JUDGMENT OF THE COURT (First Chamber)

3 March 2011 *

In Case C-437/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de grande instance de Périgueux (France), made by decision of 27 October 2009, received at the Court on 9 November 2009, in the proceedings

AG2R Prévoyance

v

Beaudout Père et Fils SARL,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, E. Levits (Rapporteur) and M. Safjan, Judges,

* Language of the case: French.

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 30 September 2010,

after considering the observations submitted on behalf of:

— AG2R Prévoyance, by J. Barthélémy and O. Barraut, avocats,

— Beaudout Père et Fils SARL, by F. Uroz, avocat,

— the French Government, by J. Gstalter, acting as Agent,

— the Belgian Government, by J.-C. Halleux and C. Pochet, acting as Agents,

— the German Government, by J. Möller and N. Graf Vitzthum, acting as Agents,

— the European Commission, by F. Castillo de la Torre and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2010,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Articles 81 EC and 82 EC.

2 The reference has been made in the context of proceedings between AG2R Prévoyance ('AG2R'), a provident society governed by the French Social Security Code, and Beaudout Père et Fils SARL ('Beaudout') concerning the latter's refusal to join the scheme for supplementary reimbursement of healthcare costs managed by AG2R for the French traditional bakery sector.

National legislation

3 In France, healthcare costs incurred by employees in the event of illness or accident are reimbursed in part by the basic social security scheme. The portion of the costs which remains to be paid by the insured person may be reimbursed in part by supplementary health insurance.

4 Affiliation of persons employed in a given occupational sector to such a supplementary scheme may be provided for under a collective agreement concluded by the employers' and employees' respective representatives.

5 Thus, under Article L 911-1 of the Social Security Code:

'Unless they are instituted by legislative or regulatory provisions, collective guarantees from which employees, former employees and entitled persons benefit as a supplement to those which follow from the organisation of social security shall be determined by way of collective agreements, either following ratification, by a majority of those involved, of a draft agreement proposed by the head of the undertaking or by a unilateral decision of the head of the undertaking given in writing to each person concerned.'

6 Article L 912-1 of the Social Security Code sets out the detailed arrangements for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs. That article provides:

'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 increasing 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 to which the undertakings subject to those agreements are at the time required to belong, those agreements shall 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.

Where the agreements referred to above apply to an undertaking which, prior to their date of entry into effect, has acceded to or signed a contract with a body other than that provided for in 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 Labour Code shall apply.'

7 Under Article 1 of Law No 89-1009 of 31 December 1989, as amended by Law No 94-678 of 8 August 1994 (JORF No 184, 10 August 1994), provident operations can be implemented only by insurance companies, provident societies governed by the Social Security Code or Rural Code, and mutual insurance associations.

8 In that regard, Article L 931-1 of the Social Security Code states that provident societies are to be non-profit-making legal persons governed by private law which are administered jointly by corporate members and by participating members as defined in Article L 931-3 of that Code. Their purpose is, inter alia, to provide cover for the risks of physical injury due to accident or sickness.

9 Under the fifth paragraph of Article L 932-9 of the Social Security Code, a provident society which has been given the task of managing an occupational benefits scheme can neither suspend cover nor terminate an undertaking's membership of that scheme on grounds of failure to pay the contributions due to that society.

10 Pursuant to Article L 132-23 of the Labour Code, 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 adapted accordingly.

11 Article L 133-8 of the Labour Code provides:

'At the request of one of the organisations referred to in Article L 133-1 or on the initiative of the Minister for Labour, the provisions of a sectoral agreement or occupational or inter-occupational agreement which meets the specific conditions determined in the preceding section may be made compulsory for all employees and employers who come within the scope of such an agreement, by decree of the Minister for Labour, following a reasoned opinion from the National Collective Bargaining Commission provided for in Article L 136-1.

When an application referred to in the preceding paragraph is made to the Minister for Labour, he shall, compulsorily and without delay, commence the procedure for extension.

Extension of the effects and penalties under an agreement shall be for the period and on the conditions laid down in that agreement.

The Minister for Labour may, however, exclude from the extension, after a reasoned opinion from the National Collective Bargaining Commission, clauses which may be at variance with the legislative and regulatory texts in force and those which, capable of being removed from the agreement without altering its scheme, do not address the situation of the sector or sectors covered. Under the same conditions, the Minister may, subject to the application of legislation and regulations in force, extend clauses which are incomplete in the light of those texts.'

12 By addendum of 24 April 2006 to the National Collective Agreement of 19 March 1978 concerning the institution of a scheme for 'supplementary reimbursement of healthcare costs' within the traditional bakery sector ('Addendum No 83'), the trade union of master bakers and the various trade unions representing employees in that sector agreed as follows:

'*Article 1*

Scope

This addendum shall apply to undertakings coming within the scope of the Collective Agreement for Traditional Bakery and Pastry-Making Undertakings.

Article 2

Accession – Affiliation

With effect from the date of the entry into force of the present addendum, undertakings must affiliate their employees to the insuring body by signing a specific affiliation form.

…

Article 3

Beneficiaries

The present addendum establishes a compulsory scheme for "supplementary reimbursement of healthcare costs" for the benefit of all employees of the undertakings referred to in Article 1 of this addendum who have completed one month's service in the same undertaking.

When employees have attained the required length of service, they will be able retroactively to benefit from the scheme with effect from the date on which they joined the undertaking.

…

Article 4

Cover

The cover under this scheme shall be established on the basis of the sickness insurance legislation and rules in force at the time of its creation. It shall be reviewed without delay, if necessary, should those texts be amended.

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", "work-related accidents/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 present addendum, shall be covered.

…

Article 5

Contribution and allocation

Contributions to the scheme for "supplementary reimbursement of healthcare costs" shall be expressed as a percentage of the monthly Social Security ceiling ("PMSS").

For 2007, the percentage retained for the PMSS corresponds to a contribution of EUR 40 per employee per month for the general scheme and to a contribution of EUR 32 for the Alsace-Moselle scheme.

That same percentage shall be maintained for 2008.

After the second year of application of the scheme, the contribution shall be re-examined by the signatories, on the basis of the results of the scheme and the trends in health expenditure and in fiscal and social legislation and rules, and in health insurance.

…

The contribution shall be divided on the basis of 50% to be paid by the employer and 50% to be paid by the employee.

...

The joint committee shall meet at least once per year in order to examine the results of the scheme and all statistics or factors relating to that scheme which it may require.

...

Article 13

Appointment of the insuring body

AG2R Prévoyance ... is appointed as insuring body for this scheme ...

The organisation of the pooling of the scheme shall be re-examined by the National Joint Committee of the sector ... within five years of the date on which the present addendum takes effect.

...

Article 14

Transfer clause

The accession of all undertakings covered by the National Collective Agreement of Traditional Bakery and Pastry-Making Undertakings to the scheme for "supplementary reimbursement of healthcare costs" and the affiliation of the employees of those undertakings to the designated insuring body shall be mandatory with effect from the date of entry into force specified in Article 16 of the present addendum.

To that end, the undertakings concerned shall receive an accession contract and affiliation documentation.

These provisions shall also apply to undertakings which have a contract of supplementary [cover for] health [care costs] with another insuring body offering cover which is identical or superior to that defined in the present addendum.

…'

13 Pursuant to Article 16 thereof, Addendum No 83 entered into force on 1 January 2007.

14 Addendum No 1 of 6 September 2006 to Addendum No 83 provides, in Article 1 thereof, inter alia, that the insuring body is to maintain cover of healthcare costs for a minimum period of 12 months in favour of persons covered under the policy of a deceased insured person, to run from the date of death, without a requirement of contribution.

15 Article 2 of Addendum No 5 of 21 July 2009 to Addendum No 83 inserts Article 4a, entitled 'Portability of rights under the scheme for supplementary reimbursement of healthcare costs'. Article 4a states as follows:

'In the event of breach or termination of a final employment contract which is not attributable to serious misconduct and which gives rise to entitlement to payment under the compulsory unemployment insurance scheme, cover for the employee shall be maintained under the scheme for supplementary reimbursement of healthcare costs laid down in Addendum No 83 …

…

Maintenance of the cover shall be effective from the day following the date on which the employment contract ends, subject to its being correctly notified by the undertaking to the designated insuring body.

The cover shall be maintained for a maximum period equivalent to the duration of the last employment contract of the employee in the undertaking, expressed in whole months, up to a limit of nine months.

…

The maintenance of cover on the basis of portability shall be financed by the contributions of the undertakings and active employees …'

16 Under Article 1 of the Decree of 16 October 2006 extending the scope of an addendum to the National Collective Agreement for Bakery and Pastry-Making Undertakings:

'The provisions of Addendum No 83 are hereby made mandatory for all employers and employees covered by the National Collective Agreement for Bakery and Pastry-Making (Traditional Undertakings) of 19 March 1976 …'

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

17 Beaudout has, by virtue of a supplementary healthcare costs insurance scheme, been affiliated to an insurance company other than AG2R since 10 October 2006.

18 Since Beaudout refused to join the scheme managed by AG2R, AG2R brought proceedings against it before the national court, seeking an order that Beaudout regularise its affiliation to the scheme and pay outstanding contributions.

19 As an incidental plea, Beaudout has challenged the lawfulness of Addendum No 83.

20 Having rejected Beaudout's arguments concerning the compatibility of that addendum 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 in Case C-67/96 *Albany* [1999] ECR I-5751.

21 The referring court thus found that, unlike the pension fund at issue in *Albany*, affiliation to which was compulsory subject to exemptions, the scheme for supplementary insurance to cover healthcare costs in the main proceedings made no provision for exemption from affiliation, whether under Addendum No 83 or under Article L 912-1 of the Social Security Code.

22 Taking the view that, in those circumstances, resolution of the dispute before it called for an interpretation of European Union law, the Tribunal de grande instance de Périgueux (Périgueux Regional Court) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are a provision making affiliation to a scheme for supplementary healthcare cover 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 organisations representing employers and employees 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?'

Findings of the Court

23 As a preliminary point, it must be noted that, although the question referred by the national court merely asks the Court to interpret, in the light of facts such as those in the main proceedings, Articles 81 EC and 82 EC, to which Articles 101 TFEU and 102 TFEU now correspond, which concern the conduct of undertakings, it is clear from the decision to refer that the national court wishes to determine, in essence, whether a decision by the public authorities to make compulsory, at the request of the organisations representing employers and employees within a given sector of activities, an agreement resulting from collective bargaining which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs managed by a designated body, without possibility of exemption, is compatible with European Union law.

24 It must be borne in mind that Article 101 TFEU, read in conjunction with Article 4(3) EU, 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 (see, inter alia, *Albany*, paragraph 65; Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 65; and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, paragraph 55).

25 In addition, under Article 106(1) TFEU, to which Article 86(1) EC previously corresponded, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 TFEU and in Articles 101 TFEU to 109 TFEU, subject to Article 106(2) TFEU.

26 The Court has a duty to interpret all provisions of European Union law which national courts require in order to determine the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (see, to that effect, Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 31, and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 25 and 26).

27 Accordingly, in order to provide the national court with a useful answer, the question referred must be construed as concerning the interpretation of Articles 101 TFEU and 102 TFEU, read together, respectively, with Articles 4(3) EU and 106 TFEU.

The interpretation of Article 101 TFEU, read in conjunction with Article 4(3) EU

28 In order to answer this part of the question referred, as reformulated, it is first of all necessary to examine whether a decision of the organisations representing employers and employees within a given sector of activities to appoint a body to manage a scheme for supplementary reimbursement of healthcare costs and to request the public authorities to make affiliation to that scheme compulsory for all employees in that sector is liable to come within the concept of an agreement between undertakings, decisions by associations of undertakings or concerted practices as prohibited under Article 101(1) TFEU.

29 In that regard, it should be noted, firstly, that the Court has held that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope

of Article 101(1) TFEU (see, to that effect, *Albany*, paragraph 60; *Brentjens'*, paragraph 57; *Drijvende Bokken*, paragraph 47; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 67; and Case C-222/98 *van der Woude* [2000] ECR I-7111, paragraph 22).

30 Accordingly, it is necessary to examine whether the nature and purpose of an agreement such as that at issue in the main proceedings warrant its exclusion from the scope of Article 101(1) TFEU.

31 It follows from the findings of the national court, firstly, that the agreement at issue in the main proceedings was concluded in the form of an addendum to a collective agreement and is therefore the result of collective bargaining between the organisation representing employers and those representing employees within the French traditional bakery and pastry-making sector.

32 As to its purpose, second, that agreement establishes, within a particular sector, a scheme for supplementary reimbursement of healthcare costs which contributes to improving the working conditions of employees, not only by ensuring that they have the necessary means to meet expenses incurred in connection with sickness, work-related accidents, occupational illnesses or maternity, but also by reducing the costs which, in the absence of a collective agreement, would have had to be borne by the employees.

33 That finding is not called into question by the fact that affiliation to such an agreement is compulsory for all undertakings within the occupational sector concerned of a Member State and that there is no provision for exemption from affiliation, unlike the agreement at issue in the main proceedings which gave rise to the judgment in *Albany*.

34 In that judgment, the Court did not take account of the possibility of exemption from affiliation to the pension fund at issue in that case in order to interpret Article 85(1) of the EC Treaty, to which Article 101(1) TFEU now corresponds.

35 It follows from paragraphs 26 and 27 of the judgment in *van der Woude* that a collective agreement concerning a healthcare insurance scheme which designates a single insurer in the event of subscription to that scheme, thereby excluding any possibility of affiliation to competing insurers, is excluded from the scope of Article 101(1) TFEU.

36 Accordingly, it must be held that an agreement such as Addendum No 83 does not, by reason of its nature and purpose, come within the scope of Article 101(1) TFEU.

37 Secondly, it follows from established case-law that, although it is true that Article 101 TFEU is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 4(3) EU, none the less requires Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings. Such is the case where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators the responsibility for taking decisions which affect the economic sphere (see, to that effect, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraphs 53 and 54; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraphs 35, 36 and 49; and *Albany*, paragraph 65).

38 In that regard, it should be noted that, in so far as it follows from paragraph 36 of the present judgment that an agreement such as Addendum No 83 does not come within the scope of Article 101(1) TFEU, the public authorities are free to make it compulsory for persons who are not formally bound by it (see, by way of analogy, *Albany*, paragraph 66; *Brentjens'*, paragraph 66; and *Drijvende Bokken*, paragraph 56).

39 Accordingly, the answer to the first part of the question, as reformulated, is that Article 101 TFEU, read in conjunction with Article 4(3) EU, must be interpreted as not precluding the decision by the public authorities to make compulsory, at the request of the organisations representing employers and employees within a given occupational sector, an agreement which is the result of collective bargaining and which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all undertakings within the sector concerned, without any possibility of exemption.

The interpretation of Article 102 TFEU, read in conjunction with Article 106 TFEU

The definition of an undertaking for the purposes of Article 102 TFEU

40 With regard to the interpretation of Article 102 TFEU, it is necessary to establish whether an institution such as AG2R is an undertaking for the purposes of that provision.

41 In that regard, it must be borne in mind that, in the context of European Union 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, inter alia, 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).

42 It is clear from established case-law that any activity consisting in offering goods and services on a given market is an economic activity (see, inter alia, Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 23).

43 In the present case, it follows from Article L 931-1 of the Social Security Code that AG2R, as a provident society covered by that code, is a non-profit-making legal person which is governed by private law and has as its object the provision of cover for physical injury caused by accident or sickness. In so doing, by virtue of Article L 932-9 of that code, such an institution can neither suspend cover nor terminate an undertaking's membership for failure to pay the contributions. Although undertakings covered by the National Collective Agreement for Traditional Bakery and Pastry-Making Undertakings are required to join the scheme managed by AG2R, it follows, as a corollary, that AG2R is required, under Addendum No 83, to insure all employees of those undertakings, irrespective of the risk to be covered, in consideration of a single rate of contribution borne equally by the employer and the employee, irrespective of the size of the undertaking or the remuneration of the employee insured.

44 Accordingly, inasmuch as it provides compulsory supplementary social protection for all employees within a particular economic sector, a scheme for supplementary reimbursement of healthcare costs such as that in question in the main proceedings pursues a social objective.

45 However, 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, *Albany*, paragraph 86; *Pavlov and Others*, paragraph 118; *Cisal*, paragraph 37; and *Kattner Stahlbau*, paragraph 42).

46 It is further necessary to examine, 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 which instituted it, given that these are factors that are liable to preclude a given activity from being regarded as economic (see, to that effect, *Kattner Stahlbau*, paragraph 43 and the case-law cited).

— Application of the principle of solidarity

47 As regards the application of the principle of solidarity, an overall assessment of the scheme at issue in the main proceedings shows, firstly, that it is financed by fixed-rate contributions and that, accordingly, the rate is not proportionate to the risk insured.

48 In accordance with the second paragraph of Article 5 of Addendum No 83, the contribution is fixed at the uniform sum of EUR 40, paid in part by the employer and in part by the employee.

49 That scheme does not, therefore, take into consideration factors such as age, state of health or any particular risks inherent in the position occupied by the insured employee.

50 Consequently, the nature of the services supplied by AG2R and the scope of the cover granted are not proportional to the amount of the contributions paid.

51 Secondly, the services are, in certain cases, supplied irrespective of whether the contributions due have been paid. That follows, firstly, from the second paragraph of Article 3 of Addendum No 83, which provides that, when employees have completed the minimum required length of service of one month in order to join the scheme, they can benefit retroactively from it. Next, under Article 4a of that addendum, cover for healthcare costs is, in principle, maintained for a certain period after termination of the insured person's employment contract. Finally, Article 1 of Addendum No 1 of 6 September 2006 to Addendum No 83 provides for maintenance of that cover in favour of persons covered under the policy of a deceased insured person for a minimum period of 12 months following that person's death.

52 Having regard to all those factors, it appears that a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings is characterised by a high degree of solidarity.

— State control

53 In order to determine whether classification as an undertaking engaged in an economic activity applies to a body such as that at issue in the main proceedings, it is necessary to analyse the scope of the State's control over how the scheme in question functions.

54 In the present case, firstly, under Article L 911-1 of the Social Security Code, the social partners are themselves entitled to determine, by way of collective conventions or agreements, the collective guarantees from which employees, former employees and entitled persons are to benefit by way of supplement to those which follow from the organisation of social security.

55 Secondly, Article L 912-1 of that code states that 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 by the social partners.

56 Thirdly, pursuant to Article L 133-8 of the Labour Code, a ministerial decree is necessary to make the provisions of such agreements compulsory for all employees and employers to whom they are applicable.

57 It is in that regulatory framework that the task of monitoring the functioning of the scheme at issue in the main proceedings has devolved, subject to certain reservations, on the representatives of the employers and employees within the traditional bakery sector.

58 In that context, Addendum No 83 recognises that those representatives have a predominant role inasmuch as, under the second paragraph of Article 13 thereof, a joint committee composed equally of representatives of employers and employees is to re-examine, within five years of the date on which that addendum takes effect, the organisation of the pooling of the scheme concerned. In addition, the fourth paragraph of Article 5 of that addendum provides that, after the second year of application of the scheme, the contribution fixed by it is to be re-examined by the signatories. That article also states that the joint committee is to examine, once a year, the results of the scheme.

59 However, other characteristics relating to the appointment of AG2R as manager of the scheme for supplementary reimbursement of healthcare costs could lead to the view that that body enjoys a degree of autonomy.

60 Firstly, Article L 911-1 of the Social Security Code provides that supplementary collective guarantees under which employees benefit can be established in different ways. The use of a collective agreement is, in that context, a choice made by the social partners, in the knowledge that that provision also allows such cover to be organised at the level of one undertaking, and not at that of an entire occupational sector.

61 Secondly, under Article 1 of Law No 89-1009, as amended by Law No 94-678, provident operations may be entrusted not only to provident societies and mutual insurance associations, but also to insurance companies.

62 It follows from those factors that there is no statutory obligation either on the social partners to appoint AG2R to manage a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings or on AG2R to assume in fact the management of such a scheme.

63 In that context, Beaudout argues in its observations that there are other provident societies and insurance companies which, prior to the appointment of AG2R by Addendum No 83, offered services which are substantially identical to those provided by that body.

64 Accordingly, the question arises, firstly, as to the circumstances in which AG2R was designated pursuant to Addendum No 83 and, secondly, as to the margin of negotiation enjoyed by that body as to the details relating to its appointment and the repercussion of those factors on the functioning of the scheme concerned as a whole.

65 Based on those circumstances and that margin of negotiation, which it is for the national court to examine, it might be concluded that AG2R, although being non-profit-making and acting on the basis of the principle of solidarity, is an undertaking engaged in an economic activity which was chosen by the social partners, on the basis of financial and economic considerations, from among other undertakings with which it is in competition on the market in the provident services which it offers.

Applicability of Article 106(2) TFEU

66 Inasmuch as AG2R must be regarded as an undertaking engaged in an economic activity for the purposes of Article 102 TFEU, a decision by the public authorities to make compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all of the traditional bakery sector, without possibility of exemption, necessarily implies a grant to that body of an exclusive right to receive and manage the contributions paid by the employers and employees in that sector under that scheme. Accordingly, such a body could be regarded as an undertaking holding exclusive rights within the meaning of Article 106(1) TFEU (see, to that effect, *Albany*, paragraph 90; *Brentjens'*, paragraph 90; and *Drijvende Bokken*, paragraph 80).

67 Since, because of those exclusive rights, undertakings in the French traditional bakery sector cannot pay contributions to a scheme for supplementary reimbursement of healthcare costs managed by a different body, AG2R has a statutory monopoly in a substantial part of the common market and may be regarded as occupying a dominant position within the meaning of Article 102 TFEU (see, by way of analogy, *Pavlov and Others*, paragraph 126).

68 According to well-established case-law, however, the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (see *Höfner and Elser*, paragraph 29; *Albany*, paragraph 93; *Brentjens'*, paragraph 93; and *Drijvende Bokken*, paragraph 83).

69 Such an abusive practice contrary to Article 106(1) TFEU exists where, in particular, a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind (see, to that effect, *Höfner and Elser*, paragraph 31, and *Pavlov and Others*, paragraph 127).

70 In that regard, Beaudout's refusal to join the scheme managed by AG2R is based on the assertion that insurance companies offer better cover than the services supplied by AG2R.

71 However, it must be pointed out, firstly, that the fact that undertakings in the French traditional bakery sector are unable to have recourse to other bodies in order to obtain cover for supplementary reimbursement of healthcare costs for the benefit of their employees and the resulting restriction of competition derive directly from the exclusive right conferred on AG2R (see, by way of analogy, *Albany*, paragraph 97; *Brentjens'*, paragraph 97; and *Drijvende Bokken*, paragraph 87).

72 Secondly, as the Advocate General noted in point 98 of his Opinion, there is no information in the documents supplied by the national court or in the observations submitted to the Court to show that the services supplied by AG2R do not meet the requirements of the undertakings concerned.

73 In those circumstances, it still remains to be determined whether AG2R is entrusted with the operation of services of general economic interest within the meaning of Article 106(2) TFEU.

74 As follows from paragraphs 47 to 52 of the present judgment, a scheme for supplementary reimbursement of healthcare costs such as that managed by AG2R is characterised by a high degree of solidarity. In addition, Addendum No 83 places particular constraints on AG2R, notably constraints of a financial nature, with a view to ensuring the continuity of cover granted to the persons insured.

75 Nevertheless, Beaudout argues that the introduction of a mechanism authorising exemptions from affiliation would not endanger the financial balance of the body which manages the scheme at issue in the main proceedings.

76 In that regard, it must be borne in mind that it follows from the case-law that it is not necessary, in order for the conditions for the application of Article 106(2) TFEU to be fulfilled, 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 exclusive rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder thereof to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (see, to that effect, *Albany*, paragraph 107; *Brentjens'*, paragraph 107; and *Drijvende Bokken*, paragraph 97).

77 It must, however, be held that, if the transfer clause and, as a result, the exclusive right of AG2R to manage the scheme for supplementary reimbursement of healthcare costs for all undertakings in the French traditional bakery sector were to be set aside, that body, although required under Addendum No 83 to offer cover to the employees of those undertakings on the conditions laid down in that addendum, would run the risk of suffering the defection of low-risk insured parties, who would have recourse to undertakings offering them comparable or better cover in return for lower contributions. In those circumstances, the increasing share of 'bad risks' which AG2R would have to cover would bring about a rise in the cost of cover, with the result that that body would no longer be able to offer cover of the same quality at an acceptable price.

78 That would *a fortiori* be the position in the case of a scheme which, like that at issue in the main proceedings, is characterised by a high degree of solidarity by reason of, inter alia, the fixed nature of the contributions and the obligation to accept all risks.

79 Such constraints, which render the service provided by the body concerned less competitive than a comparable service provided by insurance companies not subject to those constraints, argue in justification of the exclusive right of that body to manage such a scheme, without there being any possibility of exemption from affiliation.

80 Consequently, the annulment of a transfer clause such as that laid down in Addendum No 83 could have the result of making it impossible for the body concerned to accomplish the tasks of general economic interest which have been assigned to it under economically acceptable conditions.

81 Accordingly, the answer to the second part of the question, as reformulated, is that, inasmuch as the activity consisting in the management of a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings is to be classified as economic – this being a matter for the national court to determine – Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme.

Costs

82 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 (First Chamber) hereby rules:

1. **Article 101 TFEU, read in conjunction with Article 4(3) EU, must be interpreted as not precluding the decision by the public authorities to make compulsory, at the request of the organisations representing employers and employees within a given occupational sector, an agreement which is the result of collective bargaining and which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all undertakings within the sector concerned, without any possibility of exemption.**

2. **Inasmuch as the activity consisting in the management of a scheme for supplementary reimbursement of healthcare costs such as that at issue in the main proceedings is to be classified as economic – this being a matter for the national court to determine – Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme.**

[Signatures]