JUDGMENT OF THE COURT (Fifth Chamber)

22 January 2002 *

In Case C-218/00,

REFERENCE to the Court under Article 234 EC by the Tribunale di Vicenza (Italy) for a preliminary ruling in the proceedings pending before that court between

Cisal di Battistello Venanzio & C. Sas

and

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL),

on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: S. von Bahr, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Cisal di Battistello Venanzio & C. Sas, by D. Fantini, avvocato,

— Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), by F. Artusa and A. Pignataro, avvocati,

— the Italian Government, by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,

— the Commission of the European Communities, by L. Pignataro and W. Wils, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Cisal di Battistello Venanzio & C. Sas, of the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), of the Italian Government and of the Commission at the hearing on 7 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

1 By order of 25 May 2000, received at the Court on 2 June 2000, the Tribunale di Vicenza referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2 The questions have been raised in proceedings between Cisal di Battistello Venanzio & C. Sas (hereinafter 'Cisal') and the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (National Institute for Insurance against Accidents at Work, hereinafter 'INAIL'), concerning an order to pay the sum of ITL 6 606 890 representing insurance contributions not paid by Cisal.

Law applicable

3 The Italian provisions regulating compulsory insurance against accidents at work and occupational diseases are contained mainly in Decree No 1124 of the President of the Republic of 30 June 1965 laying down a single text of the provisions concerning compulsory insurance against accidents at work and occupational diseases (GURI No 257 of 13 October 1965, hereinafter 'Decree No 1124'), as later amended.

4 Under Article 126 of Decree No 1124, the INAIL is given the task of operating, on behalf of the State and under its supervision, a system of compulsory insurance for workers against accidents at work and occupational diseases, in accordance with the requirements of Article 38 of the Italian Constitution. Paragraph 3 of that provision concerns craft workers habitually engaged in a manual activity in their undertaking.

5 According to Article 55 of Law No 88 of 9 March 1989, on the restructuring of the Istituto nazionale della previdenza sociale (National Social Security Institute) and of the INAIL (GURI No 60 of 13 March 1989), the INAIL is to be classified as a public-service providing body and to be subject to supervision by the Ministry of Employment and Social Security. That law further provides that the INAIL is to perform the functions attributed to it in accordance with sound economic and business practice, adjusting its organisation on its own initiative to the requirements of efficient and timely collection of contributions and payment of benefits, and managing its moveable and immoveable assets in such a manner as to optimise income. The government is to pursue the same aim in the monitoring and supervision of the INAIL.

6 Under Article 9 of Decree No 1124, employers are required to insure their employees and firms must do the same as regards their members while self-employed craft workers are required to insure themselves where they are engaged in one of the activities involving risk listed in Article 1 of the Decree and the person to be covered by insurance falls in one of the categories of workers mentioned in Article 4.

7 As regards the amount of the contributions, Article 39(2) of Decree No 1124 provides, as regards the industrial sector, for a system of 'underlying capital redistribution'. Contributions for each year are determined so that they will cover all anticipated charges resulting from accidents occurring during the year, that is to say both short-term benefits and the capital value of long-term pensions to be paid in relation to accidents at work and occupational diseases.

8 Article 40 of Decree No 1124 provides:

'The scale of the premiums and contributions for insurance against accidents at work and occupational diseases and detailed rules of application are to be approved by decree of the Minister for Employment and Social Security on the basis of a resolution of the INAIL ... . The scale shall lay down the rates of premiums corresponding to the average national risk determined for each occupation insured so as to include the financial charge referred to in Article 39(2).'

9 The calculation of contributions to be made by self-employed craft workers is governed by Article 42 of Decree No 1124 and, as regards the period in question in the instant case, by Ministerial Decree of 21 June 1988 (GURI No 151 of 29 June 1988). Depending on the degree of risk which they present, the activities of self-employed craft workers are divided into 10 categories, which are themselves sub-divided into 320 headings corresponding to particular occupations.

10 According to Article 66 of Decree No 1124, benefits may take the following forms:

— a daily allowance for temporary incapacity for work;

— a pension for permanent incapacity for work;

— a permanent personal assistance allowance;

— a pension for survivors and a lump sum in the event of death;

— medical and surgical care, including hospital examinations, and

— provision of prostheses.

11 Article 67 of Decree No 1124 establishes the principle of automatic payment of benefits, under which insured persons are entitled to benefits even if the employer has failed to declare the occupational activity or to pay insurance premiums. Under Article 59(19) of Law No 449 of 27 December 1997 on measures to

stabilise the public finances (GURI No 302 of 30 December 1997), the automatic payment of benefits was excluded for self-employed workers, including craft workers, as from 1 January 1998. However, benefits may still be paid if such workers regularise their situation.

The main proceedings and the questions referred for a preliminary ruling

12 In December 1998, the Pretore di Vicenza ordered Cisal to pay to the INAIL unpaid insurance contributions of ITL 6 606 890 in respect of its managing partner, Mr Battistello, for the period 1992 to 1996. That payment order was based on the fact that, in accordance with Article 4 of Decree No 1124, Mr Battistello, as a craft worker working manually with wood in his own undertaking, should have been insured with the INAIL against accidents at work.

13 Cisal appealed against the payment order to the Tribunale di Vicenza, arguing that Mr Battistello had been insured against accidents at work under a policy with a private insurance company since 1986. It further contended that the provisions on the basis of which it was obliged to take out insurance against the same risks with the INAIL were contrary to Community competition law in that they unjustifiably maintained a monopoly for INAIL and thus induced the latter to abuse its dominant position. In support of his argument, Mr Battistello referred to an opinion of 9 February 1999 of the Italian competition authority according to which the activities of the INAIL 'do not display such elements of solidarity as to exclude the possibility that those activities are of an economic nature within the meaning of the Community case-law'.

14 The referring court points out that the INAIL displays certain characteristics which, in its view, are difficult to reconcile with the concept of undertaking within the meaning of Community competition law. It refers in this regard to the automatic nature of the benefits, the fact that affiliation is compulsory and the absence of any profit-making aim. It considers none the less that characteristics which are typical for bodies engaged in an economic activity predominate. It mentions in this respect the levying of contributions directly linked to the insured risks, the sub-division of risks into 10 distinct categories, according to an economic and commercial criterion, and the INAIL's statutory obligation to perform its functions in accordance with sound economic and business practices. The national court adds that in 1965, after it was made obligatory for craft workers to insure themselves against accidents at work, the Italian legislature accepted that compulsory private insurance cover could, for a transitional period at least, be regarded as a valid alternative to the insurance provided by the INAIL.

15 Taking the view that the Italian legislation could be contrary to Articles 90 and 86 of the Treaty and that the obligation imposed on self-employed craft workers to insure themselves with the INAIL even when they are already insured with a private company and that the abolition of compulsory affiliation for craft workers already insured elsewhere would not divert the INAIL from the performance of the other functions assigned to it by the Italian legislation, the Tribunal di Vicenza decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'Does a public non-profit-making insurance body, such as the INAIL, to which is entrusted, on the basis of sound economic and business practice, the operation as a monopoly of a scheme of insurance against risks deriving from accidents at work and occupational diseases based on a system of compulsory registration which pays benefits on a partially automatic basis (providing thus insurance cover for employees, but not for self-employed persons — as from 1998) even in the event of non-payment of premiums by the employer, and calculates the premiums on the basis of risk categories to which the insured work is assigned, constitute an undertaking within the meaning of Article 81 et seq. of the EC Treaty?

If the first question is answered in the affirmative, does the fact that the abovementioned public entity calls for the payment of premiums even where the person concerned, a self-employed person (craft worker), is already insured with a private company against the same risks in respect of which he would be covered through affiliation to the abovementioned body constitute an infringement of Articles 86 EC and 82 EC?'

Admissibility of the reference

16 The INAIL contends that the reference is inadmissible since the questions submitted have been raised in view of the fact that the principle of automatic payment of insurance benefits by the INAIL even where contributions have not been paid has been abolished in the case of craft workers. Since that principle was abolished only as from 1 January 1998, it does not therefore concern the insurance period in question in the main proceedings.

17 The INAIL also argues that, even if the Court were to answer both questions in the affirmative, the national court would not be competent to set aside the national rules granting the INAIL the monopoly in the matter of insurance against accidents at work, on the ground that only the Commission has competence to monitor and ensure compliance with Article 90(2) of the Treaty by adopting decisions or directives in accordance with Article 90(3).

18 That line of argument cannot be accepted. First, it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts

provided for by Article 234 EC, it is solely for the national court before which the case has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraphs 18 and 19). In any event, in the present case, there is no suggestion in the order for reference that the Tribunale di Vicenza submitted the questions only on account of the 1997 reform relating to automatic payment of benefits. That reform is in fact mentioned by that court only in the description which it gives of the national legal context.

19 Second, it follows from the case-law of the Court, in particular from the judgments in Case C-320/91 *Corbeau* [1993] ECR I-2533 and Case C-67/96 *Albany* [1999] ECR I-5751, that the provisions of Article 90(2) of the Treaty may be relied on by individuals before national courts in order to obtain review of compliance with the conditions which they lay down.

20 The reference for a preliminary ruling is therefore admissible.

The first question

21 By its first question, the national court asks whether a body like the INAIL, entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases, is to be treated as an undertaking within the meaning of Articles 85 and 86 of the Treaty.

22 According to settled case-law, the concept of an undertaking in competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or way in which it is financed (see, in particular, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74).

23 In that regard, it has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; and *Pavlov*, cited above, paragraph 75).

Arguments of the parties

24 Cisal contends that the INAIL is an undertaking within the meaning of Articles 85 and 86 of the Treaty.

25 It argues that the insurance services provided by the INAIL to craft workers are fully comparable to those provided by private insurance companies: first of all, insurance benefits are financed exclusively through contributions, which are determined on the basis of risk; second, there is a close link between contributions and benefits in that both are a percentage of the victim's earnings; and, finally, the INAIL must operate the insurance scheme according to sound economic and business practice. Neither the INAIL's social objective nor its non-profit-making character nor the limited elements of solidarity embodied in the scheme can detract from the predominantly economic nature of the INAIL's activities.

26 The INAIL, the Italian Government and the Commission maintain, on the other hand, that the INAIL cannot be classified as an undertaking owing to the task of general interest with which it is entrusted and to certain characteristics of the insurance scheme which it operates. In this regard, the situation of the INAIL is akin to that in question in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

27 In support of their argument, they emphasise the following characteristics of the insurance scheme.

28 First, the benefits provided by the INAIL comprise not only cash allowances but also participation in prevention, rehabilitation and social assistance activities. Benefits cover not only immediate and direct damage but also more indirect economic consequences of an accident. Furthermore, the actual amount of cash benefits, which is based on the victims' earnings and not on the extent of the damage, is governed by criteria fixed by law and does not depend on the contributions paid by the insured person or on the INAIL's financial results. In particular, for the calculation of pension benefits, only salaries in a certain band, between a minimum and a maximum, established according to the average nationwide salary, may be taken into account.

29 The INAIL, the Italian Government and the Commission add that the principle of automatic payment of benefits, which are paid even when the employer has failed to pay the contributions due, constitutes an important element of solidarity fundamental to the scheme of protection against the economic consequences of accidents at work and occupational diseases. Although automatic payment of benefits was abolished in respect of self-employed workers as from 1 January 1998, the situation could always be regularised and in any event the reform postdates the periods of insurance in question in this case.

30 Second, as regards the financing of the insurance scheme, the INAIL and the Italian Government point out that contributions are not systematically proportionate to the risk: certain specific risks, such as those linked to asbestos or noise, are partly born by other sectors according to the principle of solidarity. The Italian Government and the Commission add that the amount of contributions must be approved by decree of the competent minister. Furthermore, pensions for accidents at work are largely financed according to the pay-as-you-go principle, with only a portion corresponding to the capital value of the initial pension being put aside to constitute a technical reserve to guarantee payment of benefits.

Findings of the Court

31 According to settled case-law, Community law does not affect the power of the Member States to organise their social security systems (see, in particular, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 44).

32 In particular, the covering of risks of accidents at work and occupational diseases has for a long time been part of the social protection which Member States afford to all or part of their population.

33 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version modified and updated by Council Regulation (EC) No 118/97 of 2 December 1996

(OJ 1997 L 28, p. 1), contains specific provisions for coordinating national schemes on accidents at work and occupational diseases, for the application of which, in the case of the Italian Republic, the INAIL is expressly designated as the competent institution, within the meaning of Article 1(o) of that regulation (see Annex 2, entitled 'Competent institutions', H, point 2, of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition, 1972 (I), p. 159), in the version amended and updated by Regulation No 118/97).

34 The statutory scheme providing insurance against accidents at work and occupational diseases in question in the main proceedings, in so far as it provides for compulsory social protection for all non-salaried workers in the non-agricultural professions who carry out an activity classified as a 'risk activity' by the law, pursues a social objective.

35 Such a scheme is intended to provide all the persons protected with cover against the risks of accidents at work and occupational diseases, irrespective of any fault which may have been committed by the victim, or by the employer, and therefore without any need for civil liability to be incurred by the person drawing benefits in respect of the risk activity.

36 Furthermore, the social aim of that insurance scheme is highlighted by the fact that benefits are paid even when the contributions due have not been paid, which obviously contributes to the protection of all insured workers against the economic consequences of accidents at work or occupational diseases. Even after the 1997 reform, which abolished that automatic cover for self-employed workers, benefits may still be paid in the event of regularisation, even after contributions have not been paid in good time.

37 However, as is clear from the case-law of the Court, the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity (see *Pavlov*, cited above, paragraph 118). In that regard, two other aspects deserve attention.

38 In the first place, a number of elements tend to demonstrate that the insurance scheme in question in the main proceedings applies the principle of solidarity.

39 The insurance scheme is financed by contributions the rate of which is not systematically proportionate to the risk insured. For example, it is clear from the case-file that the rate may not exceed a maximum ceiling, even where the activity carried out entails a high risk, the balance of financing being born by all the undertakings in the same category as regards the risk run. Furthermore, contributions are calculated not only on the basis of the risk linked to the activity of the undertaking concerned but also according to the insured persons' earnings.

40 Second, the amount of benefits paid is not necessarily proportionate to the insured persons' earnings, since, for the calculation of pensions, only salaries situated between a minimum and a maximum corresponding to the average nationwide salary, decreased or increased by 30%, may be taken into consideration.

41 In those circumstances, as the Advocate General points out in point 66 of his Opinion, the payment of high contributions may give rise only to the grant of capped benefits, where the salary in question exceeds the maximum laid down by decree and, inversely, relatively low contributions, calculated on the basis of the statutory minimum wage, afford entitlement to benefits calculated according to earnings higher than that threshold, corresponding to the average salary decreased by 30%.

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

43 In the second place, it is clear from the case-file that the activity of the INAIL, entrusted by law with management of the scheme in question, is subject to supervision by the State and that the amount of benefits and of contributions is, in the last resort, fixed by the State. The amount of benefits is laid down by law and they may be paid regardless of the contributions paid and the financial results of the investments made by the INAIL. Second, the amount of contributions, upon which the INAIL deliberates, must be approved by ministerial decree, the competent minister having the power to reject the scales proposed and to invite the INAIL to submit to him a new proposal taking account of certain information.

44 In summary, it is clear from the foregoing that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them.

45 In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty.

46 In view of all the foregoing considerations, the answer to be given to the first question must therefore be that the concept of undertaking, within the meaning of Articles 85 and 86 of the Treaty, does not cover a body entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases, such as the INAIL.

The second question

47 In view of the reply given to the first question, it is not necessary to reply to the second question.

Costs

48 The costs incurred by the Italian Government and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the Tribunale di Vicenza by order of 25 May 2000, hereby rules:

The concept of an undertaking, within the meaning of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC), does not cover a body which is entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases, such as the Istituto nazionale per l'assicurazione contro gli infortuni sul lavori (INAIL).

von Bahr Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 22 January 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber