Re Insurance Services:
E.C. Commission (Netherlands and United Kingdom intervening) v. Germany
(Belgium, Denmark, France, Ireland and Italy intervening)
(Case 205/84)

Before the Court of Justice of the European Communities

ECJ

(Presiding, Lord Mackenzie Stuart C.J.; Galmot, Kakouris, O'Higgins and Schockweiler PP.C.; Bosco, Koopmans, Due, Everling, Bahlmann and Joliet JJ.)
Sir Gordon Slynn, Advocate General.

4 December 1986

Action for A Declaration under Article 169 EEC.

Services. Insurance brokers.

The profession of intermediary in the insurance sector is not the subject of any Community legislation on the basis of which the European Court could hold that such an intermediary is acting on behalf of one or other of the parties to an insurance contract (the insurer or the insured). The fact that an insurance contract has been negotiated through an intermediary who is not an authorised agent of the foreign insurance enterprise cannot change the nature of that contract as representing a service provided by that enterprise to the policy-holder. [16]

Establishment. Insurance. Services.

An insurance enterprise of one member-State which maintains a permanent presence in another member-State is covered by the EEC Treaty provisions on establishment even if its presence is not in the form of a branch or agency but consists merely of an office managed by the enterprise's own staff or by a person who is independent but authorised to act on a permanent basis for the enterprise,

as for example an agency. Such an insurance enterprise cannot avail itself of the freedom to supply services under Articles 59 and 60 EEC in respect of its activities in that latter State. [21]

Services. Establishment.

A member-State is entitled to restrict the freedom to supply services under **Article 59** EEC in the case of an enterprise established abroad whose activity is entirely or mainly directed towards its territory and which is thereby intending to evade the rules of conduct which would be applicable to it if it were established in the target State. *70 Judicial review in such a situation falls under the EEC Treaty provisions on establishment and not on those concerning the provision of services. [22]
Van Binsbergen v. Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid (33/74), [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298, *applied.*

Services.

Articles 59 and **60** EEC became directly applicable on the expiry of the transitional period (1969), and their applicability was not conditional on the harmonisation or the co-ordination of the laws of the member-States. **Articles 59** and **60** require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a member-State other than that in which the service is to be provided. [25]

Services. Community law and national law.

The principal aim of Article 60(3) EEC is to enable the provider of a service to pursue his activities in the member-State where the service is given without suffering discrimination in favour of the local nationals. But it does not follow that all national legislation applicable to local nationals and the permanent activities of locally established enterprises may likewise be applied holus-bolus to the temporary activities of enterprises which are established in another member-State. [26]

Services. Insurance. Establishment.

National law which requires an insurer who is established in another member-State (and therefore authorised and supervised by the supervisory body of that State) to have a permanent establishment within the jurisdiction and to obtain a fresh authorisation from the local authorities before he may provide insurance services there is a restriction on the freedom to provide services. Consequently it is only compatible with **Articles 59** and **60** EEC if (a) there are imperative reasons relating to the public interest, (b) that public interest is not already protected by the rules of the State of establishment, and (c) the same result

cannot be obtained by less restrictive rules. [29]

Services. Insurance.

There are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide insurance services. [33]

Services. Insurance. Establishment.

Directives 73/239 and 79/267 are concerned with the right of insurance enterprises established in one member-State to establish themselves, through branches or agencies, in other member-States. They *71 are not applicable as such to the supply of services under **Articles 59** and **60** EEC. [35]

Services. Insurance. Community law and national law.

Directives 73/239 and 79/267 (on insurance establishment) contain broad enough rules on solvency to apply to the supply of services also; consequently the target State for insurance services must accept as sufficient for its own purposes a certificate of solvency issued by the supervisory authority of the member-State of main establishment. The two directives do not have that effect in regard to the rules on technical reserves and the conditions of insurance. Therefore the application by a member-State to which insurance services are provided of its own laws on technical reserves and the conditions of insurance are, in the present state of Community law, justified--provided that the requirements of those laws do not exceed what is necessary to ensure the protection of policy-holders and insured persons. [37]-[41]

Services. Insurance. Authorisation.

A system of prior authorisation for the supply of consumer and commercial insurance services is, at present, compatible with the freedom to provide services under **Articles 59** and **60** EEC. In the absence of any legislative framework for such authorisations to be issued by the member-State of main establishment, it is permissible for the target State to control their issue. But in such a case authorisation must be granted on request to any enterprise established in another member-State if it meets the conditions laid down by the laws of the target State; in addition, the conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State of main establishment and the supervisory authority of the target State must take into account supervision and checks which have already been carried out in the State of main establishment. [46]-[47]

Services. Establishment.

If the requirement of prior authorisation constitutes a restriction on the freedom to

provide services, the requirement of a permanent establishment in the target State is the very negation of that freedom. It has the result of depriving **Article 59** EEC of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to supply services of persons who are not established in the State in which the service is to be provided. If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objectives pursued. [52]

Services. Insurance. Establishment.

There are no reasons of an imperative nature which require the presence on the national *72 territory of an insurance enterprise established elsewhere in the EEC in order to supervise its compliance with domestic rules on conduct of insurance business when it provides insurance services under **Article 59** EEC. It is therefore an infringement of that **Article** for a member-State to provide that where insurance enterprises in the Community wish to provide services in relation to direct insurance business (other than transport insurance) through salesmen, representatives, agents or other intermediaries, the latter must have an establishment in its territory. That is not, however, so for compulsory insurance or for insurance where the insurer either maintains a permanent local presence equivalent to an agency or branch or aims his business primarily at the target State. [55]-[57]

Services. Co-insurance. Establishment.

The requirement that a leading insurer in a co-insurance contract should be established in the member-State where the risk is located infringes **Articles 59** and **60** EEC and finds no basis in the Co-insurance Directive 78/473. [63]

Services. Co-insurance. Consumer protection.

Co-insurance as defined by Directive 78/473 does not concern consumers. Consequently arguments based on consumer protection have less force than in other forms of insurance as regards justification of restrictions on freedom to supply services. [64].

Services. Co-insurance. Authorisation.

The requirement that a leading insurer in a co-insurance contract must be authorised by the member-State in which the services are supplied infringes **Articles 59** and **60** EEC and also Directive 78/473. [67]

European Court procedure. Pleadings.

A head of claim argued before the European Court which differs from and is wider in scope than that formulated in the conclusions set out in the initial

application to the Court is inadmissible. [70]
The Court *held that,* as regards the provision of services relating to contracts of insurance against risks situated in one member-State concluded by a policy-holder established or residing in that State with an insurer who is established in another member-State and who does not maintain any permanent presence in the former State or aim his business activities entirely or principally towards its territory, (a) the German law requiring prior authorisation for the supply of insurance services on its territory by a foreign enterprise was lawful, (b) the similar rules requiring that the foreign insurance enterprise should have an establishment on German territory infringed Articles 59 and 60 EEC, and (c) rules requiring that the leading insurer in a co-insurance contract covered by Directive 78/473 *73 should be established on German territory and (d) authorised by the German supervisory authorities infringed both **Articles 59** and **60** and also Directive 78/473.

Representation

F.-W. Albrecht, Legal Adviser to the E.C. Commission, and Prof. Ernst Steindorff, of the University of Munich, for the applicant Commission.
Martin Seidel, Ministerialrat at the Ministry of Economic Affairs, and R. Lukes, for the respondent Government.
D. J. Keur and, in the written proceedings, I. Verkade, Secretary-General at the Ministry of Foreign Affairs, for the Dutch Government intervening.
Nicholas Phillips, Q.C., of the English Bar, instructed by J. R. J. Braggins, of the *Treasury Solicitor's Department*, for the United Kingdom Government intervening.
R. Hoebaer, Director at the Ministry of Foreign Affairs, for the Belgian Government intervening.
Prof. Claus Gulmann and, in the written proceedings, Laurids Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, for the Danish Government intervening.
R. de Gouttes and, in the written proceedings, G. Guillaume, Director of the Legal Affairs Department at the Ministry for Foreign Relations, for the French Government intervening.
John D. Cooke S.C., of the Irish Bar, instructed by Louis J. Dockery, Chief State Solicitor, for the Irish Government intervening.
Oscar Fiumara, Avvocato dello Stato, and in the written proceedings L. Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, for the Italian Government intervening.

The following cases were referred to in the judgment:
1. Van Binsbergen v. Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid (33/74), 3 December 1974: [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298. Gaz:33/74
2. Webb (279/80), 17 December 1981: [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719. Gaz:279/80
3. Ministere Public v. Van Wesemael (110/78), 18 January 1979: [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87. Gaz:110/78

4. Coenen v. Sociaal-Economische Raad (39/75), 26 November 1975: [1975] E.C.R. 1547, [1976] 1 C.M.L.R. 30. Gaz:39/75
5. Transporoute et Travaux SA v. Minister of Public Works (76/81), 10 February 1982: [1982] E.C.R. 417, [1982] 3 C.M.L.R. 382. Gaz:76/81
6. F. Van Luipen en Zonen BV (29/82), 3 February 1983: [1983] E.C.R. 151, [1983] 2 C.M.L.R. 681. Gaz:29/82
7. Re the Re-Export of Caribbean Rum: E.C. Commission v. E.C. Council (218/82), 13 December 1983: [1983] E.C.R. 4063, [1984] 2 C.M.L.R. 350. Gaz:218/82

The following further cases were referred to by the Advocate General:
*74 8. Re Co-Insurance Services: E.C. Commission v. France (220/83), 4 December 1986: [1987] 2 C.M.L.R. 113. Gaz:220/83
9. Re Co-Insurance Services: E.C. Commission v. Denmark (252/83), 4 December 1986: [1987] 2 C.M.L.R. 169. Gaz:252/83
10. Re Co-Insurance Services: E.C. Commission v. Ireland (206/84), 4 December 1986: [1987] 2 C.M.L.R. 150. Gaz:206/84
11. Schleicher (Kammergericht)
12. Rey Soda v. Cassa Conguaglio Zucchero (23/75), 30 October 1975: [1975] E.C.R. 1279, [1976] 1 C.M.L.R. 185. Gaz:23/75
13. Haug-Adrion v. Frankfurter Versicherungs-AG (251/83), 13 December 1984: [1984] E.C.R. 4277, [1985] 3 C.M.L.R. 266. Gaz:251/83

The following additional cases were referred to in argument:
14. Re Danish Taxation of Spirits: E.C. Commission v. Denmark (171/78), 27 February 1980: [1980] E.C.R. 447, [1981] 2 C.M.L.R. 688. Gaz:171/78
15. Frans-Nederlandse Maatschappij voor Biologische Producten BV (272/80), 17 December 1981: [1981] E.C.R. 3277, [1982] 2 C.M.L.R. 497. Gaz:272/80

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Facts

1. The sector of direct insurance has been the subject of the following harmonising directives.
(a) Council Directive 73/239 of 24 July 1973 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, [FN1] was adopted on the basis of Article 57(2) EEC and is designed to facilitate the setting-up of branches and agencies of insurance undertakings of other member-States by co-ordinating the conditions governing the taking-up and pursuit of the activities of direct insurance undertakings whose head offices are situated within the Community (Articles 6 to 22) and the activities of agencies or branches

established within the Community and *75 belonging to undertakings whose head offices are outside the Community (Articles 23 to 29).

FN1 [1973] O.J. L228/3.

Under that directive, the taking-up of the business of direct insurance within the territory of the member-State, both for undertakings whose head offices are situated within the Community and for those whose head offices are outside the Community, is subject to an official authorisation (Articles 6 and 23).
More specifically, Article 6(1) and (2) of the directive provides, with respect to undertakings whose head offices are situated within the Community, that:
1. Each member-State shall make the taking-up of the business of direct insurance in its territory subject to an official authorisation.
2. Such authorisation shall be sought from the competent authority of the member-State in question
by
(a) Any undertaking which establishes its head office in the territory of such State;
(b) Any undertaking whose head office is situated in another member-State and which opens a branch or agency in the territory of the member-State in question;
(c) Any undertaking which, having received the authorisation required under (a) or (b) above, extends its business in the territory of such State to other classes;
(d) ...
Directive 73/239 also regulates supervision of compliance with the conditions governing the exercise of the business of direct insurance and, in particular, the financial position of the undertakings concerned (Article 13). In that connection, the supervisory authority of the member-State in whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business (Article 14). Moreover, the directive lays down rules relating to the establishment of an adequate solvency margin in respect of the entire business of the undertaking, corresponding to the assets thereof (Articles 16 to 18). As regards technical reserves, the directive provides that they must be sufficient and represented by equivalent and matching assets localised in each country where business is carried on (Article 15), whilst reserving the question of co-ordination in that respect for later directives.
With regard to supervision of the undertakings in question, Article 19 provides:
1. Each member-State shall require every undertaking whose head office is situated in its territory to produce an annual account covering all types of operation, of its financial situation and solvency.
2. Member-States shall require undertakings operating in their territory to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision. The competent supervisory authorities shall furnish each other with the documents and information necessary for exercising supervision.
*76 Finally, the directive provides that the Commission and the competent authorities of the member-State are to collaborate closely 'for the purpose of

facilitating the supervision of direct insurance within the Community and of examining any difficulties which may arise in the application of this directive' (Article 33).
(b) Council Directive 79/267/EEC of 5 March 1979 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance, [FN2] which was adopted in particular on the bases of Article 57 EEC, also lays down rules governing, for that specific sector, the activities of direct insurance undertakings whose head offices are within the Community (Articles 6 to 26) and the activities of agencies or branches established within the Community of direct insurance undertakings whose head offices are outside the Community (Articles 27 to 32).

FN2 [1979] O.J. L63/1, [1979] 1 Commercial Laws of Europe 121.

The provisions of Directive 79/267 are for the most part identical to those of Directive 73/239.
(c) The sector of co-insurance, that is to say insurance in which several insurers take part, was the subject of a specific harmonising directive, namely Council Directive 78/473 of 30 May 1978 on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance, [FN3] which was adopted on the basis of Articles 57(2) and 66 of the Treaty. According to the first subparagraph of Article 1(2), it applies to ' risks ... which by reason of their nature or size call for the participation of several insurers for their coverage.' Article 2(1) provides that the directive is to apply only to those Community co-insurance operations which satisfy the following conditions:

(a) The risk, within the meaning of Article 1(1), is covered by a single contract at an overall premium and for the same period by two or more insurance undertakings, hereinafter referred to as 'co-insurers', each for its own part; one of these undertakings shall be the leading insurer;
(b) The risk is situated within the Community;
(c) For the purposes of covering this risk the leading insurer is authorised in accordance with the conditions laid down in the First Co-ordination Directive, i.e. he is treated as if he were the insurer covering the whole risk;
(d) At least one of the co-insurers participates in the contract by means of a head office, agency or branch established in a member-State other than that of the leading insurer;
(e) The leading insurer fully assumes the leader's rôle in co-insurance practice and in particular determines the terms and conditions of insurance and rating.

FN3 [1978] O.J. L151/25, [1978] 1 Commercial Laws of Europe 193.

On the other hand, co-insurance operations which do not satisfy those conditions or which cover risks other than those listed in *77 Article 1 (which do not include life assurance) 'remain subject to the national laws operative at the time when

this directive comes into force' (Article 2(2)).
The adoption of Article 2(1) is the source of the following statement which appears in the minutes of the Council's meeting of 23 May 1978:
The Council emphasises that the adoption of this Directive and in particular Article 2(1) thereof is entirely without prejudice to the resolving of the dispute between the member-States and the Commission on the interpretation to be placed on the rulings of the Court of Justice on freedom to provide services (No. 33/74 Van Binsbergen).
This text is without prejudice to national provisions relating to the establishment of the leading insurer, which are to be appraised on the basis of the Treaty, by the Court of Justice as a last resort if necessary.
The right of undertakings which have their head office in a member-State and which are subject to and satisfy the requirements of Directive 73/239 to participate in Community co-insurance may not be made subject to any provisions other than those of Directive 78/473 (Article 3).
The conditions and procedures for community co-insurance are dealt with in the following provisions:

Article 4

1. The amount of the technical reserves shall be determined by the different co-insurers according to the rules fixed by the member-State where they are established or, in the absence of such rules, according to customary practice in that State. However, the reserve for outstanding claims shall be at least equal to that determined by the leading insurer according to the rules or practice of the State where such insurer is established.
2. The technical reserves established by the different co-insurers shall be represented by matching assets. However, relaxation of the matching assets rule may be granted by the member-States in which the co-insurers are established in order to take account of the requirements of sound management of insurance undertakings. Such assets shall be localised either in the member-States in which the co-insurers are established or in the member-States in which the leading insurer is established, whichever the insurer chooses.

Article 5

The member-States shall ensure that co-insurers established in their territory keep statistical data showing the extent of Community co-insurance operations and the countries concerned.

Article 6

The supervisory authorities of the member-States shall co-operate closely in the implementation of this directive and shall provide each other with all the information necessary to this end.
Directive 78/473 also provides for close co-operation between the Commission

and the supervisory authority in the member-States (Article 8): *78
The Commission and the competent authorities of the member-States shall co-operate closely for the purpose of examining any difficulties which might arise in implementing this directive.
In the course of this co-operation it shall examine in particular any practices which might indicate that the purpose of the provisions of this directive and in particular Article 1(2) and Article 2 are being misused either in that the leading insurer does not assume the leader's rôle in co-insurance practices or that the risks clearly do not require the participation of two or more insurers for their coverage.
Finally according to the first four recitals in the preamble to the directive, the main reasons for its adoption were as follows:

... the effective pursuit of community co-insurance business should be facilitated by a minimum of co-ordination in order to prevent distortion of competition and inequality of treatment, without affecting the freedom existing in several member-States;
... such co-ordination covers only those co-insurance operations which are economically the most important, *i.e.* those which by reason of their nature or their size are liable to be covered by international co-insurance;
... this directive constitutes a first step towards the co-ordination of all operations which may be carried out by virtue of the freedom to provide services; whereas this co-ordination, in fact, is the object of the proposal for a second Council directive on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services ...;
... the leading insurer is better placed than the other co-insurers to assess claims and to fix the minimum amount of reserves for outstanding claims.
That proposal for a second directive, as amended in February 1978 in the light of the opinions of the Economic and Social Committee and the European Parliament, seeks to lay down specific provisions for facilitating the effective exercise of the freedom to provide services on the part of undertakings and in respect of the branches of insurance covered by Directive 73/239, particularly as regards the method of calculating technical reserves, the rules governing insurance contracts and supervision of the undertakings concerned.
It appears from the documents before the Court that significant progress has been achieved on certain points, namely definition of major risks, choice of the applicable law, compulsory insurance and procedures for the taking-up and pursuit of business in respect of major risks and mass risks.
On the other hand, other questions of a more technical nature such as the provisions dealing with transfers of portfolios or calculation of technical reserves are still under consideration. Furthermore, the discussions undertaken have not to date produced a unanimously acceptable solution regarding the application of rules on matching assets or the way in which certain types of *79 insurance are to be treated. The same is true of tax problems (methods of charging and

supervision). Finally, differences of opinion persist as to the demarcation line, in the field of direct insurance, between freedom to provide services and establishment.
2. In the *Federal Republic of Germany,* insurance undertakings, including those established in another member-State, are subject to the provisions of the Versicherungsaufsichtsgesetz (Insurance Supervision Act) as amended most recently by the Vierzehntes Änderungsgesetz (Fourteenth Act amending the Insurance Supervision Act) of 29 March 1983 [FN4] with a view to the transposition of Directive 78/473 into national law.

FN4 [1983] I Bgb1. 377.

Under section 105(1) of the Insurance Supervision Act foreign insurance undertakings which wish to carry out direct insurance operations in the Federal Republic through salesmen, representatives, agents or other intermediaries, must be authorised.
In addition, under section 106(2) of the Insurance Supervision Act those undertakings must set up an 'establishment' in the Federal Republic and 'keep available there all the commercial documents relating to that establishment,' for which separate accounts must be kept.
Section 111 of the Insurance Supervision Act provides for *exceptions* to those provisions.
(a) As regards certain types of transport insurance, section 111(1) of the Insurance Supervision Act provides that foreign insurance undertakings whose business is exclusively concerned with transport insurance are not subject to the provisions of the Act, 'in so far as they carry out direct insurance operations within the context of the freedom to provide services' within the meaning of the EEC Treaty.
(b) The second exception concerns *co-insurance.* Points 3 and 5 of section 111(2) provide that foreign insurance undertakings whose head office is in a member-State are not subject to the provisions of the Act in so far as they participate in the co-insurance of risks situated in the Community, provided that, *inter alia*, the leading insurer is authorised to cover the risks insured in the Federal Republic of Germany on his own (Point 3) and that the risk is not less than the amount fixed by regulation, in accordance with section 111(3) (Point 5). It is common ground that that authorisation means that the leading insurer must be authorised in the Federal Republic of Germany and have an establishment there. Point 2 of section 111(3) authorises the Federal Minister for Finance to adopt 'in order to implement the Council directives on insurance, measures concerning the size of the risks which may be covered in accordance with subparagraph *80 (2)' (hereinafter referred to as 'the thresholds'). It appears that those measures have not yet been adopted. However, in their place, a circular of the Bundesaufsichtsamt für das Versicherungswesen (Federal Insurance Supervision Office) of 31 May 1981 is applied. That circular provides, *inter alia*, that for fire insurance the application of Directive 78/473 is limited to cases in which the sums insured by contract amount to no less than 125 million DM. In the

sector of civil liability aircraft insurance the sum insured must be no less than 75 million DM per contract. Finally, where the risk is covered by general civil liability insurance, the insurer's turnover must be no less than 500 million DM.
Finally, under section 144(1) of the Insurance Supervision Act any person who concludes (or proposes to conclude) in the Federal Republic of Germany an insurance contract on behalf of an undertaking which does not possess the authorisation which it is required to have in order to carry out such insurance operations is guilty of an offence.
3. The Commission took the view that the German provisions set out above were contrary to **Articles 59** and **60** EEC and to Directive 78/473. Therefore, on 29 September 1983, it addressed a *formal letter* to the Federal Government pursuant to Article 169(1) EEC, calling on it to submit its observations. In that letter the Commission noted *inter alia* that under sections 105 and 106 of the Insurance Supervision Act foreign insurance undertakings which wish to conduct direct insurance business in the Federal Republic of Germany require an authorisation and must set up an establishment in the Federal Republic. As a result, in the first place, the freedom to provide services in the Federal Republic does not apply to insurance undertakings whose head offices are in another member-State unless their business is exclusively restricted to transport insurance. The second consequence is that insurance intermediaries operating in the Federal Republic are not authorised to propose to clients resident in the Federal Republic direct insurance contracts with insurers who are not established in the Federal Republic and whose head offices are in another member-State. In addition, the Commission criticised the fact that insurance undertakings whose head office is in a member-State, may, in accordance with Point 3 of section 111(2) of the Insurance Supervision Act, take part in the co-insurance of risks situated in the Community only if the leading insurer is also authorised to cover such risks in the Federal Republic of Germany on his own, in other words if he is established there and has obtained the requisite authorisation. Finally the Commission criticised Point 2 of section 111(3) of the Act, which authorises the Federal Minister of Finance to adopt measures on the size of the risks which may be covered by Community co-insurance. In particular the Commission *81 found fault with the high threshold laid down in the abovementioned circular of the Federal Supervision Office of 31 May 1981.
In its reply of 12 December 1983, the Federal Government claimed in particular that the only obligation of principle imposed by Articles 59 and 60 EEC was that there must be no discrimination against foreign undertakings. It argued that the German legislation took account of that requirement inasmuch as the obligation to obtain authorisation applied to German as well as foreign insurers. It further maintained that that obligation was justified in the public interest since in the Federal Republic of Germany the whole commercial activity of an insurer was subject to supervision and not only certain aspects thereof, such as financial soundness. In the Federal Government's view the standards for granting authorisation to insurers varied in the different member-States and the co-operation between the member-States, which was emphasised in Directive 73/239, was not yet sufficiently developed. Finally, with regard to Directive

78/473, the Government stated that it was necessary first to settle the question of the requirements of authorisation and establishment and that the directive would be rendered meaningless if the leading insurer were no longer required to be authorised in the country in which the risk insured was situated.
Subsequently, on 17 April 1984, the Commission addressed to the Federal Republic of Germany *the reasoned opinion* provided for in Article 169(1) EEC and requested the Federal Republic to comply with it within a period of two months. In that opinion the Commission claimed in particular that in respect of insurance services the requirements of establishment (section 106 of the Insurance Supervision Act) and authorisation (section 105 of the Insurance Supervision Act) were incompatible with **Article 59** EEC both as regards the direct insurer and as regards the leading insurer in co-insurance business. Similarly, Point 3 of section 111(2) of the Act imposed a restriction on the freedom to provide services and was incompatible with Directive 78/473. Finally, the high thresholds fixed by the circular of 31 May 1981 of the Federal Office for the Supervision of Insurance meant that the German provisions concerning Community co-insurance were not applicable to certain risks although the nature and the size of such risks made the participation of several insurers necessary. In the Commission's view, the Federal Republic had failed to implement Directive 78/473 correctly and thus to fulfil its obligations under **Articles 59** and **60** of the Treaty.
The Federal Government replied to the reasoned opinion on 7 July 1984 by a verbal communication from its Permanent Representative to the Communities. It contended that it was not necessary to amend the German legislation and that there were imperative reasons for not changing the existing provisions of *82 sections 105 *et seq.* of the Insurance Supervision Act. In addition, the Federal Government stressed that insurers whose head office was in a member-State were in no way prohibited from providing services, since sections 105 and 106 imposed the requirements of authorisation and establishment only where the foreign insurer wished to conduct insurance operations in the Federal Republic through salesmen, representatives, agents or other intermediaries. Through such persons foreign insurers could operate indefinitely on the German market as established insurers. There would therefore be an unjustified discrimination against established insurers if the two groups of insurers were subject, on the same market, to different provisions and if the foreign insurers could avoid the supervision of the German authorities.
4. By an application lodged at the Court Registry on 14 August 1984, the Commission brought this action.
By applications lodged at the Court Registry on 29 November and 4 December 1984 respectively, the United Kingdom and the Kingdom of the Netherlands requested leave to intervene in support of the Commission's conclusions. By applications lodged on 22 October, 22 November, 10 and 14 December 1984 respectively, the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Italian Republic and Ireland requested leave to intervene in support of the defendant's conclusions. By orders of 24 October and 12 December 1984 and 30 January 1985, the Court, having heard the views of the Advocate

General, decided to allow those applications.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to indicate in writing the provisions of Directive 78/473 which had been infringed by the rules in question, in so far as those rules require, in respect of risks situated in the Federal Republic of Germany, that the leading insurer must be established in the Federal Republic and authorised in the Federal Republic to cover on his own the risks insured. In addition, the Commission was requested to state whether the action also concerned life insurance and, if so, to state at the hearing its position on the specific problems of that branch of insurance.
The Commission replied that inasmuch as they required that, in the case of risks situated in the member-State concerned, the leading insurer must be established there and authorised to cover those risks as sole insurer, the German rules constituted an incorrect transposition into national law of Article 2(1)(c) and an infringement of Article 3 of Directive 78/473. It was true that Article 2(1)(c) was not very explicit in regard to the problem in question, namely the requirement that the leading insurer must have been granted an authorisation and be established in the *83 country in which the risk was situated. That Article must, however, be interpreted in the light of **Articles 59** and **60** of the Treaty, as the Council itself had emphasised in the abovementioned statement in the minutes relating to the adoption of the directive in question. Furthermore, Article 2(1)(c) referred to the First Co-ordination Directive, Directive 73/239, which did not require an insurer to apply for authorisation and to establish himself in the member-State in which the risk was situated and did not permit such a requirement to be imposed on him. The expression 'in the member-State in which the risk is situated' was to be found nowhere in the directives. According to Article 6 of the First Co-ordination Directive authorisation was required in the place where the undertaking carried on its business, that is to say where it established its head office, a branch or agency in order to conduct insurance business, irrespective of the place in which the risks were situated or the insurers resided. According to Article 3 of the co-insurance directive the right of Community undertakings to participate in co-insurance covered by the directive, whether as leading insurer or simple co-insurer, may not be made subject to requirements in addition to those prescribed by the directive itself.
The Commission added that the subject of the first head of claim considered in infringements of the Treaty resulting from the application of the Insurance Supervision Law which made no distinction, as regards the matters at issue, between life and non-life insurance. That head of claim therefore also related to life assurance as defined in the first 'life insurance' co-ordination directive, Directive 79/267, which was the counterpart of the first 'non-life' co-ordination directive of 1973.

Conclusions of the parties

The *Commission,* supported by the Kingdom of the Netherlands and, as regards

the claims set out below under head 1, (a) and (b), by the United Kingdom, claims that the Court should:
1. Declare that,
(a) by applying the Versicherungsaufsichtsgesetz, as amended by the Vierzehntes Änderungsgesetz (Fourteenth Act amending the Versicherungsaufsichtsgesetz) of 29 March 1983 which provides that where insurance undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business other than transport insurance through salesmen, representatives, agents or other intermediaries, such persons must be established and authorised in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of Germany may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers *84 established in another member-State, the Federal Republic has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty;
(b) by bringing into force and applying the Vierzehntes Änderungsgesetz zum Versicherungsaufsichtsgesetz of 29 March 1983, which was intended to implement Council Directive 78/473/EEC of 30 May 1978, the Federal Republic has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty and under the aforementioned directive in so far as that law provides in relation to the Community co-insurance operations that the leading insurer must be established in that State and authorised there to cover the risks insured also on his own;
(c) by the fixing through the Bundesaufsichtsamt (Federal Supervision Office), in the implementation of Directive 78/473/EEC, of excessively high thresholds in respect of the risks arising in connection with fire insurance, civil liability aircraft insurance and general civil liability insurance, which may be the subject of Community co-insurance, so that as a result co-insurance as a service is excluded in the Federal Republic of Germany for risks below those thresholds, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1(2) and 8 of the aforementioned directive and under **Articles 59** and **60** of the EEC Treaty;
2. Order the Federal Republic of Germany to pay the costs.

Opinion of the Advocate General (Sir Gordon Slynn)

These infringement proceedings brought by the Commission against the Federal Republic of Germany relate to certain restrictions imposed by that State on the provision of insurance.
In its application the Commission asks the Court to find that the Federal Republic of Germany:
1. By applying the Insurance Supervision Act as amended by the Act of 29 March 1983 which provides that where insurance undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business other than transport insurance through salesmen, representatives, agents or other intermediaries, such undertakings must be established and authorised in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of Germany

may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers established in another member-State, has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty; *85

2. By bringing into force and applying the Act of 29 March 1983, which was intended to implement Council Directive 78/473 of 30 May 1978, has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty and under the aforementioned directive in so far as that Act provides in relation to Community co-insurance operations that the leading insurer must be established in that State and authorised there to cover the risk insured also on his own;

3. By fixing through the Bundesaufsichtsamt (Federal Supervision Office), in the implementation of Directive 78/473, of excessively high threshold values in respect of the risk arising in connection with fire insurance, civil liability aircraft insurance and general civil liability insurance, which may be the subject of Community co-insurance, so that as a result co-insurance as a service is excluded in the Federal Republic of Germany for risks below those thresholds, has failed to fulfil its obligations under Articles 1(2) and 8 of the aforementioned directives and under **Articles 59** and **60** of the EEC Treaty.

Section 105(1) of the Insurance Supervision Act as amended requires foreign insurance undertakings wishing to carry out direct insurance operations in the Federal Republic of Germany through brokers, representatives, agents or other intermediaries to be authorised. Section 106(2) stipulates that, to obtain such an authorisation, an undertaking must be established in Germany and must retain there all the commercial documents relating to the establishment, for which separate accounts must be kept.

There is no corresponding restriction on the provision of insurance by companies established in other member-States without brokers or other intermediaries in Germany. Thus it is perfectly lawful for an insurer established in another member-State to cover a risk situated in Germany if the policyholder has gone directly to him without the aid of an intermediary in Germany.

Section 111(1) exempts foreign insurance companies whose business consists exclusively in insuring risks in classes 4 (railway rolling stock), 5 (aircraft), 6 (ships), 7 (goods in transit) and 12 (liability for ships) 'in so far as they carry out direct insurance operations within the context of the freedom to provide services.'

Section 111(2) relates to co-insurance. It exempts from the authorisation and establishment requirements all the participants in the co-insurance transaction other than the leading insurer. The latter must be authorised to insure by himself the risks of the kind in question and his insurance rates must apply to the transaction. Only risks of the classes covered by Directive 78/473 fall within this paragraph.

Section 111(3)(2) empowers the Federal Minister of Finance to adopt regulations laying down thresholds below which Community *86 co-insurance is prohibited. No such regulations have in fact been adopted. Instead, thresholds have been laid down by a circular of the Bundesaufsichtsamt dated 31 May 1981. For risks in classes 8 (fire and natural forces), 9 (other damage to property) and 16 (miscellaneous financial loss) the sum insured under any one contract must be not less than 125 million DM. For risks in class 11 (aircraft liability) the sum

insured under any one contract must be not less than 75 million DM. The insured must have a turnover of at least 500 million DM where the risk falls within class 13 (general liability), though damage arising from nuclear sources or from medicinal products is not caught either by the 1978 Directive or by section 111(2). The circular does not prescribe any thresholds for risks in classes 4 to 7 or 12. This flows from the exemption contained in section 111(1) of the Act. Lastly, section 144a(1) creates a criminal offence of providing unauthorised insurance. This was the provision which was in issue in the Schleicher case [FN5] which came before the Kammergericht in Berlin. In that case the court upheld the conviction of a German broker who had offered to persons resident in Germany insurance coverage from British companies not approved by the German authorities. The court, against whose judgment no appeal lay, found that the German provisions were compatible with Community law, and refused to make a reference for a preliminary ruling on the matter.

FN5 Unreported.

Admissibility

For the reasons given in my Opinion in Case 220/83 E.C. Commission v. France [FN6] I consider that these proceedings are not inadmissible on the general grounds there discussed.

FN6 Reported below at p.113.

The Second Question

The second question is limited to co-insurance and is parallel to the main question at issue in the case against France and Cases 252/83 Denmark [FN7] and 206/84 Ireland. [FN8] It is convenient to deal with it first.

FN7 Reported below at p.169.

FN8 Reported below at p.150.

In this case the requirement of establishment seems to be more onerous even than in the other three cases since the branch in the Federal Republic must be an independent working unit with separate accounts and not merely a branch or agency of the insurer's head office. The number of staff required to man, and the cost of running, such an independent branch is obviously substantial, whether or not the Commission's estimate of at least 30 staff and annual running costs of at least 1.8 million DM is right. This seems *87 effectively to rule out the possibility of an insurer from another member-State taking part in an occasional co-insurance contract (in which he may have only a small percentage of the risk). For the reasons given in my Opinion in the case against France I do not consider that this requirement is justified in respect of the leading insurer.
The requirement of authorisation in the present German legislation is essentially

linked with the obligation to be established, subject again to an exception for those who are exclusively engaged in transport insurance of the categories mentioned. There is undoubtedly detailed examination of many matters before authorisation is given. The aim is said to be to achieve 'transparency', the method to require so far as possible that the terms offered by various insurers should be broadly uniform. The facts in case 251/83 Haug Adrion v. Frankfurter-Versicherungsag [FN9] provide an illustration of this.

FN9 [1984] E.C.R. 4277, [1985] 3 C.M.L.R. 266.

In the case of co-insurance where the policy holders are likely to be large commercial or industrial concerns and the policies 'tailor-made' for the particular and often exceptional risk, I do not accept that the requirement of prior authorisation of the insurer to carry on business in the Federal Republic has been shown to be justified. The reasons given in my Opinion in France seem to apply at least equally here. For these reasons I consider that the Commission is entitled to the declaration it seeks under **Articles 59** and **60** of the Treaty. Article 3 of Council Directive 78/473 [FN10] on co-insurance provides that ' the right of undertakings which have their head office in a member-State and which are subject to and satisfy the requirements of the First Co-ordination Directive to participate in Community insurance may not be made subject to any provisions other than those of this Directive.' The Commission relies upon that in this case and in the case against Ireland, though not in the cases against France and Denmark. I doubt if it adds anything to the obligation existing under **Articles 59** and **60** of the Treaty so far as the requirements of establishment and prior authorisation are concerned. I would not, however, read it as excluding a member-State's rights to impose legal rules which must be observed in the making of insurance contracts and which are justified for the general good.

FN10 [1978] O.J. L151/25, [1978] 1 Commercial Laws of Europe 193.

The First Question

The first question is of very much wider import, since the law of the Federal Republic bars all insurers from other member-States from offering insurance in the Federal Republic, save where the insurer deals exclusively with transport or is a co-insurer other than *88 the leading insurer, unless established and authorised there in respect of all forms of insurance, whatever their scope and whatever the financial or other status of the insured.
The first matter which arises is whether these proceedings cover life insurance. The reasoned opinion and the application are in general terms and they do not expressly exclude life assurance; nonetheless, life assurance is not mentioned, nor is there any discussion of Council Directive 79/267 on the taking up and pursuit of direct life assurance. [FN11] It is true that its provisions follow closely those of the 1973 Directive on non-life insurance [FN12] but in the cases against France and Denmark there was no discussion of life assurance and it was only in answer to a written question from the Court that it was said that the claim in this

case was intended to cover life assurance. It was only at the hearing that the Commission really addressed itself to the specific question of life assurance.

FN11 [1979] O.J. L63/1, [1979] 1 Commercial Laws of Europe 121.

FN12 [1973] O.J. L228/3.

On the other hand no cogent arguments have been put forward by the Federal Republic on the basis that, even if its provisions were not justified in respect of non-life insurance, there were special factors which justified the requirement of establishment and prior authorisation in respect of insurers providing life assurance. There is, moreover, some force in the Commission's argument that this kind of restriction may act as a deterrent to persons wishing to exercise their right to settle in Germany under Articles 48 and 52 of the Treaty. Though not without some doubt, I would read the application as being in general terms covering life and non-life insurance, since the rules which are challenged themselves cover both forms of insurance.

There are differences between co-insurance and direct insurance with one insurer even though the latter may reinsure part of the risk. A greater range of risks is likely to be covered; the individual citizen, as well as the large company with a legal or indeed an expert insurance department, may want (indeed, as with motor cars, may be obliged) to take out insurance. Medical and accident insurance may involve different legal and social considerations from the insurance of a house and its contents, or of employees, or of property at risk from the escape of gas or other substances, or of such items as valuable jewellery, a luxury yacht or antiques.

There can be no doubt that pending harmonisation at Community level national law may prescribe specific rules in relation to insurance generally or as to specific branches of insurance. Article 10(3) of the 1973 Directive itself recognises the fact: 'These co-ordinating measures do not prevent member-States from enforcing provisions requiring for all insurance undertakings approval of the general and special policy conditions, tariffs and any other documents necessary for the normal exercise of supervision.'

*89 Many of the arguments advanced, carefully and in depth, by the Federal Republic seem to me to provide cogent argument for the maintenance of at any rate some national rules in the general interest and, in particular, for the protection of the insured and third parties who may be affected if the risk materialises.

That, however, is not the central issue in this case. The issue is whether in addition to these rules a requirement of establishment and authorisation across the board can be justified consistent with the Treaty.

In the first place I find it impossible to accept the argument that whilst a citizen of the Federal Republic can contract directly with an insurer in Paris or Rome or London, it is consistent with **Articles 59** and **60** of the Treaty that he cannot do so through the intermediary of a German broker. Nothing that has been said on behalf of the Federal Republic or the member-States intervening on its behalf

seems to me to justify such a restriction. Since it may be convenient for a citizen who understands only German to go through a broker who has a continuing business link with an insurer in another member-State, it seems to me if anything to take away one of the grounds of protection which is relied on. It deprives the insurer of the assistance of the German broker: it may deprive the assured of more favourable terms than he could get in the Federal Republic.

Whether the insurer who wishes to undertake insurance in Germany needs in the general interest to be established and receive a prior authorisation there--so that he cannot provide his services through salesmen, representatives or agents or other intermediaries--raises a wider issue.

I do not accept the argument that if an insurer from another member-State provides insurance regularly in Germany he must have such necessary accommodation and equipment there that in effect he becomes established and that no question as to the provision of services arises. I am not persuaded that insurance is so different that there cannot be both establishment and the provision of services as separate activities, or that even if the precise distinction between establishment and services has not yet been fully defined, there is no difference between the two. In other words, in my opinion, the appointment of an agent or representative in Germany does not *per se* necessarily constitute establishment. Nor can I see in principle why insurance services by an insurer from another member-State who visits Germany for that purpose on an occasional basis should not be permitted *per se* to do so.

That an insurer who does become established in Germany by setting up an agency or branch should be subject to control by the competent German authorities in respect of its financial standing and solvency seems to me to be justified and necessary. Such control is expressly provided for in the 1973 Directive. To go *90 further and to say that it must be established and authorised there to ensure such financial control is quite a different matter and to my mind ignores the control established by the Council in that directive which has not been shown to be insufficient. Despite all the arguments to the contrary, this requirement of German law clearly duplicates to a significant extent the control provided for in that directive in respect of one who is not established in Germany, since the member-State where the head office is established is required (a) to verify the solvency of the undertaking with respect to its entire business (Article 14), and (b) to ensure that the undertaking has equivalent matching assets in each country where business is carried on (Article 15(2) and (4)) and that the solvency margin is established in respect of its 'entire' business (Article 16(1)). Such requirement of German law ignores the degree of co-operation and cross-communication required between member-States in regard to financial standing. It also, as the Commission has shown, and as the Federal Republic has only challenged in detail, substantially increases the cost, thereby inevitably making the non-German insurer less competitive.

But for the 1973 and 1979 Directives there would have been a strong, probably irrefutable, case that before an insurer began providing services in another member-State the competent authorities should be able to check on its solvency, after taking account of the checks made and conditions imposed in the member-

State where it is established. That I regard as no longer the position since the two directives were made by the Council. It is not justified to ignore the controls to be exercised pursuant to the directive by other member-States; on the contrary it must be accepted as sufficient even if there are some differences in the practice of member-States.
As to matters other than financial standing, it seems to me that, subject to harmonisation, national law may impose requirements as to the terms to be included in particular types of policy, indeed perhaps in all policies, and as to the control to be exercised in relation to the conduct of insurance business, so long as they do not discriminate against non-German nationals as such, so long as they are proportional to the aims to be achieved in the public interest, and so long as they take account of controls existing which are adequately enforced in other member-States. Thus provisions as to notification by insurers of their intention to offer insurance in Germany, of the kind of business they wish to transact, as to the nomination of an agent for the service of documents, as to the use of the German language and German law for certain types of insurance and as to the deposit of documents, may be justified. Matters other than financial standing which are necessary in the general good for the protection of the insured and third parties fall *91 to be dealt with by national laws. The person providing the insurance must observe these laws so long as they do not go beyond what the Court in such cases as Van Binsbergen [FN13] and Webb [FN14] has accepted as being justified in the public interest. On the other hand, there is far less need for a personal presence in this sort of case than that which was found to be justified in Van Binsbergen

FN13 [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298.

FN14 [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719.

I do not consider that it has been shown in this case that the adoption of such national provisions falling short of a requirement of establishment and authorisation are insufficient or that establishment and prior authorisation are justified and indispensable to achieve the aims which it is sought to achieve. Even though the argument in favour of requiring prior authorisation ('licensing') may be stronger than that in favour of requiring establishment, so long as there is a right of appeal to the courts against refusal, and even though the arguments in favour of prior licensing in respect of general insurance are stronger than in the case of the leading insurer in co-insurance, I do not, in any event, consider that the particularly detailed and stringent requirements of the German authorisation have been shown to be justified. They may in large part have been in existence since the beginning of this century, as has been urged upon the Court; they do, however, seem to me to run counter to the provisions of **Articles 59** and **60** of the Treaty. They also appear to ignore differences between different risks and the different standing of different insurers. It is not without significance that other member-States which require authorisation in respect of the leading insurer do not require such detailed prior investigation; that two member-States with

substantial insurance businesses do not require authorisation at all.
The arguments based on violations of national sovereignty in this case seem to me not to be justified in the light of the provisions of the Treaty and the directives. The fact that much may remain to be harmonised does not mean that establishment and prior authorisation are *per se* justified. I would accordingly accept, despite the greater importance of consumer protection and the protection of third parties than appears to exist in the co-insurance cases, that the Commission has established the first claim in this case.

The Third Question

The claim under **Articles 59** and **60** is limited to saying that the thresholds set are too high. It does not say that thresholds may not be set at all. I consider for the reasons given in the case against *92 FRANCE that it has not been shown to be justified for thresholds to be fixed under **Articles 59** and **60** for co-insurance. If I had come to the opposite view I should have concluded that thresholds may not be fixed so as to exclude (a) cases where the amount involved may not be very large but the likelihood of the risk is so great that it is reasonable to co-insure; or (b) cases which are currently accepted by the market as being the normal subject matter of co-insurance. On this basis it does not seem to me that even though the maxima fixed seem in absolute terms high, the Commission has adduced any evidence to show that the figures adopted are so high that they go beyond what is reasonably justified in the general interest and therefore in breach of **Articles 59** and **60** of the Treaty. This seems to me to be entirely a matter of evidence.
As to the alternative claim under the directive, Article 1(2) of Directive 78/473 provides:
This Directive shall apply to risks referred to in the first sub-paragraph of paragraph 1 which by reason of their nature or size call for the participation of several insured [*i.e.* insurers] for their coverage.
Any difficulties which may arise in implementing this principle shall be examined pursuant to Article 8.
Article 8 reads as follows:
The Commission and the competent authorities of the member-States shall co-operate closely for the purposes of examining any difficulties which might arise in implementing this Directive.
In the course of this co-operation they shall examine in particular any practices which might indicate that the purpose of the provisions of this Directive and in particular Article 1(2) and Article 2 are being misused either in that the leading insurer does not assume the leader's role in co-insurance practice or that the risks clearly do not require the participation of two or more insurers for their coverage.
By a declaration entered into its minutes when adopting this directive, the Council invited the supervisory authorities of the member-States to adopt any measures in co-operation with the Commission to determine by agreement, within a period of 12 months from the notification of the directive, general indications as to what was to be understood by 'nature' and 'size' of the risk justifying recourse to co-

insurance. The declaration went on to state that the Council accepted that for legislative and administrative reasons the member-States might incorporate in their legislation implementing the directive criteria for the interpretation of the first sub-paragraph of Article 1(2).
As I understand it, this led to the setting up of a working group at which the majority of the supervisory authorities decided on quantitative thresholds below which co-insurance within the directive was not to be permitted. The thresholds set by the four defendant member-States therefore bear a very close similarity to one another. Below these thresholds Community co-insurance is precluded in *93 each of these member-States. It follows that all of the co-insurers are required to be established in the State of the risk and duly authorised by the authorities of that State in respect of co-insurance below these thresholds.
The Commission's claim again here is limited to saying that the thresholds set are too high. It does not say that they may not be set at all. Whether the member-States are entitled independently, or whether a few of them in agreement are entitled, to fix these thresholds under the directive is not immediately clear. I read Article 1(2) of the 1978 Directive, however, as leaving it to market forces to decide what risks by reason of their nature and size call for co-insurance. It is only if it is found that the provisions of the directive are being misused, in that the co-insurance directive is being used for insurance which does not normally call for co-insurance or if difficulties in the application of the Directive arise, that member-States and the Commission are to consider those practices. It may be that, if such difficulties were shown to exist, it would be reasonable for the Community to adopt amongst other measures, the fixing of thresholds. I do not consider, however, that the Council's Declaration empowered the member-States to set thresholds under the directive. If thresholds are to be fixed under the directive it seems to me that they have to be fixed by the Council by a further directive or by the Commission if power to do so is delegated to it. The directive does not, and in any event cannot, validly confer an open-ended power on member-States to lay down thresholds and thereby determine the scope of the directive (Case 23/75 Rey Soda [FN15]). There is accordingly no power under the directive for member-States to fix thresholds.

FN15 [1975] E.C.R. 1279, [1976] 1 C.M.L.R. 185.

It seems to me in any event to be strongly arguable that even if there were prior to the making of the directive an inherent power in member-States to fix thresholds by way of a justified limitation on the rights conferred by **Articles 59** and **60**, the directive preempts that power in respect of the classes specified in the 1978 Directive. If thresholds are needed they must be fixed by the Community.
If contrary to that view the member-States are empowered to fix thresholds under the directive, then there is again no evidence in this case to show that they are unreasonably high. This is a matter which if it cannot be agreed the Commission may need to reconsider.
It would, however, not on any view be an answer to the claim that only maxima

had been fixed since clearly the thresholds could be set at any figure up to those maxima.

Conclusion

In the light of these considerations I am of the opinion that:
1. By applying the Insurance Supervision Act as amended by the Act of 29 March 1983 which provides that where insurance *94 undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business other than transport insurance through salesmen, representatives, agents or other intermediaries, such undertakings must be established and authorised in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of Germany may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers established in another member-State, has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty;
2. By bringing into force and applying the Act of 29 March 1983, which was intended to implement Council Directive 78/473 of 30 May 1978, the Federal Republic has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty and under the aforementioned directive in so far as that Act provides in relation to Community co-insurance operations that the leading insurers must be established in that State and authorised there to cover the risk insured also on his own;
3. The fixing of thresholds for certain classes of insurance, below which co-insurance is prohibited, is contrary to **Articles 59** and **60** of the Treaty; it is not open to a member-State to fix those thresholds under Directive 78/473.
It seems to me that the Federal Republic should pay the Commission's costs and the costs of the Netherlands and the United Kingdom. Belgium, Denmark, France, Ireland and Italy, which intervened on behalf of the Federal Republic should in my view bear their own costs.

JUDGMENT

[1] By an application lodged at the Court Registry on 14 August 1984 the Commission of the European Communities brought an action before the Court under Article 169 EEC for a declaration that,
(a) by applying the Versicherungsaufsichtsgesetz (Insurance Supervision Act) as amended by the Vierzehntes Änderungsgesetz (Fourteenth Act amending the Versicherungsaufsichtsgesetz) of 29 March 1983 which provides that where insurance undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business, other than transport insurance, through salesmen, representatives, agents or other intermediaries, such persons must be established and authorised in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of *95 Germany may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers established in another member-State, the Federal Republic has failed to fulfil its obligations under

Articles 59 and 60 of the EEC Treaty;
(b) by bringing into force and applying the Vierzehntes Änderungsgesetz zum Versicherungsaufsichtsgesetz, which was intended to transpose into national law Council Directive 78/473 of 30 May 1978 on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance, the Federal Republic of Germany has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty and under the aforementioned directive in so far as that Act provides in relation to the Community co-insurance operations that the leading insurer (in the case of risks situated in the Federal Republic of Germany) must be established in that State and authorised there to cover the risks insured also as sole insurer;
(c) by the fixing through the Bundesaufsichtsamt für das Versicherungswesen (Federal Insurance Supervision Office), in the context of the transposition into national law of the aforementioned directive, excessively high thresholds in respect of the risks arising in connection with free insurance, civil liability aircraft insurance and general civil liability insurance, which may be the subject of Community co-insurance, so that as a result co-insurance as a service is excluded in the Federal Republic of Germany for risks below those thresholds, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1(2) and 8 of the said directive and under **Articles 59** and **60** of the EEC Treaty.
[2] The Commission has also brought actions against the French Republic (Case 220/83), Denmark (Case 252/83) and Ireland (Case 206/84) [FN16] in connection with the transposition by those States of Directive 78/473 [FN17] into their national law. The Commission's heads of claim in those actions are largely the same as those which are set out under (b) and (c) in its conclusions in this case. On the other hand, no head of claim corresponding to that under (a) is formulated in those actions, although in the said member-States the general legislation on the supervision of insurance undertakings contains restrictions similar to those which are the subject of that head of claim.

FN16 See footnotes 6, 7 and 8 above.

FN17 [1978] O.J. L151/25, [1978] 1 Commercial Laws of Europe 193.

[3] In these proceedings, the Belgian, Danish, French, Irish and Italian Governments have intervened in support of the Federal Republic of Germany, whilst the United Kingdom and the *96 Netherlands Governments have intervened in support of the Commission.
[4] Reference is made to the Report for the Hearing for the provisions of the German legislation in question, the Community co-ordination directives relating to insurance and the submissions and arguments of the original parties and the interveners, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I. Admissibility

[5] It is necessary to consider *in limine* certain questions of admissibility which were argued before the Court
[6] The Irish Government maintains that by bringing all the aforementioned actions the Commission is seeking to pre-empt the procedures already set in train by the Council under Article 57(2) of the Treaty. The proposal for a second directive concerning direct insurance other than life assurance, [FN18] (hereinafter referred to as 'the proposal for a second directive'), which is currently under discussion within the Council, deals with exactly the same problems as are at issue in these proceedings, concerning the definition of the scope of the freedom to provide services. The Irish Government considers that in reality the Commission is asking the Court to perform the task assigned by the Treaty to the Council.

FN18 [1986] O.J. C32/2.

[7] In that respect it must be borne in mind that, under Article 155 EEC, the Commission is required to ensure that the provisions of the Treaty are applied. It is open to the Commission, in carrying out that task, to bring an action under Article 169 if it considers that a member-State has failed to fulfil one of its obligations under the Treaty. The mere fact that a proposal for a legislative measure, which if adopted and transposed into national law would terminate the infringements alleged by the Commission, has already been submitted to the Council does not prevent the Commission from bringing such an action.
[8] The French and Irish Governments maintain that the Commission is in reality calling in issue the conformity of Directive 78/473 with the Treaty and, therefore, contesting the legality of that directive. The Commission failed to bring an action within the period prescribed to have the directive declared void. Those Governments accordingly voice serious doubts as to the admissibility of the Commission's action, which, in their view, seeks to call in question a measure of Community law which must be deemed to have become definitive.
[9] That argument brings to light the existence of differences in the interpretation of the directive. In its application, the Commission construes the directive in accordance with its *97 interpretation of **Articles 59** and **60** EEC, whereas the two Governments' reading of the directive is not consistent with that interpretation of **Articles 59** and **60.** Such questions of interpretation can be resolved only when the substance of the case is considered.
[10] Consequently there are no grounds which would prevent the Court from considering the substance of the case.

II. Substance

A. The Commission's first head of claim

1. The subject of that head of claim

[11] It appears from the actual wording of the Commission's conclusions that the

first head of claim concerns the requirements of authorisation and establishment imposed by the Insurance Supervision Act on any provider of services in the sector of direct insurance in general, other than transport insurance, which is not subject to those requirements, and Community co-insurance, which is the subject of the second and third heads of claim. In addition the Court notes that at the hearing the Commission stated that the action did not concern compulsory insurance.

[12] On the other hand, in reply to a question put to it by the Court, the Commission explained that, unlike the heads of claim relating to Community co-insurance, the first head of claim also concerned life assurance. At the hearing the German Government confirmed that it had never disputed that the action brought against it concerned life assurance. Certain of the Governments intervening in support of the Federal Republic of Germany nevertheless considered that the Commission's reply was an attempt to extend the subject-matter of the action, thus depriving them of the opportunity to present argument in relation to situations peculiar to the sector of life assurance.

[13] In that respect, it should be noted that the reasoned opinion and the application are drafted in general terms and refer to German provisions which also apply to life assurance. It is true that those two documents mention only Council Directive 73/239 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [FN19] and the aforementioned Directive 78/473 relating to Community co-insurance, and not Council Directive 79/267 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance. [FN20] That can, however, be explained by the fact that the 1979 directive does not differ from the 1973 directive on the points which are relevant to these proceedings. Although life assurance does indeed raise specific *98 problems, in particular in relation to the conditions of insurance and the place of investment of technical reserves, such problems may be distinguished from those raised by the requirements of establishment and authorisation which are the only matters contested by the Commission under its first head of claim. That being so, the Commission's reply should be regarded as a clarification and not as an extension of the action.

FN19 [1973] O.J. L228/3.

FN20 [1979] O.J. L63/1, [1979] 1 Commercial Laws of Europe 121.

[14] In its first head of claim the Commission refers separately to the fact that the Insurance Supervision Act prohibits intermediaries established in the Federal Republic of Germany from arranging contracts of insurance for persons resident in that State with insurers established in another member-State. During the proceedings before the Court the Commission and the United Kingdom argued that in giving advice on the choice of insurance and insurers such intermediaries were acting solely on behalf of persons seeking insurance. The reasons relating

to the protection of such persons which the German Government put forward could not therefore in any way justify that prohibition, especially as, according to the German Government, the Insurance Supervision Act did not prohibit persons seeking insurance who were resident in the Federal Republic from dealing directly with the foreign insurance undertaking in question.
[15] In reply the German Government states that where the person seeking insurance applies on his own initiative directly to a foreign insurance undertaking he is aware that he is foregoing the protection afforded by the legislation of his country. On the other hand, where the person seeking insurance does so through an intermediary established in the Federal Republic of Germany he is dealing with a local undertaking which, nevertheless, conducts its business on behalf of insurance undertakings and, in the case in point, on behalf of an undertaking which is neither established nor authorised in Germany. The prohibition in question therefore constitutes a necessary complement to the requirements of establishment and authorisation.
[16] In that connection it should be noted that the profession of intermediary in the insurance sector is not the subject of any Community legislation on the basis of which the Court could hold that an intermediary is acting on behalf of one or other of the parties to an insurance contract. In addition, the fact that an insurance contract has been negotiated through an intermediary who is not an authorised agent of the foreign insurance undertaking cannot change the nature of that contract as representing a service provided by that undertaking to the policy-holder. It follows that as regards the rules on the freedom to provide services, the prohibition in question cannot be separated from the head of claim concerning the requirements of establishment and authorisation imposed on insurance undertakings as providers of services. It is *99 therefore sufficient for the Court to adjudicate on that head of claim.
[17] It must therefore be concluded that the Commission's first head of claim concerns all insurance business other than transport insurance, Community co-insurance and compulsory insurance and that it refers to the requirements of establishment and authorisation imposed by the German legislation on Community insurers as providers of services within the meaning of the Treaty.

The provisions of services in the context of insurance

[18] According to Article 59(1) EEC, the abolition of restrictions on the freedom to provide services within the Community concerns all services provided by nationals to member-States who are established in a State of the Community other than that of the person for whom the services are intended. Article 60(1) provides that services are to be considered to be 'services' within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
[19] Those **Articles** require the abolition of all restrictions on the free movement of the provision of services, as thus defined, subject nevertheless to the provisions of Article 61 and those of Articles 55 and 56 to which Article 66 refers.

Although those provisions are not at issue in these proceedings, the Italian Government has made the observation that, according to Article 61(2), the liberalisation of insurance services connected with movements of capital must be effected in step with the progressive liberalisation of the movement of capital. In that respect it should, however, be pointed out that the First Council Directive for the implementation of Article 67 of the Treaty of 11 May 1960 [FN21] already provided that member-States were to grant all foreign exchange authorisations required for capital movements in respect of transfers in performance of insurance contracts as and when freedom of movement in respect of services was extended to those contracts in implementation of **Articles 59** *et seq.* of the Treaty.

FN21 [1959-1962] O.J. Spec.Ed. 49.

[20] Although the rules on movements of capital are therefore not of such a nature as to restrict the freedom to conclude insurance contracts in the context of the provision of services under **Articles 59** and **60,** it is, however, necessary to determine the scope of those **Articles** in relation to the provisions of the Treaty on the right of establishment.
[21] In that respect, it must be acknowledged that an insurance undertaking of another member-State which maintains a permanent presence in the member-State in question comes within the scope of the provisions of the Treaty on the right of establishment, even *100 if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. In the light of the aforementioned definition contained in **Article 60(1),** such an insurance undertaking cannot therefore avail itself of **Articles 59** and **60** with regard to its activities in the member-State in question.
[22] Similarly, as the Court held in Case 33/74, Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid [FN22] a member-State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by **Article 59** for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

FN22 [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298.

[23] Finally, it should be mentioned that since the scope of **Articles 59** and **60** is defined by reference to the places of establishment or of residence of the provider of the services and of the person for whom they are intended, special problems may arise where the risk covered by the insurance contract is situated on the territory of a member-State other than that of the policy-holder, as the

person for whom the services are intended. The Court does not propose in these proceedings to consider such problems, which were not the subject of argument before it. The following examination therefore concerns only insurance against risks situated in the member-State of the policy-holder (hereinafter referred to as 'the State in which the service is provided').
[24] It follows from the foregoing that in order to give judgment in these proceedings it is necessary to consider only the provision of services relating to contracts of insurance against risks situated in a member-State concluded by a policy-holder established or residing in that State with an insurer who is established in another member-State and who does not maintain any permanent presence in the first State or direct his business activities entirely or principally towards the territory of that State.

3. The conformity of the contested requirements with Articles 59 and 60 of the Treaty

[25] According to the well-established case law of the Court, **Articles 59** and **60** EEC became directly applicable on the expiry of the transitional period, and their applicability was not conditional on the harmonisation or the co-ordination of the laws of the *101 member-States. Those **Articles** require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a member-State other than that in which the service is to be provided.
[26] Since the German Government and certain other of the Governments intervening in its support have referred to the third paragraph of **Article 60** as a basis for their contention that the State of the person insured can also apply its supervisory legislation to insurers established in another member-State, it should be added, as the Court made clear in particular in Case 279/80, Webb, [FN23] that the principal aim of that paragraph is to enable the provider of the service to pursue his activities in the member-State where the service is given without suffering discrimination in favour of the nationals of the State. However, it does not follow from that paragraph that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other member-States.

FN23 [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719.

[27] The Court has nevertheless accepted, in particular in Joined Cases 110 and 111/78, Ministere Public v. Van Wesemael [FN24] and Case 279/80, Webb, that regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered to be incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions

which are justified by the general good and which are applied to all persons or undertakings operating within the territory of that State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the member-State of his establishment. In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.

FN24 [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87.

[28] It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another member-State, authorised by the supervisory authority of that State and subject to the supervision of that authority, must have a permanent establishment within the territory of the State in which the service is provided and that he must obtain a separate authorisation from the supervisory authority of that State, constitute *102 restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided, in particular where the insurer conducts business in that State only occasionally.
[29] It follows that those requirements may be regarded as compatible with **Articles 59** and **60** EEC only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules.
(a) The existence of an interest justifying certain restrictions on the freedom to provide insurance services.
[30] As the German Government and the parties intervening in its support have maintained, without being contradicted by the Commission or the United Kingdom and Dutch Governments, the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer both as a policy-holder and as an insured person. This is so in particular because of the specific nature of the service provided by the insurer, which is linked to future events, the occurrence of which, or at least the timing of which, is uncertain at the time when the contract is concluded. An insured person who does not obtain payment under a policy following an event giving rise to a claim may find himself in a very precarious position. Similarly, it is as a rule very difficult for a person seeking insurance to judge whether the likely future development of the insurer's financial position and the terms of the contract, usually imposed by the insurer, offer him sufficient guarantees that he will receive payment under the policy if a claimable event occurs.
[31] It must also be borne in mind, as the German Government has pointed out, that in certain fields insurance has become a mass phenomenon. Contracts are concluded by such enormous numbers of policy-holders that the protection of the interests of insured persons and injured third parties affects virtually the whole population.

[32] Those special characteristics, which are peculiar to the insurance sector, have led all the member-States to introduce legislation making insurance undertakings subject to mandatory rules both as regards their financial position and the conditions of insurance which they apply, and to permanent supervision to ensure that those rules are complied with.
[33] It therefore appears that in the field in question there are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services, provided, however, that the rules of the State of establishment are not adequate in order to achieve the necessary level of protection and that the *103 requirements of the State in which the service is provided do not exceed what is necessary in that respect.
(b) The question of whether the public interest is already protected by the rules of the State of establishment
[34] The Commission and the United Kingdom and Dutch Governments maintain that, in any event, since the adoption of the first Co-ordination Directives, namely Directives 73/239 and 79/267, the supervision by the authorities of the State of establishment to a large extent meets the considerations of protection mentioned above.
[35] In that respect it should be observed *in limine* that according to their preambles and the wording of their provisions, those two directives are intended to facilitate the setting-up of branches or agencies in a member-State other than that in which the head office is situated. They lay down rules governing the relationship between, on the one hand, the legislation and the supervisory authority of the State in which the head office is situated, and, on the other hand, the legislation and the supervisory authority of States in which the undertaking has set up branches or agencies: but they do not concern the activities pursued by the undertaking in the context of the provision of services within the meaning of the Treaty. Consequently the provisions of those directives cannot be applied to the relationship between the State of establishment, where the head office, branch or agency is situated, and the State in which the service is provided. That relationship is considered only in the proposal for a second directive.
[36] It is however necessary to consider whether the two 'First Directives' have nevertheless provided for conditions for conducting insurance business which are sufficiently equivalent throughout the Community and means of supervision which are sufficiently effective for the restrictions imposed by the States in which the services are provided on the undertakings providing them to be entirely, or at least partially, abolished.
[37] As regards the financial position of insurance undertakings, the two directives contain very detailed provisions on the free assets of the undertaking, in other words its own capital resources. Those provisions are intended to ensure that the undertaking is solvent and the directives require the supervisory authority of the member-State in which the head office is situated to verify the state of solvency of the undertaking 'with respect to its entire business.' That expression must be construed as also covering business conducted in the context of the provision of services. It follows that the State in which the service is provided is not entitled to carry out such verifications itself, but must accept a certificate of

solvency drawn up by the supervisory authority of the member-State in whose territory the head office of the undertaking providing the service is situated. According to the German Government, *104 which has not been contradicted by the Commission, that is the case in the Federal Republic of Germany.
[38] On the other hand, the two directives did not harmonise the national rules concerning technical reserves, in other words financial resources which are set aside to guarantee liabilities under contracts entered into and which do not form part of the undertaking's own capital resources. The directives expressly left the necessary harmonisation in that respect to later directives. Thus under Directives 73/239 and 79/267 it is for each country in which business is carried on to lay down rules according to its own law for the calculation of such reserves and for determining the nature of and valuing the assets which represent such reserves. The assets covering business conducted in the member-State in which the service is provided must be localised in that State and their existence monitored by the supervisory authority of that State, although the directives provide that the State in which the head office is situated must verify that the balance sheet of the undertaking shows equivalent and matching assets to the underwriting liabilities assumed in all the countries in which it undertakes business. The abolition of that requirement of localisation is proposed only in the draft for a second directive which concerns in particular the harmonisation of national provisions relating to technical reserves.
[39] In the course of the proceedings before the Court, the German Government and the Governments intervening in its support have shown that considerable differences exist in the national rules currently in force concerning technical reserves and the assets which represent such reserves. In the absence of harmonisation in that respect and of any rule requiring the supervisory authority of the member-State of establishment to supervise compliance with the rules in force in the State in which the service is provided, it must be recognised that the latter State is justified in requiring and supervising compliance with its own rules on technical reserves with regard to services provided within its territory, provided that such rules do not exceed what is necessary for the purpose of ensuring that policy-holders and insured persons are protected.
[40] Finally, the two 'First Co-ordination Directives' make no provision for harmonisation of the conditions of insurance and leave to each member-State in which business is conducted the task of ensuring that its own mandatory rules are complied with in respect of business carried on within its territory. The proposal for a second directive defines the scope of such mandatory rules and excludes their application to certain types of commerical insurance which are defined in detail. In view of the considerable differences existing between national rules in that respect it must be stated that, in this connection too and subject to the same reservation, the member-State in which the service is provided is justified in *105 requiring and verifying compliance with its own rules in respect of services provided within its territory.
[41] It must therefore be recognised that, in the present state of Community law, the considerations described above relating to the protection of policy-holders and insured persons justify the application by the member-State in which the

service is provided of its own legislation concerning technical reserves and the conditions of insurance, provided that the requirements of that legislation do not exceed what is necessary to ensure the protection of policy-holders and insured persons. It therefore remains to consider whether it is necessary for such supervision to be effected under an authorisation procedure and on the basis of a requirement that the insurance undertaking should have a permanent establishment in the State in which the service is provided.

(c) The necessity of an authorisation procedure

[42] The Commission does not dispute that the State in which the service is provided is entitled to exercise a certain control over insurance undertakings which provide services within its territory. At the hearing it even accepted that it was permissible to provide for certain measures of supervision of the undertaking concerned to be applied prior to is conducting any business in the context of the provision of services. It nevertheless maintained that such supervision should take a form less restrictive than that of authorisation. It did not however explain how such a system might work.

[43] The German Government and the Governments intervening in its support maintain that the necessary supervision can be carried out only by means of an authorisation procedure which makes it possible to investigate the undertaking before it commences its activities, to monitor those activities continuously and to withdraw the authorisation in the event of serious and repeated infringements.

[44] In that respect it should be noted that in all the member-States the supervision of insurance undertakings is organised in the form of an authorisation procedure and that the necessity of such a procedure is recognised in the two 'First Co-ordination Directives' as regards the activities to which they refer. In each of those directives Article 6 thereof provides that each member-State must make the taking-up of the business of insurance in its territory subject to an official authorisation. An undertaking which sets up branches and agencies in member-States other than that in which its head office is situated must therefore obtain an authorisation from the supervisory authority of each of those States.

[45] It must also be observed that the proposal for a second directive provides for the retention of that system. The undertaking must obtain an official authorisation from each member-State in which it wishes to conduct business in the context of the provision *106 of services. Although, according to that proposal, the authorisation must be obtained from the supervisory authority of the State of establishment, that authority must first consult the authority of the State in which the service is to be provided and send it all the relevant papers. The proposal also envisages permanent co-operation between the two supervisory authorities, this making it possible, in particular, for the authority of the State or establishment to take all appropriate measures, which may extend to withdrawal of the authorisation, to put an end to the infringements which have been notified to it by the supervisory authority of the State in which the service is provided.

[46] In those circumstances the German Government's argument to the effect that only the requirement of an authorisation can provide an effective means of ensuring the supervision which, having regard to the foregoing considerations, is justified on grounds relating to the protection of the consumer both as a policy-

holder and as an insured person, must be accepted. Since a system such as that proposed in the draft for a second directive, which entrusts the operation of the authorisation procedure to the member-State in which the undertaking is established, working in close co-operation with the State in which the service is provided, can be set up only by legislation, it must also be acknowledged that, in the present state of Community law, it is for the State in which the service is provided to grant and withdraw that authorisation.

[47] It should however be emphasised that the authorisation must be granted on request to any undertaking established in another member-State which meets the conditions laid down by the legislation of the State in which the service is provided, that those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the member-State of establishment. According to the German Government, which has not been contradicted on that point by the Commission, the German authorisation procedure conforms fully to those requirements.

[48] It is still necessary to consider whether the requirement of authorisation which, under the Insurance Supervision Act, applies to any insurance business other than transport insurance, is justified in all its applications. In that respect it has been pointed out, in particular by the United Kingdom Government, that the free movement of services is of importance principally for commercial insurance and that with regard to that particular type of insurance the grounds relating to the protection of policy-holders relied on by *107 the German Government and the Governments intervening in its support do not apply.

[49] It follows from the foregoing that the requirement of authorisation may be maintained only in so far as it is justified on the grounds relating to the protection of policy-holders and insured persons relied upon by the German Government. It must also be recognised that those grounds are not equally important in every sector of insurance and that there may be cases where, because of the nature of the risk insured and of the party seeking insurance, there is no need to protect the latter by the application of the mandatory rules of his national law.

[50] However, although it is true that the proposal for a second directive takes account of those considerations by excluding *inter alia* commercial insurance, which is defined in detail, from the scope of the mandatory rules of the State in which the service is provided, it must also be observed that, in the light of the legal and factual arguments which have been presented before it, the Court is not in a position to make such a general distinction and to lay down the limits of that distinction with sufficent precision to determine the individual cases in which the needs of protection, which are characteristic of insurance business in general, do not justify the requirement of an authorisation.

[51] It follows from the foregoing that the Commission's first head of claim must be rejected in so far as it is directed against the requirement of authorisation.

(d) The necessity of establishment

[52] If the requirement of an authorisation constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very

negation of that freedom. It has the result of depriving **Article 59** of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided (see in particular Van Binsbergen, and also Case 39/75, Coenen v. Sociaal-Economische Raad [FN25] and Case 76/81, Transporoute v. Minister of Public Works [FN26]). If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued.

FN25 [1975] E.C.R. 1547, [1976] 1 C.M.L.R. 30.

FN26 [1982] E.C.R. 417, [1982] 3 C.M.L.R. 382.

[53] In that respect, the German Government points out in particular that the requirement of an establishment in the State in which the service is provided makes it possible for the supervisory authority of that State to carry out verifications *in situ* and to monitor continuously the activities carried on by the authorised *108 insurer and that, without that requirement, the authority would be unable to perform its task.
[54] The Court has already stressed in its decision, most recently in Case 29/82, Van Luipen, [FN27] that considerations of an administrative nature cannot justify derogation by a member-State from the rules of Community law. That principle applies with even greater force where the derogation in question amounts to preventing the exercise of one of the fundamental freedoms guaranteed by the Treaty. In this instance it is therefore not sufficient that the presence on the undertaking's premises of all the documents needed for supervision by the authorities of the State in which the service is provided may make it easier for those authorities to perform their task. It must also be shown that those authorities cannot, even under an authorisation procedure, carry out their supervisory tasks effectively unless the undertaking has in the aforesaid State a permanent establishment at which all the necessary documents are kept.

FN27 [1983] E.C.R. 151, [1983] 2 C.M.L.R. 681.

[55] That has not been shown to be the case. As has been stated above, Community law on insurance does not, as it stands at present, prohibit the State in which the service is provided from requiring that the assets representing the technical reserves covering business conducted on its territory be localised in that State. In that case the presence of such assets may be verified *in situ*, even if the undertaking does not have any permanent establishment in the State. As regards the other conditions for the conduct of business which are subject to supervision, it appears to the Court that such supervision may be effected on the basis of copies of balance sheets, accounts and commercial documents, including the conditions of insurance and schemes of operation, sent from the State of establishment and duly certified by the authorities of that member-State. It is possible under an authorisation procedure to subject the undertaking to such

conditions of supervision by means of a provision in the certificate of authorisation and to ensure compliance with those conditions, if necessary by withdrawing that certificate.
[56] It has therefore not been established that the considerations acknowledged above concerning the protection of policy-holders and insured persons make the establishment of the insurer in the territory of the State in which the service is provided an indispensable requirement.
[57] As regards the Commission's first head of claim, it must therefore be concluded that the Federal Republic of Germany has failed to fulfil its obligations under **Articles 59** and **60** of the Treaty by providing in the Versicherungsaufsichtsgesetz that where insurance undertakings in the Community wish to provide services in relation to direct insurance business, other than transport *109 insurance, through salesmen, representatives, agents or other intermediaries, they must have an establishment in its territory; however, that failure does not extend to compulsory insurance and insurance for which the insurer either maintains a permanent presence equivalent to an agency or a branch or directs his business entirely or principally towards the territory of the Federal Republic of Germany.

B. The Commission's second head of claim

[58] In its second head of claim the Commission seeks a declaration that the Federal Republic has failed to fulfil its obligations not only under **Articles 59** and **60** of the Treaty but also under Directive 78/473 on Community co-insurance. However, that head of claim, like the first, is based on the proposition that the requirements of authorisation and establishment are contrary to **Articles 59** and **60** of the Treaty with regard to all insurance business. In the Commission's view there are therefore no grounds for distinguishing in that respect between the position of the insurer in general and that of the leading insurer in particular. Thus, according to the Commission, the Federal Republic of Germany infringed those **Articles** when, in transposing Directive 78/473 into national law, it exempted only the other co-insurers, and not the leading insurer, from those requirements.
[59] The Commission admits that the directive is ambiguous on that point but it claims that it must be interpreted in a manner consistent with the Treaty. That was acknowledged by the member-States in their joint statement in the minutes of the Council meeting of 23 May 1978. Consequently, the directive can in the Commission's view in no way be regarded as requiring the leading insurer to be authorised and to be established in the member-State in which the risk is situated.
[60] For its part, the German Government refers to the distinction made in Directive 78/473 between the leading insurer and the other co-insurers. The provisions of that directive regarding the leading insurer, and in particular Article 2(1)(c) thereof inasmuch as it refers to Directive 73/239, show that the country of the risk may require that the leading insurer be established and authorised in its territory so that he is in a position to cover the whole risk as sole insurer. In the

German Government's view, therefore, the German legislation does not infringe Directive 78/473 or **Articles 59** and **60** EEC.
[61] It is true that the aforesaid provision of the directive provides that ' the leading insurer is authorised in accordance with the conditions laid down in the First Co-ordination Directive, *i.e.* he is treated as if he were the insurer covering the whole risk.' The directive does not however indicate in which member-State the leading insurer must be authorised and it follows from what the *110 Court has said under A above that, according to Community law, an insurer who is already authorised and established in a member-State need not necessarily be established in another member-State in order to be able to cover the whole of a risk situated in the territory of that State.
[62] As the Court held in Case 218/82 E.C. Commission v. E.C. Council, [FN28] when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty. Consequently, the directive should not be construed in isolation and it is necessary to consider whether or not the requirements in question are contrary to the abovementioned provisions of the Treaty and to interpret the directive in the light of the conclusions reached in that respect.

FN28 [1983] E.C.R. 4063, [1984] 2 C.M.L.R. 350.

[63] As regards the insurance sector in general, the Court has already held in this case that the requirement of establishment is incompatible with **Articles 59** and **60** of the Treaty. Consequently, such a requirement in relation to the leading insurer can find no basis in Directive 78/473. It is therefore sufficient to consider whether the requirement that the leading insurer must be authorised in the country of the risk is in conformity with Community law.
[64] In that respect consideration of the first head of claim has shown that the requirement that an insurance undertaking providing services must be authorised in the State in which the service is provided can be regarded as compatible with the Treaty only in so far as it is justified on grounds relating to the protection of the consumer both as a policy-holder and as an insured person. According to Article 1(2) thereof, Directive 78/473 concerns only insurance against risks which by reason of their nature or size call for the participation of several insurers for their coverage. Moreover, according to Article 1(1) the directive applies only to Community co-insurance operations relating to certain of the risks listed in the annex to Directive 73/239. For example, it does not concern either life assurance or accident and sickness insurance or road traffic civil liability insurance. The directive is concerned with insurance which is taken out only by large undertakings or groups of undertakings which are in a position to assess and negotiate insurance policies proposed to them. Consequently the arguments based on consumer protection do not have the same force as in connection with other forms of insurance.
[65] Consideration of the first head of claim has shown, in addition, that the

requirement of authorisation in the State in which the service is provided is not justified where the undertaking providing the services already satisfied equivalent conditions in the *111 member-State in which it is established and where there exists a system of co-operation between the supervisory authorities of the member-States concerned ensuring effective supervision of compliance with such conditions also as regards the provision of services. According to the preamble to Directive 78/473, the directive is intended to establish the minimum co-ordination necessary to facilitate the effective pursuit of Community co-insurance business and to organise special co-operation between the supervisory authorities of the member-States and between those authorities and the Commission which, for the provision of services in the insurance business in general, is provided for only in the proposal for a second directive.
[66] Moreover, a difference of treatment in that respect between the leading insurer and other co-insurers does not appear objectively justified. Although it is for the leading insurer to negotiate the contract and to ensure its performance, there is nothing to prevent him from covering a much smaller part of the risk than that covered by the other co-insurers.
[67] In those circumstances and in the case of the insurance to which Directive 78/473 on co-insurance applies, not only the requirement that the leading insurer be established but also the requirement that he be authorised, which are laid down in the Insurance Supervision Act, are contrary to **Articles 59** and **60** of the Treaty and therefore also to the directive.
[68] It must therefore be held that the Federal Republic of Germany has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty and under Council Directive 78/473 in so far as the provisions of its legislation require, with regard to Community co-insurance, that where the risks are situated in the Federal Republic of Germany the leading insurer must be established and authorised there.

C. The Commission's third head of claim

[69] The third head of claim, as worded, concerns the level of the thresholds fixed in the Federal Republic of Germany for certain risks which are the subject of Community co-insurance. However, in the course of the proceedings before the Court, the Commission stated that that head of claim is in reality directed against the very existence of such thresholds.
[70] It must however be observed that this is a head of claim which differs from and is wider in scope than that formulated in the conclusions set out in the application. It cannot therefore be admissible. As regards the initial head of claim, the Commission has presented no argument to show that the level of the thresholds fixed by the German legislation is too high.
[71] It follows that the Commission's third head of claim must fail.

*112 *III. Costs*

[72] Article 69(2) of the Rules of Procedure provides that the unsuccessful party

shall be ordered to pay the costs. However, according to the first subparagraph of Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part. Since each of the parties has failed on certain heads, they must be ordered to bear their own costs.

Order

On those grounds, THE COURT hereby:
1. Declares that the Federal Republic of Germany has failed to fulfil its obligations under **Articles 59** and **60** of the EEC Treaty by providing in the Versicherungsaufsichtsgesetz that where insurance undertakings wish to provide services in that member-State in relation to direct insurance business, other than transport insurance, through salesmen, representatives, agents and other intermediaries, they must be established in its territory; however, that failure does not extend to compulsory insurance and insurance for which the insurer either maintains a permanent presence equivalent to an agency or a branch or directs his business entirely or principally toward the territory of the Federal Republic of Germany.
2. Declares that the Federal Republic of Germany has failed to fulfil its obligations under **Articles 59** and **60** of the Treaty and under Council Directive 78/473/EEC of 30 May 1978 on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance by requiring that, for services provided in connection with Community co-insurance, where the risks are situated in the Federal Republic of Germany the leading insurer be established and authorised there.
3. For the rest, dismisses the application.
4. Orders, the parties, including the interveners, to bear their own costs.

[1987] 2 C.M.L.R. 69

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