OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 20 January 2000 *

I — Subject of the proceedings — Community and national law — Pre-litigation procedure

1. By this action the Commission is seeking a declaration from the Court that the Kingdom of Belgium is in breach of its obligations under Community law by failing to implement correctly Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive; hereinafter: 'the Directive' or 'the Third Directive'). [1] The applicant institution contests the legality of excluding compulsory insurance against accidents at work from the scope of the national provisions transposing the Directive. In its defence, the Belgian Government claims that this category of insurance is not included within the scope of the Directive as the Directive expressly excludes national social security schemes. The Belgian Government puts forward a plea based on Article 184 of the EC Treaty (now Article 241 EC) alleging the illegality of Article 55 of the Directive which deals with compulsory insurance against accidents at work.

2. On this matter, I would point out that Article 2 of the Directive, in defining its scope, refers to First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance. [2] Under Article 2(1)(d), the Directive does not apply, amongst other things, to 'insurance forming part of a statutory system of social security'. Letter A of the Annex to the Directive which classifies risks according to classes of insurance includes under accidents 'industrial injury and occupational diseases' (no. 1). The Third Directive also states in Article 55 that 'Member States may require that any insurance undertaking offering, at its own risk, compulsory insurance against accidents at work within their

* Original language: Italian.

1 — OJ 1992 L 228, p. 1.

2 — OJ 1973 L 228, p. 3.

territories comply with the specific provisions of their national law concerning such insurance, except for the provisions concerning financial supervision, which shall be the exclusive responsibility of the home Member State'.

3. The national provision which, the Commission claims, is in conflict with Community law is Article 2 of the Belgian Law of 9 July 1975 on the control of insurance undertakings, as amended by the Royal Decree of 12 August 1994. [3] The provision states that the Law does not apply to various categories of undertakings, in particular: mutual funds, private undertakings and public institutions providing insurance against accidents at work and occupational diseases, the last two categories in relation to the public sector only.

4. The pre-litigation procedure was initiated by letter of formal notice of 27 December 1995 to which the Belgian Government replied on 23 December 1996 in a letter from its Permanent Representation in which it disputed the existence of any incompatibility between the Directive and its national legal provisions on accidents at work. The Belgian Government's letter was followed by the reasoned opinion from the Commission of 17 June 1997 to which the Belgian authorities replied, putting forward in their letters of 2 February 1998 and of 19 March 1998 the arguments which were later advanced in its written pleadings in these proceedings, and which I shall consider at a later point.

II — Admissibility

5. The Belgian Government has put forward a plea of inadmissibility, claiming that the Commission, in paragraph 15 of the application, stated that it considered as outside the scope of the Directive basic, compulsory insurance against accidents at work, and that, consequently, as the case is concerned with insurance benefits in this category, the application serves no purpose.

The Commission replies, stating that the action concerns all compulsory insurance against accidents at work provided by private Belgian undertakings; it claims that this insurance is incompatible with Article 55 of the Directive owing to the prohibition on foreign undertakings not estab-

3 — Royal Decree of 12 August 1994 (*Moniteur belge* of 16 September 1994) and Decree of 22 November 1994 (*Moniteur belge* of 21 December 1994) amending the Royal Decree of 22 February; these constitute the national implementing measures for Directive 92/49.

lished in Belgium from providing the same services.

From the application it is clear that the subject of the infringement proceedings is the aforesaid conflict between national and Community legislation. The arguments put forward by the Belgian Government concerning the nature of the insurance at issue as part of the social security scheme are of no importance in determining the subject of the application and, hence, the decision on whether it is admissible; they may however assume some importance in the consideration of the substance of the Commission's action, in that this is one factor to be taken into consideration regarding the inclusion of this insurance in the 'statutory system of social security' mentioned in Article 2(1)(d) of the First Directive.

III — Substance

Applicability of Directive 92/49/EEC to compulsory insurance against accidents at work provided by private undertakings

6. In order to rule on the substance of the application, it is necessary to interpret Article 2(1)(d) of the First Directive (which excludes from the scope of the Third Directive on Non-Life Insurance 'insurance forming part of a statutory system of social security'). The interpretation by the parties differs, in particular, on the meaning to be attached to the concept of 'statutory system of social security' and, in particular, on whether this should cover the concept of all contracts whose origins lie in national systems of social security, regardless of who is providing the service, and of the organisations and undertakings participating directly in the system. The parties also have a different interpretation of the scope to be attributed to Article 55 of the Directive, which, as I have pointed out, concerns compulsory insurance for accidents at work provided by private undertakings operating with a view to profit.

Arguments of the parties

7. According to the Commission, the Community legislature intended to exclude from the scope of the Directive insurance services managed or controlled by bodies forming part of a system of social security and which are operated according to the solidarity principle on which these schemes are generally based. It follows, according to the

applicant, that insurance businesses with links to national social security schemes do fall within the scope of the Directive where they are provided by private undertakings operating with a view to profit. The Directive concerns the undertakings as such, guaranteeing them the freedom to establish themselves and to provide their services throughout the Community, by virtue of the harmonisation of the systems for the authorisation and supervision of undertakings. The mere fact that an undertaking is providing a service which can be linked to the social security system does not, therefore, entail the automatic inapplicability of the Directive.

This interpretation is confirmed, according to the Commission, by Articles 1(3) and 2(4) of the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance [4]: Article 1(3) states that 'operations relating to the length of human life which are prescribed by or provided for in social insurance legislation, when they are effected or managed at their own risk by assurance undertakings in accordance with the laws of a Member State' are included within the scope of the Directive; under Article 2(4), insurance forming part of a statutory system of social security, with the exception of insurance provided by private undertakings operating at their own risk, is excluded from the scope of the Directive. According to the Commission, it is in the light of that interpretation that one should also read Article 55 of the Third Directive, which concerns specifically compulsory insurance against accidents at work offered by private undertakings 'at their own risk'; for those operations which fall within the scope of the Directive, the State in which an insurance company from another Member State is established and offering its services (hereinafter: 'the State where the insurance is offered' or 'country of the risk') may require the company to observe national rules on insurance contracts, with the exception of those relating to financial supervision which are the exclusive responsibility of the home Member State. [5]

8. The Belgian Government maintains, on the contrary, that the Third Directive should be interpreted as not covering all basic social security insurance — namely that insurance which constitutes the essential feature of the national social security system. In the area of compulsory insurance against accidents at work, the Third Directive, and Article 55 in particular, apply

4 — OJ 1979 L 63, p. 1.

5 — The Commission draws attention to the fact that the delegation to private undertakings of the management of insurance against accidents at work is to be found in other national legal systems, namely in Portugal and Denmark, where this service may also be provided by foreign undertakings.

only to insurance not directly included in the general system of social security. The groups of insurance mentioned in the Royal Decree of 1994, the legality of which the Commission is contesting, are those provided for by Article 21(4) of the Law of 29 June 1981 laying down the general principles in the field of social security. [6] These groups of insurance were considered by the Belgian Conseil d'État [7] to be an integral part of the statutory system of social security. The Belgian Government also states that to follow the interpretation of the Directive proposed by the Commission would lead to a manifest anomaly in the Belgian legal system, since in that system compulsory insurance against accidents at work provided by the national funds, which are public bodies, coexist with identical insurance offered by private undertakings.

Assessment of the Advocate General

9. Although the arguments put forward by the two parties reach opposing conclusions, each of the two arguments can be upheld in part. There is no doubt that, as stated by the Belgian Government, we are dealing here with compulsory insurance which is an integral part of the national social security system. However, one can also agree with the Commission's argument that it cannot be asserted, even if in the country concerned the undertakings established there may provide insurance services whose origins and *raison d'être* lie in the social security system, that the same right is not also to be accorded to foreign undertakings on the basis of the provisions of the Third Directive.

10. But what kind of services did the Community legislature intend to bring within the term 'social security scheme' mentioned in Article 2(1) of the First Directive? I hardly need add that the field of application of social security systems begins where that of the Community provisions on the removal of national frontiers and the liberalisation of the respective markets ends. [8] It is clear that the measures under the Treaty designed to realise the

6 — *Moniteur belge*, 2 July 1981.

7 — See opinion of the Conseil D'État on the Royal Decree of 20 May 1997 amending the Royal Decree of 21 December 1971, *Moniteur belge* of 29 August 1997, p. 2214.

8 — The principle is set out clearly in Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523, in particular paragraph 16, and Joined Cases C-159/91 and C-160/91 *Poucet* v *Assurances Générales de France* [1993] ECR I-637. In *Poucet* the Court made the following observations on the French systems of sickness insurance and maternity cover for self-employed workers in sectors other than agriculture and pensions for craftsmen; this was the national scheme of reference in the question for a preliminary ruling on the rules defining the extent of the applicability of the Community provisions: 'those schemes pursue a social objective and embody the principle of solidarity ... the principle of solidarity is ... embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons making them; only recipients ... with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover' (see in particular paragraphs 8 et seq.).

single market and freedom of competition [9] do not in any way envisage as a further aim regulating national systems of social security, which remain, in accordance with social policy measures adopted at Community level, within the exclusive competence of the Member States.

11. The Court has already had reason to rule on the scope of the abovementioned provisions of the Third Directive in its judgment in *Garcia* in 1996, [10] a judgment invoked several times by both parties in their pleadings, albeit in different perspectives. In the case in question the Court was asked to interpret Article 2(2) in so far as, by referring to Article 2(1) of the First Directive, it establishes that that directive does not concern insurance included in national social security schemes. The question for a preliminary ruling had been put by a French court in the context of a dispute in which a number of self-employed workers were contesting the right of social security offices — responsible for managing compulsory insurance schemes covering retirement, sickness, maternity, invalidity and death — to demand payment of the relevant contributions. The workers claimed that the exclusive right granted to these social security funds for managing this insurance was incompatible with the Third Non-life Insurance Directive. The Court, relying on the case-law cited above on the intangibility of national systems of social security, affirmed that the French scheme came under the concept referred to in Article 2(1) of the First Directive. It went on to say that liberalising the national market would have meant removing the obligation to be affiliated to that scheme, which would have had the effect of threatening its survival.

According to the Belgian Government, that judgment [11] defines the scope of the Directive, not in relation to the nature of the undertakings, but in relation to the nature of the insurance, so that the concept of 'social security scheme' does not include all basic social insurance. This interpretation it maintains, is confirmed in the Court's

9 — I should point out here that the aim of the directive in question is, as set out in the fifth recital, to require on the part of Member States 'such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State'. The system is based on two instruments of a general nature: the first consists of the competence reserved exclusively to the authorities of the home State to issue and withdraw authorisations to operate an insurance business; the second requires the authorities of the State where the insurance is offered not to subject the foreign undertakings to further controls. In order for these two coordinating instruments to function properly, the directive also establishes minimum standards for authorisation to be issued (see Articles 6 to 8 and Chapter II of the directive). States may lay down further requirements necessary for an undertaking to be authorised within the meaning and for the purposes of the directive; however they may only require national undertakings to observe these and not foreign undertakings wishing to set up an establishment or offer services in the country. If an undertaking wishes to offer a service in a State other than its home State without being established there, it must also provide for the authorities of the country where the insurance is offered all the documents requested with the exception of any of a prudential or financial nature (Article 40). Furthermore, the authorities of the country of origin must provide the corresponding authorities of the State where the insurance is offered with a series of documents on the financial situation and the activities carried out by the undertaking concerned (Article 35). If these authorities establish that an undertaking is not complying with the legal provisions applicable to it, they may contact the authorities of the home Member State and, in an emergency, adopt measures of a temporary nature (Article 40). The directive permits the State where the insurance is offered to require compliance with its internal rules on clauses contained in insurance contracts and with particular requirements such as participation in schemes designed to guarantee payment of insurance claims or the communication of particular data or documents (see in particular Article 45(2)).

10 — Case C-238/94 [1996] ECR I-1673.

11 — In particular paragraph 12.

judgment in *Assurances du Crédit* v *Council and Commission* [12] on the subject of the definition of the scope of Council Directive 87/343/EEC of 22 June 1987 amending, as regards credit insurance and suretyship insurance, First Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance. [13] In that judgment the Court considered all insurance that is social in origin and in nature as not covered by Directive 87/343, 'irrespective of the legal status of the undertaking effecting such operations'.

In my opinion, the *Garcia* judgment, which includes in the concept of a social security scheme mentioned in Article 2(1)(d) of the First Directive the insurance provided by the French social security offices, deals with insurance displaying the typical characteristics of a social benefit, in the sense that it is provided by a public body and governed exclusively by rules of public law. That situation is different from the one we are considering here because the insurance services are provided by private undertakings within a market system and, consequently, the considerations expounded by the Court on the French system cannot be applied here. In view of the obvious difference between the two cases in question, I cannot accept the Belgian Government's argument that the conclusions reached by the Court in that judgment should also be transposed to this case.

Similarly, the reference made by the Belgian Government to the judgment in *Assurances du Crédit* v *Council and Commission* is not relevant because in that judgment the Court confines itself to declaring lawful the exclusion which appears *expressis verbis* in Article 2(2)(d) of the First Directive as amended by Directive 87/343 concerning public export credit insurance. The Court's analysis, based essentially on the subject-matter and the objectives of the measure whose validity was in dispute, focuses on an appraisal of the possibility of reconciling the subject-matter and the objectives with the exclusion of public export credit insurance, independent of the modalities by which these operations were effected at national level. [14]

In the case in point here, unlike the national situation analysed by the Court in *Garcia*, we are concerned with an ambiguous situation displaying only in part the intrinsic characteristics of a social security system; namely compulsory insurance provided not only by the mutual funds forming part of the social security system but also by private undertakings operating with a view to profit, without the inherent links with the policy of the States on social

12 — Case C-63/89 [1991] ECR I-1799, in particular paragraph 22.

13 — OJ 1987 L 185, p. 72.

14 — In that judgment the Court affirms that Directive 73/239 is intended to facilitate the taking-up and pursuit of direct insurance other than life insurance by removing variations between national laws on controls and, in particular, by coordinating legal provisions on the financial guarantees required of the insurance undertakings. The purpose of these guarantees is to provide sufficient protection for insured persons and third parties in all Member States. The Council claimed that, as far as export credit insurance operations for the account of or guaranteed by the State were concerned, there was sufficient protection of the insured person, as guaranteed by the Directive, provided by the State itself (see paragraphs 15, 16 and 21) and therefore properly excluded such operations from the scope of the directive (judgment of 26 March 1996 *Garcia* v *Mutuelle de Prevoyance Sociale*, cited above).

security for workers.[15] I have already mentioned that the Belgian Government has pointed out that, according to the Belgian Conseil d'État, this compulsory insurance constitutes a service of a social-security nature. However, in my opinion, the definition under national law cannot have any influence on the definition of the concept of social security set out in Article 2(1)(d) of the Directive.[16] A reading of the Directive and the identification of its objectives point, in fact, to the opposite conclusion.

12. As the Commission has stated, a first argument, of a purely literal nature, precludes the insurance at issue from being regarded as excluded from the scope of the Directive. Article 55 of the Directive expressly refers to 'any insurance undertaking offering, at its own risk, compulsory insurance against accidents at work', and provides that Member States may require compliance with 'specific provisions of their national law ... , except for the provisions concerning financial supervision, which shall be the exclusive responsibility of the home Member State'. I would add that Article 54 concerns a different category of insurance which, while it is in principle covered by social security schemes, is regulated by the Directive. This insurance is 'alternative to health cover provided by the statutory social security system', for which reason the Member State 'may require that those contracts comply with the specific legal provisions adopted by that Member State to protect the general good in that class of insurance, and that the general and special conditions of that insurance be communicated to the competent authorities of that Member State before use'.

13. Apart from this argument of a literal nature, which very clearly limits the scope of the concept in Article 2(1) of the First Directive, other reasons of a substantive nature linked to the specific characteristics of the Belgian social security system lead to the same conclusion.

From this angle, it must first be considered whether the Belgian compulsory insurance scheme against accidents at work has any impact on the structure and the activities of the undertaking providing the insurance and whether, if this is not the case, the Directive, whose aim is to remove barriers to freedom of establishment and freedom to provide services for insurance undertakings

15 — In Case C-70/95 *Sodemare* v *Regione Lombardia* [1997] ECR I-3395 invoked by the Commission, the Court stated that a national scheme such as that provided for by the Legge Regionale Lombardia (Lombardy Regional Law) No 39 of 11 April 1980 concerning the organisation and functioning of local health and welfare centres does not constitute a restriction on the freedom to provide services; the scheme allows 'only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature' (paragraph 35). The Court defined this national scheme in the following terms: a 'system of social welfare, whose implementation is in principle entrusted to the public authorities, is based on the principle of solidarity, as reflected by the fact that it is designed as a matter of priority to assist those who are in a state of need ... and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, *in accordance with scales determined by reference to family income*' (paragraph 29, my italics).

16 — See on this point Case 279/80 *Webb* [1981] ECR 3305, in particular paragraph 10 and Case C-158/96 *Kohll* [1998] ECR I-1931, in particular paragraphs 18-20.

must, for this reason, not be considered to apply. It is clear that, even though the rules governing social security would not affect in any way the manner in which the undertakings carry out their economic activity, the Community provisions of which these undertakings are the subject cannot affect the national provisions, public in origin and nature, which govern social security systems, and consequently, cannot undermine the function or the essential objective of these systems.

14. Following this line of reasoning, I shall go on to examine the overall framework of the provisions on compulsory insurance against accidents at work as laid down in Belgian law.

As I have already pointed out in the introduction to my Opinion, Article 2(2) of the Law of 1975 on the control of insurance undertakings, as amended by the Royal Decree of 12 August 1994, implementing Directive 92/49, in defining the scope *ratione materiae* of the Law excludes 'mutual funds, private undertakings with fixed premiums [17] and public institutions in relation to the operations referred to: (a) by the Law of 10 April 1971 on accidents at work [and by the Law of 3 July 1967 on compensation for damage resulting from accidents at work, accidents on the way to or from work and occupational diseases in the public sector]'.

The delegation of insurance against accidents at work to private undertakings, which dates back to 1903, was reaffirmed in 1971 and most recently by the Royal Decree of 31 March 1987. [18] The Law of 10 April 1971 (hereinafter 'the Law of 1971') which, together with the Royal Decree of 21 December 1971 (hereinafter 'the Royal Decree of 1971'), governs this insurance requires employers to insure their employees with a mutual fund or an authorised insurance undertaking (Article 49).

The Law of 29 June 1981 laying down the general principles governing the social security of employees provides in Articles 3 and 21(4) that social security includes allowances payable by reason to accidents at work and occupational diseases.

The amount of compensation to be paid to employees is established by statute (see Articles 10–21 and 28–33 of the Law of 1971) on the basis of the employee's remuneration, while the amount of insur-

17 — Private undertakings 'with fixed premiums' refers to all undertakings which are not entitled to adjust the level of premiums before expiry of the various contracts.

18 — This information on the legislation was produced by the Commission in paragraph 10 of the reply and was not disputed by the Belgian Government.

ance premiums is freely decided upon by individual insurance companies.[19] The rates must be communicated to the Ministry for Social Security by 31 December each year and may not increased by more than 10% (Article 12 of Royal Decree of 1971).

When applying for authorisation, the authorised undertakings must provide proof of financial stability by producing accounts for the Ministry of Social Security and the Fund for accidents at work (Article 4, in particular (5), of the Royal Decree of 1971).[20] Secondly, for operations relating to the insurance at issue, they must keep separate accounts in accordance with the provisions of specific legislation (Article 8 of the Royal Decree). Thirdly, they must lodge a security with a public body, the Caisse des Dépôts et Consignations (Article 4(7) and Article 16 of the Royal Decree of 1971) and they are required to hold reserves in the circumstances and in accordance with the rules established by the King (Article 52 of the Law of 1971 and Articles 21 and 22 of the Royal Decree of 1971). Finally, the Fund for accidents at work (see below) carries out the technical, medical and financial monitoring of the observance by the authorised insurers of the Law of 1971 (Article 58(9) of the Law of 1971).

Furthermore, under the Royal Decree No 66 of 10 November 1967, a Fund for Accidents at Work was set up (Fonds des accidents du travail; hereinafter: 'the FAT') which is governed by Chapter III of Section 2 of the Law of 1971. The role of the Fund is to pay the compensation where the employer has not insured the employee or where the insurance company fails to pay out (Article 58(3) of the Law of 1971).

15. It is apparent from these aspects of the legislation, firstly, that the insurance companies set the level of contributions autonomously and freely manage the funds they accumulate from the payment of those contributions. It follows that, in carrying out their economic activity of receiving and investing contributions for compulsory insurance against accidents at work, they do not act in conformity with criteria based on social solidarity but operate according to the traditional logic of schemes based on capitalisation. Secondly, as the Commission points out, the relationship between the employer (and therefore also the employee/insured party) and the insurance company is governed by private law, which, among other things, means that the insurance company is not required to pay compensation where the employer has failed to pay some or all of the contributions. From these points of fact and of law it can be clearly seen that what is concerned here is private insurance business carried on in accordance with the classic rules of free competition, notwithstanding the fact that the services

19 — See in particular the report to the King on the draft Royal Decree of 20 May 1997, amending the Law of 1971 (*Moniteur belge* of 29 August 1997). The following can be found in the seventh paragraph: 'Lors du calcul et de l'élaboration de ces tarifs, les assureurs furent laissés complètement libres, actuellement c'est encore le cas'.

20 — In accordance with Articles 7 and 28 of the Royal Decree of 1971, for authorisation to be granted, the management committee of the Fund for accidents at work must give its opinion (apparently not binding); the committee is made up of representatives of businesses and employees (Article 44 of the Decree).

provided by the undertaking have their origins in social security rules. That aspect is not decisive given that the service is provided by undertakings according to operations and calculations which are not defined precisely and in detail by the Belgian rules on social security.

16. Admittedly, certain characteristics of the system do appear to bring the insurance in question within the traditional pattern of social benefits. These are the employer's obligation to insure, the determination by statute or another act of general application of the rate of compensation, on the basis of the income of the insured parties and, finally, intervention by the FAT where the employer has failed to fulfil the obligations placed on him or where the insurance undertaking is in financial difficulties. However, I do doubt whether the presence of such factors is an obstacle to applying Community legislation such as the Third Directive, which, let me point out once again, has as its aim the liberalisation of the activities of Community undertakings. Similarly, in interpreting the Community measure from the point of view of its effects in the national legal system, I doubt whether opening up the Belgian market can in any way harm the proper functioning of the national insurance system. Since, as we have seen, the application of the public-law provisions of the insurance system do not in any way affect the freedom of the undertaking to provide this service and to determine how it is to be provided, it cannot be jeopardised by the fact that the undertaking providing the service is foreign. I would point out in this respect that, specifically because of Article 55 of the Third Directive, the Belgian State may require foreign undertakings to comply with the rules of national law concerning compulsory-insurance contracts and that by virtue of Article 45(2) of the Directive it may also require them to join and participate, 'on the same terms as undertakings authorised there, [in] any scheme designed to guarantee the payment of insurance claims to insured persons and injured third parties'.

17. It remains for me to consider how the rules of national law on financial management, which concern authorised undertakings, and the possibility for foreign companies to provide the same insurance without being subject to any form of prior or subsequent control of their financial situation by the Belgian authorities can be reconciled.[21] As the Directive has coordinated the controls carried out by the various national authorities, the supervision of the undertakings, which is entrusted to the home State, should be considered sufficient to protect the rights of the insured parties. The fact that the controls carried out by the Belgian authorities are more rigorous than the basic controls provided for by the Directive cannot lead to the conclusion — arrived at, it would seem, by the Belgian Government — that the controls provided for in other national legal systems are insufficient to ensure the provision of the insurance services at issue on the part of foreign companies. To admit the contrary would amount to diminishing

21 — The Belgian Government maintains that in order to fulfil both requirements, namely to permit foreign undertakings to provide compulsory insurance against accidents at work and to enable its authorities to monitor those undertakings, national law requires them to establish a place of business in Belgium (see in particular Article 2 of the Royal Decree of 1971). As the Commission has pointed out, such a requirement in itself constitutes a restriction on the freedom to provide services (see Case 205/84 *Commission v Germany* [1986] ECR 3755, in particular paragraph 52).

the scope of the entire system instituted by the Third Directive, a system which is, precisely, based on collaboration and mutual trust between national authorities. Nor should it be forgotten that, in the event of infringement of provisions of national law on the part of a foreign undertaking, the authorities of the State where the insurance is offered may contact the authorities of the home State and, in an emergency, adopt 'appropriate measures to prevent or penalise further infringements' (Article 40 of the Directive). In my opinion, therefore, the factual and legal conditions which must exist for the obligation on the part of the authorities of the Member State where the insurance is offered to accept the results of the prior and subsequent controls carried out by the authorities of the home State are not satisfied in the present case.

18. Even intervention by the FAT, where the insurance undertaking is in crisis, does not make it possible to bring insurance against accidents at work within the concept 'insurance forming part of a statutory system of social security' as stated in Article 2(1) of the First Directive. That intervention is intended to substitute, and not to complement, that of the insurance undertakings. It is, in reality, a mechanism designed to provide safeguards for workers, not for insurance undertakings. The undertakings remain subject to the rules of private law which require them to carry out their contractual commitments and, in particular, to pay out compensation. In the event of default, these undertakings are subject to the standard insolvency proceedings which enable the State and, as a result, the FAT, as the case may be, to have recourse to their assets in order to recover compensation paid to workers.

19. In view of all the above considerations, I consider that the Third Directive is applicable to compulsory insurance against accidents at work of the kind governed, under the Belgian legal system, in particular by the Law of 1971 and the Royal Decree of 1971, and that, therefore, the Kingdom of Belgium has not properly implemented the Directive.

Scope of the Joint Declaration by the Council and the Commission on Article 12(2) of Directive 88/357/EEC

20. This conclusion is not undermined by the fact, when adopting the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance,[22] the Council and the Commission inserted in it a declaration according to which Article 12(2) (which prohibits the application of Title III only of the Directive to insurance against accidents at work) does not require the other titles of the Directive to be applied to Belgian insurance; Belgian insurance, however, remains subject to the Community coordinating rules and continues to be regarded as falling within the

22 — OJ 1988 L 172, p. 1.

scope of the exclusion in Article 2(1)(d) of the First Directive. [23]

21. It is the view of the Commission that this declaration cannot affect the application of the Directive to the circumstances of this case, essentially for two reasons. Firstly, it concerns a provision, Article 12(2) which — as can be seen from the text of the article — was reviewed by the Council and repealed by Article 37 of the Third Directive. Secondly, in any case, it is clear from the Court's case-law [24] that statements attached to the minutes of the meetings at which a measure is adopted cannot alter the content of the provisions of that measure as set out in their wording, but may only be used to confirm its scope. [25] In this case, if one were to interpret Article 2 of the Third Directive to the effect that that directive is not applicable to the Belgian scheme concerning accidents at work, this would clearly be contrary to what is provided in Article 55, which specifically concerns compulsory insurance against accidents at work offered by private undertakings.

22. I am in agreement with the point of view of the applicant institution. Leaving aside the fact that the declaration concerns Article 12(2) of the 1988 Directive, and thus a directive which preceded the Third Directive, and that that provision was subsequently repealed, it is undeniable that declarations which are not incorporated into the text of the measure to which they refer cannot be used to interpret that measure other than in accordance with the actual wording of its provisions. This is what is confirmed by the case-law mentioned above.

Furthermore, I do not consider that the reference in the declaration to the general rules of the First Directive on the exclusion of insurance forming part of 'a statutory system of social security' can justify, as the Belgian Government maintains, the non-application in this case of Article 55 of the Third Directive on compulsory insurance against accidents at work. Apart from that fact that the declaration concerns a measure which preceded the Third Directive, the infringement of which is alleged, it must be observed that such a declaration was not proposed anew with respect to Article 55. [26]

23 — The declaration is worded as follows: 'The Council and the Commission observe that the first indent of Article 12(2) (which excludes accidents at work from the scope of Title III) in no way alters the fact that insurance against accidents at work, as offered in Belgium, is covered by the exclusion in Article 2(1)(d) of the First coordinating Directive'.

24 — Case 429/85 *Commission* v *Italy* [1988] ECR 843 and Case C-329/95 *VAG Sverige* [1997] ECR I-2675.

25 — Case 136/78 *Auer* [1979] ECR 437, in particular paragraph 25.

26 — Articles 49 and 50 of the Third Directive contain derogations *rationae materiae* or *temporis* for Denmark, Spain, Greece and Portugal.

Application of Articles 55 and 90 of the EC Treaty (now Articles 45 EC and 86 EC)

23. In support of the exclusion of insurance against accidents at work from the scope of the Third Directive, the Belgian Government invokes the nature of this insurance as a service in the public interest; from this it infers the right of Member States, recognised in Articles 55 and 90 of the EC Treaty, not to comply with the obligations of liberalisation arising from the Treaty and secondary legislation.

24. The Commission puts forward two observations on this matter. Firstly, with regard to Article 55 of the EC Treaty, it points out that the Third Directive has as its legal basis Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now Article 55 EC) and that, consequently, the removal of restrictions on freedom of establishment and freedom to provide services in the non-life insurance sector is regulated at secondary level, with the consequence that the only derogations permitted from the rules of the Directive are those expressly provided for by the Directive itself. Secondly, the safeguard clauses which appear in Article 55 of the Treaty, according to the Court's interpretation in *Thijssen* in 1993,[27] are to be applied restrictively as they limit the exercise of fundamental rights conferred on citizens by Community law. This argument, the Commission claims, is all the more valid in cases of exemption as envisaged in Article 90(2) of the Treaty (now Article 86(2)) as it provides for non-application of the rules of Community law with regard to undertakings entrusted with the operation of services of general economic interest if these rules might obstruct the performance of the tasks of general interest assigned to those undertakings. The Commission emphasises that, in line with the Court's case-law,[28] the onus is on the Member State to prove the existence of such an obstruction, evidence which has not been produced in this case, and that, in any event, such obstruction cannot be reduced to a mere difficulty in the performance of the tasks entrusted to the undertaking.[29]

25. I support the Commission's arguments. In order to grasp the significance of the safeguard clause in Article 55 of the EC Treaty in relation to a situation such as the one with which we are concerned here, it is necessary to begin with two points of a general order. Firstly, that provision contains a derogation from the prohibition on the introduction by Member States of further restrictions on the freedom of establishment and freedom to provide services, with the result that it must be strictly interpreted, the derogation applying only where the activity the pursuit of which is

27 — Case C-42/92 *Thijssen* v *Controledienst* [1993] ECR I-4047.

28 — In particular Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, in particular paragraph 28.

29 — Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, in particular paragraph 138.

prohibited to foreigners consists in the performance of tasks of general interest. [30] Secondly, where the matter is regulated at Community level by secondary legislation, intervention on the part of the State which impedes access by foreigners to the pursuit of a particular activity is necessarily limited, above all, where, as in this instance, the Community provisions govern and coordinate in detail the national legislation in the sector in question.

Here we have an activity which, while it has close links, by its nature and function, with the provision of social security services and therefore to the exercise of official authority, is carried out by private undertakings in accordance with the classic rules of free competition. The only real reason put forward by the Belgian Government to justify excluding foreign undertakings from access to this activity is the impossibility, or the extreme difficulty, for those undertakings to comply with the general obligations imposed by national law and to subject themselves to the controls to which authorised Belgian undertakings are subject. As I have demonstrated earlier, the Third Directive provides mechanisms for overcoming any difficulties regarding control of the activities of foreign undertakings by the authorities of the State where the insurance is offered, and also permits those authorities to require foreign undertakings to comply with all the provisions of national law concerning the insurance they wish to offer. It follows that, in this case, the conditions which might justify a derogation from the right of establishment and for the freedom to provide services are not satisfied.

26. As regards Article 90 of the Treaty (now Article 86 EC), I shall merely point out that it concerns public undertakings or undertakings to which are granted special or exclusive rights. This case, however, is concerned with a national scheme which does not grant exclusive rights to any undertaking, but simply requires companies wishing to issue insurance against accidents at work to apply for authorisation to the appropriate national authorities, without denying foreign undertakings the possibility of making an application in accordance with the formal and other requirements prescribed by national law. In the case in point here, the conditions which would enable Article 90 of the Treaty (now Article 86 EC) to be applied are therefore not satisfied. [31]

30 — In addition to the judgment in *Thijssen* invoked by the applicant, I would also refer to Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631, in particular paragraphs 42 to 44; Case 307/84 *Commission* v *France* [1986] ECR 1725, in particular paragraphs 12 and 13; Case 147/86 *Commission* v *Greece* [1988] ECR 1637, in particular paragraphs 7-13, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, in particular paragraph 13, and Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, in particular paragraphs 7 and 8.

31 — The national circumstances were different in the question referred for preliminary ruling, Case C-67/96 *Albany* v *Stichting Bedrijfspensioenfonds* [1999] ECR I-5751, Joined Cases C-115/97 to C-117/97 *Brebtjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds* [1999] ECR I-6025, and Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Bedrijfspensioenfonds* [1999] ECR I-6121, where the Court ruled, among other things, in relation to this case, on the applicability of Article 90 to the Netherlands law granting a fund the *exclusive right* to run a complementary pension scheme.

IV — Plea raised under Article 184 of the EC Treaty (now Article 241 EC)

27. The Belgian Government contests the legality of Article 55 of the Third Directive, by expressly raising a plea to that effect, in the event of that provision being held to extend also to compulsory insurance against accidents at work. It claims in this respect that the Council has no competence to regulate this category of insurance by means of a directive such as the one at issue, which is aimed at removing restrictions on freedom of movement. In support of its submission, the Belgian Government argues that it is impossible, given the content of the Third Directive, for the States where the insurance is offered to exercise financial supervision of foreign undertakings and, therefore, to provide appropriate safeguards to the insured parties.

On this point, I would merely point out that, in accordance with settled case-law cited by the Commission, a Member State may not plead the illegality of a directive which the Commission charges it with infringing. [32] On the substance, I would refer to what I have already said as regards the effect of the application of the Directive and, in particular, to the safeguard which the system of controls of undertakings, as provided and regulated by the Directive, affords to the authorities of the State where the insurance is offered. I considered that this safeguard was sufficient because foreign undertakings can, in the sector in question, help national undertakings. These considerations led me to conclude that the Directive, and Article 55 in particular, is not such as to compromise the proper functioning of an insurance scheme against accidents at work such as the Belgian scheme.

32 — Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, in particular paragraph 10 and, concerning a decision, Case 226/87 *Commission* v *Greece* [1988] ECR 3611, in particular paragraph 14.

V — Costs

28. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to pay the costs if applied for by the successful party. In this case, since the Commission has expressly applied for costs, Belgium should, in my opinion, be ordered to pay its costs.

VI — Conclusion

29. In view of the foregoing considerations I propose that the Court:

(1) declare the application to be admissible;

(2) declares that, by maintaining in force Article 2 of the Law of 9 July 1975 on insurance undertakings, as amended by the Royal Decree of 12 August 1994, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC;

(3) dismiss the plea of illegality raised by the Kingdom of Belgium;

(4) order the Kingdom of Belgium to pay the Commission's costs.