OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 4 April 2000 *

1. The question referred to the Court for a preliminary ruling in this matter has arisen in the context of a failure to transpose Community law providing for the Europe-wide harmonisation of insurance business into French Mutuality law. It relates particularly to the First Directive on insurance other than life assurance, namely Directive 73/239/EEC [1] ('First Directive', 'Directive 73/239' or simply 'Directive'), as amended by Directive 92/49/EEC, the third non-life insurance Directive ('Directive 92/49' or 'Third Directive'). [2]

The question centres on the effects of the so-called 'principle of exclusivity', established by the First Directive, under which insurance undertakings are required to limit their business activities to the business of insurance and operations directly arising therefrom, to the exclusion of all other commercial business (Article 8(1)(b)).

In my view, the Court's judgment in *Försäkringsaktiebolaget Skandia* [3] ('the *Skandia* judgment') contains, albeit indirectly, all the elements of the reply the Court is in a position to give in the light of the legislation in force.

The French legislation

2. The national legislation governing mutual benefit societies is primarily contained in the Code de la Mutualité, in the version enacted by Law No 85-773 of 25 July 1985 [4] ('Mutuality Code').

3. Article L.111-1 of the Mutuality Code defines a mutual benefit society as a non-profit-making association which, mainly by virtue of the subscriptions paid by its members, provides, in the interests of the latter or their families, a service of welfare provision, support and mutual assistance,

* Original language: Spanish.

1 — First 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 (OJ 1973 L 228, p. 3).

2 — Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1).

3 — Case C-241/97 [1999] ECR I-1879.

4 — *Journal officiel de la République Française*, p. 8483.

for the purposes of which it pursues, *inter alia*, the following objectives:

— the prevention of social risks to the person and reparation of their consequences;

— the fostering of motherhood and the protection of children, family life, the elderly and the disabled or handicapped;

— the cultural, moral, intellectual and physical development of its members and the improvement of their living conditions.

4. In order to attain those objectives, mutual benefit societies may set up health, medical-social or cultural establishments or facilities (Article L.411-1).

5. Those establishments and facilities do not have a legal personality distinct from that of the founding mutual benefit society, but their respective business activities must be the subject of a separate budget and of specific accounts (Article L.411-2). Their operation is conditional upon a percentage of the directors approving the rules establishing their management and financial regimes. To this end, the Government can lay down, by decree, after consulting the Council of State ('décret en Conseil d'État'), model rules containing compulsory provisions (Article L.411-6).

6. For the purposes of setting up the abovementioned establishments and facilities, mutual benefit societies may create between them associations of mutual benefit societies, which in turn may join together to form federations of associations of mutual benefit societies (Article L.123-1). The provisions relating to mutual benefit societies apply, in addition, to the associations and federations (Article L.123-3).

7. The general assembly of the associations and federations is made up of delegates from the participating mutual benefit societies, who are elected in accordance with the statutes. The decisions duly adopted by the general assembly are binding on all participating mutual benefit societies (Article L.123-2).

8. The general assembly of the mutual benefit society — and therefore of the association or federation — is required to rule on amendments to the statutes, on division or dissolution, on merger with other mutual benefit societies and on certain loans whose nature and amount are specified by decree. Every member of a

mutual benefit society is entitled to vote (Article L.125-1).

9. Model mutual benefit society statutes, incorporating the provisions whose inclusion is required by law, are set out in the annexes to Decree No 86-1359 of 30 December 1986.[5] These provisions include the power of each association or federation to allocate votes at the general assembly among the participating mutual benefit societies, either in proportion to the number of members of each society, or in proportion to their respective contributions, or, alternatively, according to a combination of the two criteria (Article 26).

10. Model rules for mutual eye centres, incorporating the wording of the compulsory provisions, is contained in Annex 2 to Decree No 64-827 of 23 July 1964.[6]

Of these compulsory provisions, mention should be made of the fact that an eye centre has no legal personality of its own (Article 1) and that closure of the centre must be decided by the general assembly under the procedure laid down for amendment of the statutes (Article 36).

5 — *Journal Officiel de la République Française*, p. 16013.

6 — *Journal Officiel de la République Française*, p. 7329.

Community legislation

11. There have been three stages in the evolution of Community legislation on insurance:

— a first generation of directives (Directive 79/267/EEC on life assurance[7] and Directive 73/239, cited above, on insurance other than life assurance) aimed at facilitating actual exercise of the right of establishment by insurance undertakings;

— a second generation of directives made it easier to engage in insurance business, from the point of view of the freedom to provide services;

— finally, a generation of directives (Directive 92/96/EEC on life assurance[8] and Directive 92/49, cited above, on insurance other than life assurance) aimed at full completion of the internal market in insurance, in accordance with the principle of a single administrative authorisation and of financial supervision by the authorities in the

7 — First 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 (OJ 1979 L 63, p. 1).

8 — Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1).

Member State where the insurance undertaking has its head office.

12. The Community legislation has, therefore, on the one hand, sought to enable insurance undertakings to carry on their business activities freely and, on the other, to provide citizens with free access to the widest possible range of insurance products available in the Community and to guarantee them the necessary legal and financial protection.

13. The legislation's first objective required that insurance undertakings holding an authorisation in one of the Member States should be able to carry on business throughout the Community, from the point of view both of the right of establishment and of the freedom to provide services. With this aim in mind, the third generation of directives opted in favour of '... bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.' [9]

14. That principle implies that each Member State must monitor the financial health of the insurance undertakings under its supervision, having particular regard to their state of solvency, the establishment of adequate technical provisions and the covering of those provisions by matching assets. The result of this was that the need for coordination of the relevant national rules became imperative within a system of mutual recognition of authorisations and prudential control systems.

15. For this same reason, Community law prohibits insurance undertakings from extending their business activities to other classes of commercial business. In this regard, the wording of Article 8(1)(b) is identical in both Directive 73/239 and Directive 79/267 and provides that the home Member State is to require an insurance undertaking to 'limit its business activities to the activities referred to in this Directive and operations directly arising therefrom, to the exclusion of all other commercial business.'

16. Furthermore, Article 8(1)(a) of Directive 73/239 provided that, in the case of the French Republic, insurance undertakings should adopt one of the following forms: 'société anonyme', 'société à forme mutuelle', 'mutuelle', 'union de mutuelles'. Following the amendment effected by Directive 92/49, that same article provides that the legal forms are to be: 'société anonyme', 'société d'assurance mutuelle', 'institution de prévoyance régie par le code de la sécurité sociale', 'institution de prévoyance régie par le code rural', 'mutuelles régies par le code de la mutualité'.

9 — Fifth recital in the preamble to Directives 92/49 and 92/96.

17. Harmonisation of the Member States' rules on the technical provisions which insurance undertakings are required to establish to cover their commitments had already been implemented. The third generation of insurance directives made further headway on this matter by coordinating 'the rules governing the spread, localisation and matching of the assets used to cover technical provisions... in order to facilitate the mutual recognition of Member States' rules.' [10]

18. To that end, the articles dealing with technical provisions in the first generation of directives (Article 15 of Directive 73/239 and Article 17 of Directive 79/267) were reformulated. Pursuant to those rules, the home Member State is to require all insurance undertakings to establish adequate technical provisions in respect of their entire business. The amount of these provisions is determined according to the rules set out in Directive 91/674/EEC [11] and Directive 92/96. Technical provisions in respect of an undertaking's entire business must be covered by matching assets.

19. The directives regulate the rules relating to the spread, localisation and matching of such assets. Specifically, only certain categories of assets (that is, certain investments, debts owing to the undertaking and other assets) may be used to cover technical provisions. Moreover, Member States are to require that each insurance undertaking does not invest in excess of specified percentages of its gross technical provisions in respect of certain categories of assets.

20. Assets not covering the technical provisions form what can be described as an insurance undertaking's 'free', 'available' or 'unattached' assets.

21. In its current version, Article 18(1) of Directive 73/239 provides: 'Member States shall not prescribe any rules as to the choice of the assets in excess of those representing the technical reserves referred to in Article 15.'

22. Finally, pursuant to Article 57(1), first indent, of Directive 92/49, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by no later than 31 December 1993 and to bring them into force by no later than 1 July 1994.

23. Because France had failed to transpose the aforementioned rules covering 'mutuelles régies par le code de la mutua-

10 — Thirteenth recital in the preamble to Directive 92/49 and fifteenth recital in the preamble to Directive 92/96.

11 — Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ 1991 L 374, p. 7).

lité' into its national law, the Court, in *Commission* v *France*, declared on 16 December 1999 that that Member State had failed to fulfil its obligations under the EC Treaty. [12]

Facts

24. On application by Adour Mutualité ('Adour') and Mutualité Française Union des Pyrénées-Atlantiques ('UPA') respectively, the Préfet of Pyrénées-Atlantiques approved, by decisions dated 10 May 1995 and 20 May 1996, the rules of both eye centres.

25. The observations submitted by the Association Basco-Béarnaise des Opticiens Indépendants ('ABBOI'), a local body representing the interests of optical professionals and an applicant in the main proceedings, make clear that Adour is a mutual benefit society which offers its members supplementary medical insurance and the services of an eye centre, while UPA is an association of mutual benefit societies which operates various mutual benefit services but does not carry on any insurance business whatsoever.

26. ABBOI contested both decisions of the Préfet before the Tribunal Administratif, Pau (Administrative Court, Pau) (France), which is the court with jurisdiction in contentious administrative proceedings and which granted leave to Adour and UPA to intervene in support of the Préfet in the proceedings.

27. Before that court, ABBOI claimed that the Préfet's orders were vitiated by illegality because they were founded on legal provisions incompatible with the provisions of Directive 73/239, as amended, which was not transposed into French law within the prescribed period, and in particular with Article 8(1)(b) of the said Directive.

28. The national court acknowledges that it cannot find anything in the documents before it which would enable it to state with certainty either that an association of mutual benefit societies, which does not carry on any business of insurance, falls within the scope of the Directive, or that the provisions of the Directive should be interpreted as precluding the administrative authority from granting its approval of the statutes of a mutual benefit body carrying on a commercial business under the relevant national laws.

29. That being so, the Tribunal Administratif stayed proceedings and, pursuant to Article 177 of the EC Treaty (now

12 — Case C-239/98 [1999] ECR I-8935.

Article 234 EC), sought a preliminary ruling from the Court on the following questions:

'1. Must Article 8(1)(b) of the Directive be interpreted as precluding the provisions of Articles L.123-1 and L.123-2 of the French Code de la Mutualité, which allow mutual benefit societies whose sole business is that of insurance to create between them mutual benefit bodies which have legal personality and legal autonomy and engage in commercial business in the optical sector?

2. If the provisions of the Directive are incompatible with French law, is the prohibition of commercial business imposed on the mutual benefit body set up by mutual benefit societies whose sole business is that of insurance general and absolute, or is it open to the competent authorities of the Member State to define the conditions under which and the spheres in which a commercial business may be pursued?'

Admissibility

30. The Netherlands Government, which has submitted observations, is of the opinion that the questions referred by the Tribunal Administratif, Pau, do not fulfil the minimum requirements for admissibility.

According to that Government, the information set out in the order for reference is not sufficiently clear to determine whether Directive 73/239 applies. The order describes neither the nature nor the business activities of the mutual benefit societies, which makes it impossible to verify whether they carry on the business of private insurance and are therefore covered by the Directive, or whether, in fact, they fall outside its scope because their operations form part of a compulsory social security scheme, in the sense contemplated by the Court in its judgment in *García*.[13] Moreover, the order does not state exactly how the body responsible for operating the eye centre differs from the participating mutual benefit societies, nor what kind of business this body conducts, information which is needed to determine whether Article 8(1)(b) of the Directive is relevant to the case.

31. As the Court has repeatedly stated,[14] the national court must explain the factual and legal background to the question referred or, at the very least, explain the factual circumstances which surround it, in order for the Court to be able to reply effectively to the question and for interested parties to be able to exercise fully

13 — Case C-238/94 *García and Others* [1996] ECR I-1673, paragraph 10.

14 — See, *inter alia*, the judgment of the Court in Joined Cases C-28/98 and C-29/98 *Charreire and Hirtsmann* [1999] ECR I-1963.

their right to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice.

Therefore, a request from a national court which does not contain the aforementioned required information as to the legal and factual background to the cases, or the reasons why it has been judged necessary to put questions to this Court, must be ruled inadmissible.

32. In my view, although the order for reference, which is not a model of clarity, contains only the briefest description of the factual and legal background to the dispute, it is at least possible to extract from the tenor of the questions all the information needed to provide the national court with a helpful interpretation of Community law and for the parties to the action, the Member States and the Commission to be able to exercise effectively their right to submit observations.

It can be inferred from those two questions that what the national court wishes to know is whether Directive 73/239, as amended, prohibits insurance undertakings from creating between them bodies which have legal personality and legal autonomy and engage in commercial business and, if this is the case, what is the absolute or relative nature of such a prohibition. Two premisses which can be inferred from the statement 'mutual benefit societies whose sole business is that of insurance', used by the national court in its questions, are that the purpose of the mutual benefit societies at issue is the creation of 'insurance undertakings', within the meaning of Article 1 of Directive 92/49, and that those societies do not carry on activities covered by a compulsory social security scheme.

33. It is my view, therefore, that the request for a preliminary ruling from the Tribunal Administratif, Pau, should be admitted in the above terms.

Substance

34. As a preliminary point, I should like to point out that the facts described above give the impression of two distinct legal situations. Whereas, in the case of Adour, the eye centre is operated directly by a mutual benefit society, in the case of UPA operation of the centre is entrusted to an association of mutual benefit societies which has legal personality. The national court's questions relate exclusively to the latter situation. However, as will be seen, the answer I propose applies equally to both.

The first question referred for a preliminary ruling

35. By its first question, the national court is seeking to ascertain whether Community law, and in particular Article 8(1)(b) of Directive 73/239, as amended, precludes provisions of national legislation, such as Articles L.123-1 and L.123-3 of the French Mutuality Code, which allow insurance undertakings to create between them entities which have legal personality and engage in commercial business.

The fact that the insurance undertakings in question are constituted as mutual benefit societies, together with the fact that the purpose of the entity they create is to operate an eye centre, although perhaps relevant in other respects, does not appear to be of any consequence as regards the answer which the Court is called upon to give. For the purposes of the present case, the Directive contains no specific provisions applicable according to the legal form of the undertaking, nor does it accord a different treatment, according to their nature, to the commercial operations, other than insurance operations, carried out by the insurance undertakings. [15]

36. ABBOI, the applicant in the main proceedings, contends that by authorising mutual benefit societies to create an entity, such as an eye centre, the French legislation is in contravention of the principle of specialisation contained in Article 8(1)(b) of the Directive, even where that entity has legal personality of its own. This is because, in so far as Article L.123-2, second indent, of the Mutuality Code provides that the decisions duly adopted by the association's general assembly are binding on the participating mutual benefit societies (see point 7 above), those entities may find themselves called upon to cover the association's losses by a sum possibly in excess of their initial financial contributions and of their own resources. In this way, the financial difficulties of an eye centre managed by an association of mutual benefit societies, or simply the need to finance its investments, could ultimately affect the solvency of the participating mutual benefit societies. The bankruptcy and dissolution of the eye centre might lead to a similar situation.

ABBOI concludes from the foregoing considerations that the French legislation, as it now stands, does not ensure complete legal, accounting and financial separation between the participating mutual benefit societies and the association, and so is contrary to Article 8(1)(b) of the Directive.

37. Adour and UPA, the entities managing the eye centres whose rules form the subject of the main proceedings, contend, in relation to the second question, that Article 8(1)(b) does not have direct effect since the Member States have a discretion when it comes to defining what is meant by 'the

15 — This is an aspect which perhaps merits some criticism, *de lege ferenda*, in view of the special nature of mutual benefit societies which combine the business of insurance, founded on their own principles of risk solidarity, with a social welfare vocation.

business of insurance and operations arising directly therefrom.'

In relation to the first question, those entities argue that Directive 73/239 does not apply to an association of mutual benefit societies which does not carry on any insurance business and which has legal personality of its own.

38. The Netherlands Government, in a direct extension of its argument on admissibility, contends, on the substance of the case, that Directive 73/239 does not apply to a national social security scheme.

39. The French Government, for its part, contends that Article 8(1)(b) of Directive 73/239 lacks direct effect by reason of the uncertainty as to the definition and scope of the concept of commercial business contained in that provision.

40. For the Commission, Directive 73/239 does not preclude national legislation allowing insurance undertakings to participate in setting up an entity with legal personality of its own, whose purpose is to carry on business activities other than insurance, provided that the obligations of the participating undertakings is limited to their initial financial contributions and does not exceed the amount of their available resources or affect their technical provisions or solvency margins.

41. I am in complete agreement with the position taken by the Commission.

I acknowledge at once that the solution resulting from this approach does not simply prohibit or permit the creation by insurance undertakings of entities such as the eye centres in this case. However, it does make the creation of such entities subject to the single condition that it must not affect any of the undertakings' resources apart from their free assets. To my mind, no other principles can be derived from the Community law currently in force. It will be for the national court to assess whether it is possible to give effect by judicial action to this requirement in a situation which has not been adapted to the provisions of the Directive, as amended, taken as a whole, as is the case with the situation in relation to mutual benefit societies regulated by the French Mutuality Code. In addition to the difficulties posed by the personal nature of mutual benefit societies, it is likely that, in its current form, the regime governing them does not recognise parameters equivalent to that of 'free assets' or that the latter parameter does not accord with that specified in the Community legislation. [16]

16 — The security rules in Community legislation are more stringent than the ones currently governing mutual benefit societies. In this regard, see Jean-Charles, G. and Lafargue, G., *Les mutuelles face à l'Europe*, Paris, 1994, p. 62.

42. To begin with, therefore, I shall dispose of the objections raised against this solution.

43. In the submission of the Netherlands Government, the provisions of the Directive do not apply to a legal situation embodied in a social security scheme. Community law does not restrict Member States' powers to organise their social security systems. [17]

Nevertheless, as I have already explained (see point 32 above), there is no reason to suppose that Adour and UPA — or, to be precise, the mutual benefit societies making up the latter — are entities responsible for the administration of the compulsory social security scheme. The documents before the Court contain no information whatsoever about the nature of the activities pursued by the mutual benefit societies participating in UPA. As far as Adour is concerned, ABBOI claims (see point 25 above) that it is a mutual benefit society providing its members with supplementary medical insurance, which seems rather to suggest that it does not operate in the area of compulsory social protection, which is the natural province of the social security system, but that it offers, in any event, a partial alternative to the health cover available under the statutory scheme. That kind of business activity falls expressly within the scope of the Directive. [18] Finally, it can be concluded from the order for reference that both Adour and UPA are entities covered by the Mutuality Code and constituted in a legal form provided for in Article 8(1)(a) of the Directive (see point 16 above), which invites the assumption that they are not responsible for administering the statutory social security scheme. [19]

In those circumstances, it is essential to adhere to the wording of the question, which quite clearly refers to 'mutual benefit societies whose sole business is that of insurance.' It will be sufficient to limit the scope of the answer to the point whether that condition is satisfied or not, which it is for the national court to verify. [20]

44. According to Adour and UPA, Directive 73/239 does not apply to an association of mutual benefit societies which does not itself carry on insurance business. Although this objection is formulated in relation to the second question, for the sake of clarity of presentation it is appropriate to dispose of it at this stage of the analysis. For this purpose, it is sufficient to note that, while it is perfectly conceivable that an association of mutual benefit societies, such as the one in point in this case, might not fall within the scope of the Directive and, ultimately, of the principle of exclusivity

17 — See Article 2(1)(d) of Directive 73/239, Case 238/82 *Duphar* [1984] ECR 523, paragraph 16, and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 6.

18 — As may be inferred, in particular, from the wording of Article 54 of Directive 92/49.

19 — It is true, however, that Article L.111-2, final indent, of the Mutuality Code provides that, without prejudice to their own rules, mutual benefit societies administering a compulsory social security scheme are governed by that code. At the hearing, unfortunately, Adour and UPA's legal representatives were unable to remove the doubts which exist as to whether or not their clients do in fact administer such schemes.

20 — The national court must also check whether any of the other grounds for non-application of the Directive, listed in Articles 2 and 3, apply.

contained therein, it is equally conceivable that both the Directive and the principle of exclusivity apply to each one of the mutual benefit societies forming the association, with the result that it is wholly relevant to consider the extent to which these mutual benefit societies are permitted to carry on commercial business activities other than insurance, albeit through the intermediary of a legal person.

45. Furthermore, Adour and UPA believe that Article 8(1)(b) does not have direct effect until such time as the national legislature defines the concept of 'the business of insurance and operations directly arising therefrom'. The French Government adopts the same approach in relation to the concept of 'commercial business'. [21]

46. These objections are groundless. Article 8(1)(b), inserted into Directive 73/239 by Directive 92/49 (see point 15 above), creates the 'principle of exclusivity', by virtue of which insurance undertakings must limit their business activities to those specified in the Directive and to operations directly arising from them, to the exclusion of all other commercial business. The Directive clearly defines its own scope which, broadly speaking, is confined to the taking-up and pursuit of the self-employed activity of direct insurance in the 18 classes of insurance defined in Section A of the Annex [22] thereto (Article 1). Articles 2, 3 and 4 set out the circumstances in which the Directive does not apply, by reason of the kind of insurance (life assurance and supplementary insurance carried on by life-assurance undertakings, annuities, insurance forming part of a statutory system of social security, capital redemption operations and operations with no actuarial technical basis) and of the form or characteristics of the insurance undertaking (certain mutual benefit societies and specific public-law bodies).

On the other hand, the Directive does not allow any adaptation of or derogation from that principle. [23]

47. I am therefore of the opinion that the statement of the principle of exclusivity contained in the Directive complies with the conditions of precision and unconditionality which are necessary for it to be possible to invoke it directly.

48. Turning to the case before the Court, it is evident that the business of an eye centre, consisting, it would appear, [24] of the sale to the general public of products such as, *inter alia*, sunglasses and contact lenses, does not

21 — In spite of this, during the hearing, the French Government, in response to a question put by the Court, and, in particular, to one put to it by myself, was unable to explain what exactly the French legislature has done in terms of its clarification exercise relating to the other legal forms which insurance undertakings may adopt and which have been the object of transposition into French law, namely those governed by the Code des Assurances (société anonyme, société d'assurance mutuelle) and those governed by the Code de la Sécurité Sociale or the Code Rural (institutions de prévoyance).

22 — Following the amendments introduced by Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1984 L 339, p. 21).

23 — Unlike what happens in relation to the 'principle of specialisation', for example, which requires separation of the business of life assurance from other kinds of insurance business.

24 — See the notarially authenticated statement attached to ABBOI's observations.

amount to insurance business and cannot be claimed to arise directly therefrom. [25] Nor can recourse be had to the conditions for exclusion set out in Articles 2, 3 and 4 of the Directive. It does, however, amount to a commercial business activity. The fact that the entity operating the centre does not do so with a view to profit does not affect that characterisation. [26] Support for this can be found in the criterion which the Court employs in the context of competition law, and according to which 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.' [27] Nevertheless, it is preferable to refer directly to the *ratio legis* of the provision at issue. As the Court has held, 'the prohibition preventing insurance undertakings from carrying on commercial business other than insurance business, laid down in the amended Article 8(1)(b) of Directives 73/239 and 79/267, is in particular to protect the interests of insured persons against the risks which the exercise of such business could entail for the solvency of those undertakings.' [28] There is certainly no doubt that the management of an eye centre gives rise to obligations of an economic nature which may create losses that might affect the undertaking concerned. This therefore introduces a risk factor which is unrelated to any business of insurance and for which provision has not been made in the prudential calculations. [29]

For all those reasons, the second objection should be rejected and it should be stated that the insurance undertakings referred to in Article 8 of the Directive may not include in their objects the creation and operation of a retail centre selling optical products. [30]

49. However, it does not follow from this conclusion that there is an absolute prohibition on insurance undertakings participating, if only indirectly, in commercial business other than insurance. Not every participation affects the objects of the undertaking.

25 — Generally, in the field of insurance, European legislation only provides for specific services in the sphere of tourist assistance, regulated by Directive 84/641, cited in footnote 23, although it is true that nowhere are they prohibited.

26 — Which, in any event, would only be certain in relation to the entity itself and not to the actual business of selling optical products to the general public, which it would be difficult to carry out without a profit margin. This was the Cour d'Appel de Douai's understanding when, in its judgment of 6 April 1998, it interpreted Article L.111-1 of the Mutuality Code (see point 3 above) as requiring that an optical centre operated by a mutual benefit body must restrict its services to the members of the mutual benefit body itself (cited in Mr Rocard's report, *Mission mutualité et droit communautaire*, 1999, p. 9).

27 — On the concept of an undertaking within the meaning of Articles 85 and 86 of the Treaty, see, *inter alia*, the judgments in the following cases: C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; *Poucet and Pistre*, cited in footnote 17, paragraph 17; C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 18; and C-244/94 *Fédération Fançaise des Sociétés d'Assurances* [1995] ECR I-4013, paragraph 14. In particular, see the judgment in Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming* [1999] ECR I-6025, paragraph 71 et seq., where a non-profit-making body responsible for managing a supplementary pension scheme, to which affiliation was compulsory, was found to constitute an undertaking.

28 — *Skandia*, cited in point 3 above, paragraph 47 of the judgment.

29 — According to the construction given to the concept of 'commercial business other than insurance' on p. 29 of the Rocard report (cited in footnote 26).

30 — This appears to have been the French legislature's understanding of the situation when it amended, in the light of Directive 92/49, the rules governing 'institutions de prévoyance', one of the other forms laid down in Article 8(1)(a) of the Directive (see point 16 above), so as to permit them to 'engage in social action for the benefit of their members, which, when this entails the exploitation of collective social achievements, must be conduct by one or more legal persons distinct from the *institution* itself' (Article L.931-1 of the Code de la Sécurité Sociale).

50. In the case which gave rise to the *Skandia* judgment, it fell to be determined whether Member States had the power to limit freedom of choice with regard to unattached assets, guaranteed under Article 18(1) of the Directive, as amended (see point 21 above). As I pointed out in the Opinion I delivered in that case, [31] the restriction on an insurance undertaking's business operations to those within the sphere of the insurance sector is expressed in very precise terms in the Directives, which make reference to an undertaking's 'business activities'. These must be limited to the business of insurance and to operations directly arising therefrom. There is nothing to prevent insurance undertakings from investing, while complying with that rule, funds in other entities outside the insurance sector. This is so because the holding of a share in the capital of an entity constitutes a share in the assets of a natural or legal person but does not necessarily presume or imply that that person is engaged in the same commercial activity as that engaged in, in each case, by the undertaking in question.

51. I believe now, as I did then, that the investment of free assets in any other given assets, if it does not distort the objects of the insurance undertaking which thus invests its available funds, is not to be regarded as 'business other than insurance', in which that type of company is not allowed to engage. It is only where, by means of those holdings, the undertaking seeks to circumvent the limitation imposed by its objects through the creation of intermediary companies through which it engages in other types of business, that the national supervisory authorities will be able to intervene, in each case, to prevent what would presuppose a substantial alteration of the insurer's objects.

52. In accordance with the foregoing, the Court held that the wording of Article 8(1)(b) of the Directive 'does not prohibit insurance undertakings from holding, as their free assets, shares in a company carrying on business other than insurance business.' [32] The Court concluded from this that 'the aforesaid provision does not prevent insurance undertakings from holding shares in public limited companies carrying on commercial business other than insurance business and to the assets of which the financial risks are confined.' [33]

53. The same solution clearly applies to all forms of holding in a third entity, provided that there is a guarantee that the liability of the company taking the holding is limited to the amount of its capital contribution.

54. The reply to be given to the national court must therefore be that Article 8(1)(b) of the Directive does not prohibit an insurance undertaking from holding a capital interest in other entities carrying on commercial business other than insurance, provided that their contribution does not exceed the sum of their free assets and that their liability is limited to the amount of that contribution.

31 — [1999] ECR I-1881.

32 — *Skandia*, paragraph 46 of the judgment.

33 — Ibid., paragraph 47.

The second question referred for a preliminary ruling

55. In its second question, the Tribunal Administratif, Pau, wishes to know whether the prohibition on a mutual benefit body engaging in commercial business other than insurance is general and absolute or, alternatively, whether it is open to Member States to define the conditions under which and the spheres in which a commercial business may be pursued.

56. The answer to the second question follows from the wording of the answer I propose to the first. It is possible for insurance undertakings to engage in commercial business other than insurance by transferring their free assets to a third person, provided that their liability is limited to the amount so transferred. For the rest, and as may be inferred from Article 18(1) of the Directive, as amended, Member States do not have the power to lay down any rules regarding those assets.

Conclusion

57. In view of the foregoing considerations, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Tribunal Administratif, Pau, as follows:

First 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, as amended by Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations

and administrative provisions relating to direct insurance other than life assurance and amending Directives 72/239/EEC and 88/357/EEC (third non-life insurance Directive) does not prohibit an insurance undertaking from holding a share in the capital of other legal persons which engage in commercial business other than insurance, provided that its financial contribution does not exceed the sum of its free assets and that its liability is limited to the said contribution.