JUDGMENT OF THE COURT
4 December 1986 *

In Case 205/84

Commission of the European Communities, represented by F.-W. Albrecht, Legal Adviser, acting as Agent, assisted by E. Steindorff, of the Law Faculty of the University of Munich, with an address for service in Luxembourg at the office of M. Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by

1. **Kingdom of the Netherlands**, represented by I. Verkade, Secretary-General at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Netherlands Embassy, 5 rue C. M. Spoo,

2. **United Kingdom**, represented by J. R. J. Braggins, of the Treasury Solicitor's Department, Queen Anne's Chambers, London, acting as Agent, supported by N. Phillips, QC, and P. Lasok, Barrister, with an address for service in Luxembourg at the United Kingdom Embassy, 28 boulevard Royal,

interveners,

v

Federal Republic of Germany, represented by M. Seidel, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent, assisted by R. Lukes, of the Law Faculty of the University of Münster, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 avenue E. Reuter,

defendant,

supported by

* Language of the Case: German.

1. **Kingdom of Belgium**, in the person of the Minister for Foreign Relations, represented by R. Hoebaer, Director at the Ministry of Foreign Affairs, Overseas Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins,

2. **Kingdom of Denmark**, represented by L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by Claus Gulmann, Professor of Law, with an address for service in Luxembourg at the office of the Danish Chargé d'Affaires, Ib Bodenhagen, Ministerial Adviser, at the Danish Embassy, 11b boulevard Joseph-II,

3. **French Republic**, represented by G. Guillaume, Director of the Legal Affairs Department at the Ministry of Foreign Relations, acting as Agent, with an address for service in Luxembourg at the French Embassy, 2 rue Bertholet,

4. **Ireland**, represented by L. J. Dockery, Chief State Solicitor, Dublin Castle, Dublin, acting as Agent, with an address for service in Luxembourg at the Irish Embassy, 28 route d'Arlon,

5. **Italian Republic**, in the person of L. Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters, acting as Agent, represented and assisted by O. Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

interveners,

APPLICATION for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, and in particular under Articles 59 and 60 thereof, in relation to the freedom to provide services in the field of insurance, including co-insurance, and under Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (Official Journal 1978, L 151, p. 25),

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, U. Everling, K. Bahlmann and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing, as supplemented further to the hearing on 6 and 7 November 1985,

after hearing the Opinion of the Advocate General delivered at the sitting on 20 March 1986,

gives the following

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 of the EEC Treaty for a declaration that,

(a) by applying the Versicherungsaufsichtsgesetz [Insurance Supervision Law] as amended by the Vierzehntes Änderungsgesetz [Fourteenth Law amending the Versicherungsaufsichtsgesetz] of 29 March 1983 *(Bundesgesetzblatt* I, p. 377) 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 authorized 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, 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/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (Official Journal 1978, L 151, p. 25), 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 law 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 authorized 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, 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 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) in connection with the transposition by those States of Directive 78/473 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.

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 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 coordination 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 (Official Journal 1976, C 32, p. 2, 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.

7 In that respect it must be borne in mind that, under Article 155 of the EEC Treaty, 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 interpretation of Articles 59 and 60 of the EEC Treaty, 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 authorization and establishment imposed by the Insurance Supervision Law 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/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (Official Journal 1973, L 228, p. 3) and the aforementioned Directive 78/473 relating to Community co-insurance, and not Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance (Official Journal 1979, L 63, p. 1). 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 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 authorization 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.

14 In its first head of claim the Commission refers separately to the fact that the Insurance Supervision Law 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 Law 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 forgoing 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 authorized in Germany. The prohibition in question therefore constitutes a necessary complement to the requirements of establishment and authorization.

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 authorized agent of the foreign insurance undertaking cannot change the nature of that contract as representing a service provided by that undertaking to the policyholder. 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 authorization imposed on insurance undertakings as providers of services. It is 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 authorization imposed by the German legislation on Community insurers as providers of services within the meaning of the Treaty.

2. *The provision of services in the context of insurance*

18 According to the first paragraph of Article 59 of the EEC Treaty, the abolition of restrictions on the freedom to provide services within the Community concerns all services provided by nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The first paragraph of Article 60 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 liberalization of insurance services connected with movements of capital must be effected in step with the progressive liberalization 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 (Official Journal, English Special Edition 1959-1962, p. 49) already provided that Member States were to grant all foreign exchange authorizations 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 Article 59 *et seq.* of the Treaty.

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 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 authorized 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 the first paragraph of Article 60, 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 its judgment of 3 December 1974 (Case 33/74 *van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299) 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.

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 of the EEC Treaty became directly applicable on the expiry of the transitional period, and their applicability was not conditional on the harmonization or the coordination of the laws of the 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 its judgment of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), 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.

27 The Court has nevertheless accepted, in particular in its judgments of 18 January 1979 (Joined Cases 110 and 111/78 *Ministère public and Another* v *van Wesemael and Others* [1979] ECR 35) and 17 December 1981 (Case 279/80 *Webb*, cited

above), 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 the 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.

28 It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another Member State, authorized 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 authorization from the supervisory authority of that State, constitute 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 of the EEC Treaty 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 Netherlands 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 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 Netherlands Governments maintain that, in any event since the adoption of the first coordination 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, 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 harmonize 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 harmonization 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 localized 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 localization is proposed only in the draft for a second directive which concerns in particular the harmonization 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 harmonization 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 recognized 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 coordination directives make no provision for harmonization 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 commercial 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 requiring and verifying compliance with its own rules in respect of services provided within its territory.

41 It must therefore be recognized 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 authorization 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 authorization 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 its 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 authorization. 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 authorization procedure which makes it possible to investigate the undertaking before it commences its activities, to monitor those activities continuously and to withdraw the authorization 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 organized in the form of an authorization procedure and that the necessity of such a procedure is recognized in the two first coordination 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 authorization. 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 authorization 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 authorization from each Member State in which it wishes to conduct business in the context of the provision of services. Although, according to that proposal, the authorization 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 cooperation between the two supervisory authorities, thus making it possible, in particular, for the authority of the State of establishment to take all appropriate measures, which may extend to withdrawal of the authorization, 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 authorization 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 authorization procedure to the Member State in which the undertaking is established, working in close cooperation 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 authorization.

47 It should however be emphasized that the authorization 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 authorization procedure conforms fully to those requirements.

48 It is still necessary to consider whether the requirement of authorization which, under the Insurance Supervision Law, 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 the German Government and the governments intervening in its support do not apply.

49 It follows from the foregoing that the requirement of authorization 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 recognized 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 sufficient 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 authorization.

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 authorization.

(d) The necessity of establishment

52 If the requirement of an authorization 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 the judgment of 3 December 1974, cited above, and the judgments of 26 November 1985 in Case 39/75 *Coenen* v *Sociaal-Economische Raad* [1975] ECR 1547, and 10 February 1982 in Case 76/81 *Transporoute* v *Minister for Public Works* [1982] ECR 417). 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.

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 authorized insurer and that, without that requirement, the authority would be unable to perform its task.

54 The Court has already stressed in its decisions, most recently in its judgment of 3 February 1983 (Case 29/82 *Van Luipen* [1983] ECR 151), 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 authorization 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.

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 localized 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 authorization procedure to subject the undertaking to such conditions of supervision by means of a provision in the certificate of authorization 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 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 authorization 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 authorized 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 authorized 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 of the EEC Treaty.

61 It is true that the aforesaid provision of the directive provides that 'the leading insurer is authorized in accordance with the conditions laid down in the first coordination 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 authorized and it follows from what the Court has said under A above that, according to Community law, an insurer who is already authorized 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 its judgment of 13 December 1983 (Case 218/82 *Commission* v *Council* [1983] ECR 4063), 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.

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 authorized 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 authorized 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 authorization in the State in which the service is provided is not justified where the undertaking providing the services already satisfies equivalent conditions in the Member State in which it is established and where there exists a system of cooperation 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 coordination necessary to facilitate the effective pursuit of Community co-insurance business and to organize special cooperation 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 authorized, which are laid down in the Insurance Supervision Law, 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 authorized 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.

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.

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 towards 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 coordination 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 authorized there;**

(3) **For the rest, dismisses the application;**

(4) **Orders the parties, including the interveners, to bear their own costs.**

Mackenzie Stuart Galmot Kakouris O'Higgins Schockweiler

Bosco Koopmans Due Everling Bahlmann Joliet

Delivered in open court in Luxembourg on 4 December 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President