OPINION OF ADVOCATE GENERAL TESAURO

delivered on 29 February 1996 *

1. The question with which these proceedings are concerned, submitted by the Tribunal des Affaires de Sécurité Sociale for Tarn-et-Garonne, relates to the interpretation of certain provisions of 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) [1] ('the Third Directive').

In particular, the national tribunal seeks a ruling from the Court on the scope of the Third Directive, in order to determine whether certain welfare schemes forming part of the French statutory social security system fall within it.

2. The Third Directive, adopted on the basis of Articles 57(2) and 66 of the Treaty, sets as its main objective the completion of the internal market in direct insurance other than life assurance from the point of view both of the right of establishment and of the freedom to provide services.

In defining its own scope, the Third Directive refers to the general provisions of Council Directive 73/239/EEC of 24 July 1973 [2] ('the First Directive'), which regulates the field in question. Under Article 2, the Third Directive is to apply to the types of insurance and undertakings referred to in Article 1 of the First Directive, but not to the types of insurance, operations, undertakings or institutions which fall outwith the scope of that directive.

3. Article 1 of the First Directive provides that it concerns the taking-up and pursuit of the self-employed activity of direct insurance carried on by insurance undertakings which are established in a Member State or which wish to become established there.

Article 2 goes on to specify the types of insurance and operations excluded from the scope of the First Directive. Under Article 2(1)(d), 'insurance forming part of a statutory system of social security' is explicitly excluded.

* Original language: Italian.

1 — OJ 1992 L 228, p. 1.

2 — First Council Directive 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 (OJ 1973 L 228, p. 3).

4. The problem to be considered here has arisen in the context of proceedings between a number of self-employed persons, mainly in skilled manual or commercial trades ('the plaintiffs'), and various social security organizations responsible for administering the compulsory insurance schemes covering old age, health, maternity, invalidity and death for persons pursuing those occupations ('the defendant organizations'). [3]

In order to obtain settlement of the compulsory contributions relating to certain insurance periods, which the plaintiffs had refused to pay, the defendant organizations issued enforceable demands against them. The plaintiffs have challenged those measures before the national court, arguing, *inter alia*, that the insurance schemes in question were incompatible either with the Third Directive or, more specifically, with the principles of freedom on which that directive is based.

5. The national tribunal, explicitly acknowledging in its order for reference that the defendant organizations administer schemes forming part of the national statutory system of social security within the meaning of the First and Third Directives and that those directives 'unquestionably' exclude such systems from their scope, states that it has doubts as to 'the scope of that exclusion in the light of the provisions of [the Third] Directive itself'.

Ascribing significant importance to the preamble to that directive, in particular the aims expressed therein of liberalizing the market in the sector concerned, the national tribunal decided to join the cases pending before it, stay the proceedings in those cases, and submit the following question to the Court of Justice: 'Does Article 2(2) of Council Directive 92/49/EEC concern at all, in whole or in part, the actual subject-matter of the existing statutory social security system applied in France?'

6. In other words, the national tribunal is asking the Court to determine whether the Third Directive, notwithstanding the explicit exclusion of organizations such as the defendants from its scope, cannot still be deemed to be applicable by virtue of the principles set out in its preamble, at least as regards the *activities* entrusted to such organizations.

It is quite clear that the answer to that question can only be in the negative.

7. The very wording of Article 2(1)(d) of the First Directive, to which Article 2(2) of the Third Directive explicitly refers ('This Directive does not apply to insurance forming part of a statutory system of social security'), is

3 — In particular, the Caisse de Maladie Régionale des Professions Indépendantes Midi-Pyrénées, the CANCAVA and the Caisse ORGANIC Midi-Pyrénées.

so absolute as to leave no scope at all for any other interpretation.

It is, moreover, obvious that the exclusion of the defendant organizations from the scope of the Third Directive must relate also, and even predominantly, to their activities in the administration of the national social security system.

8. Furthermore, the Court itself has in its case-law unhesitatingly confirmed on a number of occasions that, as it now stands, 'Community law does not detract from the powers of Member States to organize their social security systems'. [4]

In other words, when, as in the present case, it is undisputed that the bodies in question are operating within the context of a national social security system which pursues a social objective and is based on the principle of solidarity, their activities cannot be regarded as being economic and thus that of an undertaking within the meaning of the Treaty. [5]

9. Faced with a clear and explicit exclusion, therefore, together with the equally clear case-law of the Court in the field, it does not seem to me possible for other elements of the Third Directive to suggest that its scope should be extended to include social security matters. Furthermore, an analysis of the objectives of that directive in relation to the provisions which form its legal basis, far from supporting a different conclusion, confirms that it does not concern schemes forming part of a national social security system.

First of all, it should be noted that, consistently with the objectives which it pursues, the Third Directive was adopted on the basis of Treaty provisions pursuing freedom of establishment and freedom to provide services (namely, Articles 57(2) and 66); social security matters, however, are governed by different, specific provisions. [6]

10. More particularly, the view put forward by the plaintiffs (and apparently shared by the national tribunal) to the effect that the broad scope of the preamble to the Third Directive, setting out the opening up of the insurance market to competition as the principal objective of the rules laid down, makes it possible to interpret the directive itself as

4 — Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523, paragraph 16, and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *Assurances Générales de France and Others* [1993] ECR I-637, paragraph 6.

5 — *Poucet and Pistre*, paragraphs 18 and 19. Such a conclusion is not contradicted, but rather confirmed, by the recent judgment in Case C-244/94 *FFSA and Others* v *Ministère de l'Agriculture* [1995] ECR I-4013, in which the Court held that bodies such as (or similar to) those in question here, but which administer an optional, supplementary insurance scheme based on capitalization, are to be regarded as undertakings for the purposes of the Treaty provisions on competition.

6 — None of these, moreover (Articles 51 and 117 et seq. of the Treaty), can constitute a proper legal basis for the adoption of measures aimed at dismantling national social security systems. It is only since the entry into force of the Maastricht Treaty, and thus of the Protocol on Social Policy appended thereto, that the Community (with the exception of the United Kingdom) has had a specific legal basis (which has in fact never yet been used) to adopt wider-ranging measures in the field of social security (first indent of Article 2(3) of the Agreement on Social Policy appended to the Protocol).

referring also to insurance schemes such as those in issue, is undoubtedly not merely unfounded but also irrelevant in the present context.

It is unfounded inasmuch as there is no trace in the preamble of any reference to social security matters, from which it could be inferred or assumed that the real intention of the legislature was to interfere in the organization and regulation of the compulsory social security schemes established under the legislation in force in the various Member States. [7]

It is irrelevant, moreover, because there is no need in the present case to have recourse to the preamble in order to define the purpose or scope of a provision whose clarity, as we have seen, is incontrovertible.

11. In the light of the foregoing I propose that the Court should give the following answer to the question raised by the Tribunal des Affaires de Sécurité Sociale for Tarn-et-Garonne:

Article 2(2) of 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) must be interpreted as meaning that the directive does not apply to insurance forming part of a statutory system of social security.

7 — Recital 22, for example, does no more than note that in some Member States, under and in accordance with the national legislation in force, private or voluntary health insurance may serve as a partial or complete alternative to health cover provided for by the social security systems, which justifies the right of the national authorities to require insurance undertakings to provide all the information necessary to verify that the alternative is an effective one (Article 54(1)). It is obvious, on the other hand, that the need to abolish the monopoly enjoyed by certain bodies in certain Member States, expressed in recital 10, refers exclusively, as specified in Article 3, to the bodies explicitly referred to in Article 4 of the First Directive.