC?

2. Does the compulsory affiliation of [Kattner] to [MMB] infringe Community law?’

The questions referred for a preliminary ruling

Admissibility

23 As regards the first question, MMB and the Commission submit that the referring court, first, seeks an interpretation of national law and, second, does not specify the circumstances in which an employers’ liability insurance association could constitute an undertaking within the meaning of Articles 81 EC and 82 EC. The Commission adds, as regards the second question, that the referring court has not indicated in sufficient detail which rules of Community law require interpretation. Moreover, MMB submits that the two questions referred cannot result in a useful answer for the referring court, as the latter may not terminate Kattner’s compulsory affiliation, since the first decision on affiliation of 27 January 2004 has not been challenged.

24 As regards, first, the wording of the questions referred for a preliminary ruling, it must first of all be recalled that in proceedings brought under Article 234 EC the Court has no jurisdiction to apply the rules of Community law to a specific case nor, consequently, to

classify provisions of national law with respect to such a rule. It may, however, provide the national court with all the criteria for the interpretation of Community law which might be useful in assessing the effects of such provisions of national law (see, to that effect, Case 37/86 *Coenen* [1987] ECR 3589, paragraph 8, and Joined Cases C-145/06 and C-146/06 *Fendt Italiana* [2007] ECR I-5869, paragraph 30). To that end, the Court may have to reformulate the questions referred to it (see, in particular, Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46).

25 In the present case, while it is true that, with its first question, the referring court asks the Court to apply Articles 81 EC and 82 EC to the dispute in the main proceedings by deciding itself whether MMB is an undertaking within the meaning of those provisions and that it does not, in that respect, specify the circumstances that would be relevant for the purpose of such classification, there is nothing to stop the Court from reformulating the question with a view to providing the referring court with an interpretation of those provisions that would help it resolve the dispute before it.

26 Moreover, according to case-law, where a question referred for a preliminary ruling merely refers to Community law, and does not state which provisions of Community law are in issue, the Court must extract from all the factors provided by the referring court, and in particular from the statement of grounds contained in the order for reference, the provisions of Community law requiring an interpretation, having regard to the subject-matter of the dispute (see, to that effect, in particular, Case 204/87 *Bekaert* [1988] ECR 2029, paragraphs 6 and 7).

27 In the present case, even though the wording of the second question does not state which provisions of Community law are to be interpreted, the order for reference makes it clear that the second question seeks to establish whether, as Kattner claims in the case in the main proceedings, compulsory affiliation to a employers' liability insurance association such as MMB can constitute a restriction on the freedom to provide services prohibited by Articles 49 EC and 50 EC or an abuse prohibited by Article 82 EC, in conjunction, if appropriate, with Article 86 EC, so that the question may be reformulated to that effect.

28 As regards, second, the usefulness of the questions referred for the referring court, it must be pointed out that, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, in particular, C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 15, and the case-law cited).

29 However, in exceptional circumstances, the Court must examine the conditions in which the case was referred to it by the national court in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions. Nonetheless, a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Asnef-Equifax and Administración del Estado*, paragraphs 16 and 17 and the case-law cited).

30 In the present case, the order for reference shows that the dispute in the main proceedings concerns the lawfulness of the compulsory affiliation of Kattner to MMB in respect of insurance against accidents at work and occupational diseases. In that context, the referring court asks, in particular, whether that compulsory affiliation is compatible with Articles 49 EC and 50 EC, on the one hand, and with Articles 82 EC and 86 EC on the other.

31 In those circumstances, it cannot be regarded as obvious that the interpretation of Community law requested bears no relation to the actual facts or the purpose of the dispute before the referring court, which is clearly not hypothetical.

32 Therefore, the reference for a preliminary ruling must be considered to be admissible.

Substance

The first question

33 By its first question, the referring court essentially asks whether Articles 81 EC and 82 EC are to be interpreted to the effect that a body such as MMB, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is an undertaking within the meaning of those two provisions.

34 According to consistent case-law, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38).

35 In the present case, it must first be noted that employers' liability insurance associations such as MMB are involved, as public law bodies, in the management of the German social security system and that, in this respect, they fulfil a social function, which is entirely non-profit-making (see, to that effect, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraphs 51).

36 As the Court held in respect of the Italian statutory insurance scheme in respect of accidents at work and occupational diseases, the covering of those risks has for a long time been part of the social protection which Member States afford to all or part of their population (*Cisal*, paragraph 32).

37 According to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems (see, in particular, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 44; and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92).

38 Moreover, a statutory insurance scheme in respect of accidents at work and occupational diseases such as the one at issue in the main proceedings, in so far as it provides for compulsory social protection for all workers, pursues a social objective (see, by analogy, *Cisal*, paragraph 34).

39 According to Paragraph 1 of SGB VII, the purpose of the scheme is, first, to prevent, by all appropriate means, accidents at work and occupational diseases, together with all health risks associated with work and, second, to restore, by all appropriate means, the health and the capacity to work of insured persons and to provide financial compensation to insured persons or their dependants.

40 Moreover, the submissions to the Court show that the scheme is intended to provide all the persons protected with cover against the risks of accidents at work and occupational diseases, irrespective of any fault which may have been committed by the victim or by the employer and therefore without any need to examine the question of the civil liability of the person drawing benefits in respect of the risk activity (see, by analogy, *Cisal*, paragraph 35).

41 Furthermore, the social aim of such a scheme is also highlighted by the fact that, as the documents before the Court show, benefits are paid even when the contributions due have not been paid, which obviously contributes to the protection of all workers against the economic consequences of accidents at work (see, by analogy, *Cisal*, paragraph 36).

42 However, as is clear from the case-law of the Court, the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity (see, to that effect, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 86; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 118; and *Cisal*, paragraph 37).

43 It remains to be examined, in particular, whether that scheme can be regarded as applying the principle of solidarity and to what extent it is subject to supervision by the State, given that these are factors that are likely to preclude a given activity from being regarded as economic (see, to that effect, *Cisal*, paragraphs 38 to 44).

— Application of the principle of solidarity

44 As regards, in the first place, the application of the principle of solidarity, an overall assessment of the scheme at issue in the main proceedings shows, first, that it is, like the scheme at issue in *Cisal* (paragraph 39), financed by contributions the rate of which is not systematically proportionate to the risk insured.

45 The level of contributions depends not only on the risk insured, but also, as is clear from Paragraph 153(1) to (3) of SGB VII, on the earnings of the insured persons, situated between a maximum amount and, where relevant, a minimum amount (see, by analogy, *Cisal*, paragraph 39).

46 In addition, pursuant to Paragraphs 152(1) and 153(1) of SGB VII, the level of contributions depends also on the funding requirements resulting from benefits paid out by the relevant employers' liability insurance association in the preceding calendar year. Taking into account those funding requirements allows for the risks connected with the activities of the members of an employers' liability insurance association to be shared by all of its members, and not just the branch of industry in which they are active, thus establishing a risk community at the level of the employers' liability insurance association as a whole.

47 Furthermore, the risks that are taken into account in order to calculate the contributions are — subject to certain possible adjustments related to the activity of individual undertakings — within each employers' liability insurance association those of the branch of industry to which the relevant members belong, through risk categories which have been laid down in accordance with Paragraph 157 of SGB VII, so that those members constitute a risk community reflecting the risks incurred in that branch of industry.

48 Moreover, according to Paragraph 176 of SGB VII, employers' liability insurance associations are under an obligation to apportion any excess costs amongst themselves where the expenditure of one association significantly exceeds the average expenditure of all the associations. It follows that the principle of solidarity is thus also applied amongst all branches of industry at the level of the country as a whole, with different employers' liability insurance associations being grouped together in a risk community, which enables them to effect an equalisation of costs and risks between them (see, by analogy, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 12, and *AOK Bundesverband,* paragraph 53).

49 The referring court does point out that, in contrast to the Italian scheme in question in *Cisal*, the German scheme at issue in the main proceedings, first, does not provide for contributions to be capped at a maximum amount and, second, is applied not by a single body with a monopoly, but by a group of bodies which, according to the referring court, constitute an oligopoly.

50 However, in the context of an overall assessment, those two factors do not cast doubt on the solidarity inherent in the funding of a scheme such as the one at issue in the main proceedings, which is apparent from the findings in paragraphs 44 to 48 of this judgment.

51 As regards the first factor, it should be noted that, although a ceiling certainly contributes to the application of the principle of solidarity, especially where the balance of financing is borne by all undertakings in the same category (see, to that effect, *Cisal*, paragraph 39), the fact that there is no ceiling cannot, alone, have the effect of removing from a scheme that has all the abovementioned features its characteristic of solidarity.

52 Furthermore, and in any event, since Paragraph 153(2) of SGB VII expressly provides that '[t]he wages and salaries of the insured persons shall be taken as the basis of contribution up to the amount of their maximum annual earnings', it is for the referring court, whose order moreover refers expressly to that provision, to examine whether, as submitted by the German Government and in Kattner's observations, that provision does not strengthen the characteristic of solidarity of the scheme at issue in the main proceedings, by indirectly capping the level of contributions even where the insured risk is high.

53 As regards the second aspect highlighted by the referring court, as stated in paragraph 37 of the present judgment, Community law does not detract from the powers of the Member States to organise their social security systems. Where, in exercising those powers, a Member State chooses to divide the running of the social security system among several bodies on a sectoral and/geographic basis, that Member State effectively applies the principle of solidarity, even if it limits its scope of application. This is even more true where, as in the scheme at issue in the main proceedings, employers' liability insurance associations equalise costs and risks between themselves at the level of the country as a whole.

54 Finally, contrary to Kattner's claim, the principle of solidarity underlying the funding of a scheme such as that in the main proceedings cannot be affected either by the fact that employers' liability insurance associations could, pursuant to Paragraph 161 of SGB VII, decide to lay down a uniform minimum contribution. On the contrary, laying down such a uniform minimum contribution — even if, as Kattner submits, it reduced the funding requirements to be shared — is itself likely to contribute to the characteristic solidarity of that scheme. As regards insured persons whose earnings are lower than the earnings to which the minimum contribution corresponds, the existence of such a minimum contribution amounts to levying a contribution the amount of which is not only uniform for all those insured under the relevant employers' liability insurance association but also independent of the risk insured and, therefore, of the branch of industry in which those insured persons are active.

55 Second, it should be noted that, as the Court found in *Cisal* (paragraph 40), the value of the benefits paid by employers' liability insurance associations such as MMB is not necessarily proportionate to the insured person's earnings.

56 Even if the amount of earnings is taken into account in calculating the contribution, it is clear from the order for reference and the observations submitted to the Court that benefits in kind, such as benefits for accident prevention and retraining, are wholly independent of remuneration. Those benefits are significant, amounting, according to the referring court, to approximately 12% of MMB's total expenditure in 2002 and, according to MMB and the German Government, to as much as between 25% and 30% of that total.

57 In addition, as regards cash payments intended to compensate in part for the loss of earnings following an accident at work or an occupational disease, it follows from the order for reference and the observations submitted to the Court that, pursuant to Paragraph 85 of SGB VII, only salaries between a minimum and a maximum — respectively, 'minimum annual earnings' and 'maximum annual earnings' — are taken into consideration; however, this is for the referring court to confirm. Moreover, the German Government and the Commission submitted that the amount of the care allowance is entirely unrelated to contributions paid — which is also for the referring court to verify.

58 In those circumstances, as in the context of the scheme at issue in *Cisal*, it appears that the payment of high contributions may give rise to capped benefits only and, conversely, the payment of relatively low contributions may afford entitlement to benefits calculated on the basis of higher earnings, as Kattner itself stated in its submissions.

59 The absence of any direct link between the contributions paid and the benefits granted thus entails solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed (see *Cisal*, paragraph 42).

— Supervision by the State

60 As regards, in the second place, supervision by the State, according to the order for reference, although German law has entrusted employers' liability insurance associations such as MMB with providing statutory insurance against accidents at work and occupational diseases, those associations may, in their statutes, decide, first, to take the minimum annual wage as the minimum basis to calculate contributions, in accordance with Paragraph 153(3) of SGB VII and, second, — as Kattner stressed in its submission — to raise the amount of maximum annual earnings which is taken as the basis for calculating contributions under Paragraph 153(2) of SGB VII and benefits under Paragraph 85 of SGB VII. Moreover, according to Kattner's observations, which the German Government confirms in this respect, under Paragraph 157(1) of SGB VII, employers' liability insurance associations autonomously draw up a scale of risks and categories of risk that are taken into account in calculating contributions.

61 However, the fact that employers' liability insurance associations such as MMB are given that degree of latitude, within the framework of a system of self-management, in order to lay down the factors that determine the amount of contributions and benefits cannot as such change the nature of those associations' activity (see, to that effect, *AOK Bundesverband and Others,* paragraph 56).

62 The documents before the Court show that — as the Advocate General found in point 54 of his Opinion — that degree of latitude is established and strictly delimited by law, with the SGB VII laying down, first, the factors that must be taken into account in calculating the contributions payable under the statutory scheme at issue in the main proceedings and, second, an exhaustive list of benefits provided under that scheme, together with the arrangements for the grant of such benefits.

63 In this respect, the observations submitted by Kattner, the German Government and the Commission indicate that the legal provisions applicable — to be verified, however, by the referring court — determine the minimum amount and the maximum amount of earnings to be taken into account in calculating, as the case may be, contributions and benefits, and that only the maximum amount can, where appropriate, be established by the statutes of the employers' liability insurance associations.

64 In addition it appears — and this must also be verified by the referring court — that employers' liability insurance associations are, as regards the content of their statutes, and in particular the setting of the amount of contributions and benefits under the statutory scheme at issue in the main proceedings, subject to control by the Federal State, which, according to the provisions of SGB VII, acts as a supervisory authority.

65 Therefore, it is clear from the foregoing that, under a statutory insurance scheme such as that at issue in the main proceedings, the amount of contributions and the amount of benefits, which are the two essential elements of such a scheme, appear — subject to verification to be carried out by the referring court —, first, to apply the principle of solidarity, which entails that benefits are not strictly proportionate to contributions and, second, to be subject to State control (see, by analogy, *Cisal*, paragraph 44).

66 In those circumstances, and subject to verification by the referring court of those two factors relating to the principle of solidarity and supervision by the State, it must be held that, in participating in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, a body such as MMB fulfils an exclusively social function, so that its activity is not an economic activity for the purposes of competition law; accordingly that body does not constitute an undertaking within the meaning of Articles 81 EC and 82 EC (see, to that effect, *Cisal*, paragraph 45).

67 That conclusion is not undermined by the fact, noted by the referring court, that, in contrast to the situation that prevailed under the Italian scheme at issue in *Cisal*, an employers' liability insurance association such as MMB does not manage the statutory insurance scheme concerned, but provides insurance services directly. As the Advocate General observed in substance in point 61 of his Opinion, since Community law does not detract from the powers of the Member States to organise their social security systems, that mere circumstance does not, of itself, affect the purely social nature of the function performed by such an association, in so far as it does not affect either the solidarity inherent in that scheme or State supervision of it, as is clear from the foregoing analysis.

68 Consequently, the answer to the first question referred for a preliminary ruling must be that Articles 81 EC and 82 EC are to be interpreted to the effect that a body such as the employers' liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify.

The second question

69 By its second question, the referring court asks, essentially, whether Articles 49 EC and 50 EC, on the one hand, and Articles 82 EC and 86 EC on the other, must be interpreted to the effect that they preclude national legislation such as that at issue in the main proceedings, pursuant to which undertakings in a particular branch of industry and a particular territory must be affiliated to a body such as MMB.

70 In that regard, it should firstly be observed that, in the light of the answer to the first question, there is no need to respond to the second question in so far as it concerns the interpretation of Articles 82 EC and 86 EC, since those two provisions can only apply if there is an 'undertaking'.

71 As regards the interpretation of Articles 49 EC and 50 EC, it should be noted that, as previously stated in paragraph 37 of this judgment, since Community law does not detract from the powers of the Member States to organise their social security, in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme (see, in particular, *Kohll*, paragraph 18, *Smits and Peerbooms*, paragraph 45, and *Watts*, paragraph 92).

72 The Commission and, in effect, the German Government, take the view that that case-law shows that the introduction of compulsory affiliation to a social security scheme, such as that provided for by the national legislation at issue in the main proceedings, falls within the powers of the Member States alone, so that that legislation is not covered by Articles 49 EC and 50 EC. There is no restriction on freedom to provide services

going beyond compulsory affiliation, since only the method of financing a social security scheme rather than the provision of benefits once the social risk insured against has occurred is in issue.

73 That contention cannot be accepted.

74 While it is true that, according to the consistent case-law cited in paragraph 71 of this judgment, in the absence of Community harmonisation, it is for the legislation of each Member State to determine, in particular, the conditions concerning the requirement to be insured with a social security scheme and, consequently, the method of financing that scheme, the Member States must nevertheless comply with Community law when exercising those powers (see, in particular, *Kohll*, paragraph 19, *Smits and Peerbooms*, paragraph 46). It follows that that power of the Member States is not unlimited (Case C-103/06 *Derouin* [2008] ECR I-1853, paragraph 25).

75 Consequently, the fact that national legislation such as that at issue in the main proceedings concerns only the financing of a branch of social security, that is to say, insurance against accidents at work and occupational diseases, by providing for compulsory affiliation of undertakings covered by the scheme at issue to the employers' liability insurance associations entrusted by the law with providing such insurance, does not exclude the application of the EC Treaty rules, in particular those relating to freedom to provide services (see C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 35).

76 Accordingly, the system of compulsory affiliation laid down in the national legislation at issue in the main proceedings must be compatible with the provisions of Articles 49 EC and 50 EC.

77 It is therefore necessary to examine whether, as Kattner submitted before the referring court and in its observations to the Court, the putting in place by a Member State of a statutory insurance scheme such as that at issue in the main proceedings, which provides for compulsory affiliation of undertakings, in respect of insurance against accidents at work and occupational diseases, to employers' liability insurance associations such as MMB, is likely to constitute a restriction to freedom to provide services within the meaning of Article 49 EC. It must accordingly be ascertained, first, whether it restricts the ability of insurance companies established in other Member States to offer their insurance services relating to some or all of the risks in question on the market of the first Member State and, second, whether it discourages undertakings established in that first Member State, in their capacity as recipients of services, from taking out insurance with those insurance companies.

78 In this respect, it must be recalled that, according to the case-law, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see, to that effect, in particular, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21; Joined Cases C-202/04 and C-94/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 56; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 55).

79 Furthermore, according to settled case-law, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*Kohll*, paragraph 33, and *Smits and Peerbooms*, paragraph 61).

80 In the present case, it may well be doubted, as the Advocate General pointed out in substance in point 72 of his Opinion, whether, the risks covered by the statutory

insurance scheme at issue in the main proceedings, or at least some of them, could be insured with private insurance companies, given that those do not, as a rule, operate in accordance with a system that incorporates the elements of solidarity set out in paragraphs 44 to 59 of this judgment.

81 In addition, since the statutory insurance scheme at issue in the main proceedings, as indicated in paragraphs 57 and 58 of this judgment, provides only for capped benefits and, consequently, minimal cover, undertakings covered by that scheme are at liberty, as the referring court points out and as Kattner admits, to enter into complementary contracts of insurance with private insurance companies established both in Germany and in other Member States (see, by analogy, Case C-355/00 *Freskot* [2002] ECR I-5263, paragraphs 62).

82 However, since, as the facts of the case in the main proceedings show, the statutory insurance scheme at issue in the main proceedings appears also to be intended to cover risks that may be insured with insurance companies that do not operate in accordance with the principle of solidarity, such a scheme may constitute a restriction of the freedom of companies established in other Member States, who wish to offer contracts of insurance covering such risks in the Member State concerned, to provide services, in that it hinders or renders less attractive, or even prevents, directly or indirectly, the exercise of that freedom (see, to that effect, *Freskot*, paragraph 63).

83 Moreover, such a scheme in addition is apt to deter, or even prevent, undertakings that are covered by it from approaching such providers of insurance services established in Member States other than the Member State in which they are affiliated, and might also constitute an obstacle to freedom to provide services for those undertakings (see, by analogy, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; *Kohll*, paragraph 35, and *Smits and Peerbooms*, paragraph 69).

84 Nevertheless, such a restriction may be justified where it reflects overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, in particular, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; *Cipolla and Others*, paragraph 61, and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 39).

85 In this respect, it must be noted that, according to the Court's case-law, the risk of seriously undermining the financial equilibrium of the social security system may constitute an overriding reason in the public interest capable of justifying an obstacle to the principle of freedom to provide services (see, in particular, *Kohll*, paragraph 41; *Smits and Peerbooms*, paragraph 72, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 30).

86 As the observations submitted to the Court show, compulsory affiliation to a statutory insurance scheme such as that laid down in the national legislation at issue in the main proceedings seeks to ensure the financial equilibrium of one of the traditional branches of social security, in this case, insurance against accidents at work and occupational diseases.

87 Such compulsory affiliation, in so far as it ensures that all undertakings covered by the relevant scheme are grouped together within risk communities, enables that scheme — which, as is apparent from paragraph 38 of this judgment, pursues a social objective — to operate in a way that applies the principle of solidarity, which is characterised, in particular, by funding through contributions the amount of which is not strictly proportionate to the risks insured and by the granting of benefits the amount of which is not strictly proportionate to contributions.

88 In those circumstances, national legislation such as that at issue in the main proceedings, inasmuch as it makes affiliation compulsory, can be justified on an overriding ground of public interest, namely the objective of ensuring the financial equilibrium of a branch of social security, such compulsory affiliation being a suitable means of securing the attainment of that objective.

89 As regards the question whether such legislation does not go beyond what is necessary to achieve the desired objective, the information in the file before the Court indicates, as previously stated in paragraph 81 of this judgment, that the statutory scheme at issue in the main proceedings offers minimal cover, so that, despite the fact that it makes affiliation compulsory, undertakings covered by the scheme may top up their cover by taking out supplementary insurance, assuming it is available on the market. That is a factor militating in favour of the proportionality of a statutory insurance scheme such as that at issue in the main proceedings (see, to that effect, *Freskot*, paragraph 70).

90 Moreover, as regards the scope of cover such as that provided by that statutory insurance scheme, it is conceivable that, as MMB submits, if compulsory affiliation were to be applied only in respect of certain benefits, such as those aimed at prevention, as Kattner surmises in its submissions, undertakings employing, for example, young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of those 'good' risks would leave employers' liability insurance associations such as MMB with an increasing share of 'bad' risks, thereby increasing the cost of benefits, particularly for undertakings with older employees engaged in dangerous activities; those associations could no longer offer pensions at an acceptable cost to such undertakings. Such a situation would arise particularly in a case where, as in the main proceedings, the statutory insurance scheme at issue, inasmuch as it applies the principle of solidarity, is characterised, in particular, by the absence of a strictly proportionate link between contributions and risks insured (see, by analogy, *Albany*, paragraphs 108 and 109).

91 It is for the referring court to verify whether the statutory insurance scheme at issue in the main proceedings necessary, having regard to its objective of ensuring the financial equilibrium of social security, by taking into account all the facts of the case before it as well as the guidance provided in paragraphs 89 and 90 of this judgment.

92 Consequently, the answer to the second question must be that Articles 49 EC and 50 EC are to be interpreted to the effect that they do not preclude national legislation such as that at issue in the main proceedings, pursuant to which undertakings in a particular branch of industry and a particular territory must be affiliated to a body such as the employers' liability insurance association at issue in the main proceedings, to the extent that that scheme does not go beyond what is necessary to achieve the objective of ensuring the financial equilibrium of a branch of social security, which it is for the referring court to verify.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Articles 81 EC and 82 EC are to be interpreted to the effect that a body such as the employers' liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify.**

2. **Articles 49 EC and 50 EC are to be interpreted to the effect that they do not preclude national legislation such as that at issue in the main proceedings, pursuant to which undertakings in a particular branch of industry and a particular territory must be affiliated to a body such as the employers' liability insurance association at issue in the main proceedings, to the extent that that scheme does not go beyond what is necessary to achieve the objective of ensuring the financial equilibrium of a branch of social security, which it is for the referring court to verify.**

[Signatures]