JUDGMENT OF THE COURT
26 March 1996 *

In Case C-238/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal des Affaires de Sécurité Sociale for Tarn-et-Garonne, France, for a preliminary ruling in the proceedings pending before that tribunal between

José García and Others

and

Mutuelle de Prévoyance Sociale d'Aquitaine and Others,

on the interpretation of 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) (OJ 1992 L 228, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), F. A. Schockweiler,

* Language of the case: French.

J. C. Moitinho de Almeida (Rapporteur), P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— José García and Others, by Richard Marcou, of the Montpellier Bar,

— Mutuelle de Prévoyance Sociale d'Aquitaine and Others, by Régis Waquet, of the Hauts-de-Seine Bar,

— the French Government, by Edwige Belliard, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Foreign Affairs Secretary in the same ministry, acting as Agents,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,

— the Spanish Government, by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, and Gloria Calvo Díaz, Abogado del Estado, of the Legal Service for Community Affairs, acting as Agents,

— the Netherlands Government, by Professor J. G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Finnish Government, by Ora Meres-Wuori, Head of Division, acting Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by Dimitrios Gouloussis, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of José García and Others, represented by Laurence Fourrier, of the Montpellier Bar, Mutuelle de Prévoyance Sociale d'Aquitaine and Others, represented by Régis Waquet, the French Government, represented by Claude Chavance, the Spanish Government, represented by Gloria Calvo Díaz, the Finnish Government, represented by Tuula Pynnä, Legislative Adviser, Head of the Court of Justice Division in the Legal Service, acting as Agent, and the Commission, represented by Dimitrios Gouloussis, at the hearing on 6 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 29 February 1996,

gives the following

Judgment

1 By judgment of 7 June 1994, received at the Court on 22 August 1994, the Tribunal des Affaires de Sécurité Sociale (Social Security Tribunal) for Tarn-et-Garonne, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of 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) (OJ 1992 L 228, p. 1).

2 That question was raised in various proceedings challenging final orders to settle unpaid contributions, served on the plaintiffs in the main proceedings by a number of social security organizations.

3 The social security schemes involved cover health and maternity insurance for the self-employed in non-agricultural trades, old-age insurance for those in skilled manual trades and old-age insurance for those in industrial and commercial trades.

4 According to the plaintiffs, the monopoly established by French legislation in the field of social insurance is incompatible with Community rules, specifically with Directive 92/49/EEC.

5 The national tribunal notes that under Article 2(2) of Directive 92/49/EEC that directive is to apply 'neither to the types of insurance or operations, nor to undertakings or institutions to which Directive 73/239/EEC does not apply, nor to the bodies referred to in Article 4 of that Directive'. The First Council Directive 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 (OJ 1973 L 228, p. 3) does not apply, under Article 2(1)(d) thereof, to 'insurance forming part of a statutory system of social security'.

6 The national tribunal wonders none the less whether, in the light of certain recitals in the preamble to Directive 92/49/EEC, Article 2(2) thereof should not be

interpreted as referring solely to the structures of social security schemes, whereas the content of those schemes — cover against the risks concerned (old-age, sickness and invalidity) — still falls within the scope of the directive and is thus excluded from the monopoly enshrined in the French legislation.

7 The national tribunal refers to the first, third, tenth, fifteenth, twentieth, twenty-second and twenty-third recitals, which are worded as follows:

'(1) ... it is necessary to complete 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, to make it easier for insurance undertakings with head offices in the Community to cover risks situated within the Community;

(3) ... Directive 88/357/EEC therefore represents an important stage in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling all policyholders, irrespective of their status, their size or the nature of the risks to be insured, to have recourse to any insurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection;

(10) ... the internal market comprises an area without internal frontiers and involves access to all insurance business other than life assurance throughout the Community and, hence, the possibility for any duly authorized insurer to

cover any of the risks referred to in the Annex to Directive 73/239/EEC; ... to that end, the monopoly enjoyed by certain bodies in certain Member States in respect of the coverage of certain risks must be abolished;

(15) ... pending the adoption of a Directive on investment services harmonizing inter alia the definition of the concept of regulated market, for the purposes of this Directive and without prejudice to such future harmonization that concept must be defined provisionally; ... that definition will be replaced by that harmonized at Community level which will give the home Member State of the market the responsibilities for these matters which this Directive transitionally gives to the insurance undertaking's home Member State;

(20) ... the Member States must be able to ensure that the insurance products and contract documents used, under the right of establishment or the freedom to provide services, to cover risks situated within their territories comply with such specific legal provisions protecting the general good as are applicable; ... the systems of supervision to be employed must meet the requirements of an integrated market but their employment may not constitute a prior condition for carrying on insurance business; ... from this standpoint systems for the prior approval of policy conditions do not appear to be justified; ... it is therefore necessary to provide for other systems better suited to the requirements of an internal market which enable every Member State to guarantee policyholders adequate protection;

(22) ... in some Member States private or voluntary health insurance serves as a partial or complete alternative to health cover provided for by the social security systems;

(23) ... the nature and social consequences of health insurance contracts justify the competent authorities of the Member State in which a risk is situated in requiring systematic notification of the general and special policy conditions in order to verify that such contracts are a partial or complete alternative to the health cover provided by the social security system; ... such verification must not be a prior condition for the marketing of the products; ... the particular nature of health insurance, serving as a partial or complete alternative to the health cover provided by the social security system, distinguishes it from other classes of indemnity insurance and life assurance in so far as it is necessary to ensure that policyholders have effective access to private health cover or health cover taken out on a voluntary basis regardless of their age or risk profile'.

8 The national tribunal therefore decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'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?'

9 It must be held that there is no reason to interpret Article 2(2) of Directive 92/49/EEC as meaning that cover against the risks envisaged by the social security schemes in issue in the main proceedings falls within the scope of that directive.

10 That provision quite clearly excludes from the scope of the directive not merely social security organizations ('undertakings or institutions') but also the types of insurance and operations which they provide in that capacity.

11 In view of the clear and precise terms of Article 2(2), it is not necessary to look at the preamble to the directive in order to determine the purpose or scope of that provision.

12 In any event, with particular regard to the tenth, twenty-second and twenty-third recitals, it must be noted, first, that the abolition of monopolies referred to in the tenth recital concerns only those whose activities are covered by the directive and which constitute undertakings within the meaning of Articles 85, 86 and 90 of the EC Treaty and, secondly, that there are two types of health insurance scheme in the Member States, one of which, referred to in the twenty-second and twenty-third recitals, is private, the other being in the nature of a system of social security and excluded from the scope of the directive.

13 Furthermore, as the Advocate General has noted at point 9 of his Opinion, Directive 92/49/EEC, which is based on Articles 57(2) and 66 of the EEC Treaty, could not regulate the field of social security, which is covered by different provisions of Community law.

14 Finally, as the Court stressed in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *Assurances Générales de France and Others* [1993] ECR I-637, paragraph 13, social security schemes such as those in issue in the main proceedings, which are based on the principle of solidarity, require compulsory contributions in order to ensure that the principle of solidarity is applied and that their financial equilibrium is maintained. If Article 2(2) of Directive 92/49/EEC were to be interpreted in the manner contemplated by the national tribunal, the obligation to contribute would be removed and the schemes in question would thus be unable to survive.

15 The Court has also pointed out that Member States retain their powers to organize their social security systems (see *Poucet and Pistre*, paragraph 6, and Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523, paragraph 16).

16 The answer to the national tribunal's question must therefore be that Article 2(2) of Directive 92/49/EEC must be interpreted as meaning that social security schemes such as those in issue in the main proceedings are excluded from the scope of the directive.

Costs

17 The costs incurred by the French, German, Spanish, Netherlands and Finnish Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT

in answer to the question referred to it by the Tribunal des Affaires de Sécurité Sociale for Tarn-et-Garonne by judgment of 7 June 1994, hereby rules:

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 social security schemes such as those in issue in the main proceedings are excluded from the scope of the directive.

Rodríguez Iglesias Edward Puissochet

Hirsch Schockweiler Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Ragnemalm

Delivered in open court in Luxembourg on 26 March 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President