OPINION OF ADVOCATE GENERAL JACOBS

delivered on 18 January 2001 [1]

1. This reference from the Hoge Raad (Supreme Court), the Netherlands, seeks guidance from the Court on the interpretation of Articles 2(c) and (d) and 3 of the Second Non-life Insurance Directive. [2]

2. In essence, the issue is the meaning of the policy-holder's 'establishment' in the fourth indent of Article 2(d) of the Directive and whether the definition of 'establishment' given in Article 2(c) also applies to the term as used in Article 2(d).

The Community legislation

3. In order better to understand the legislation at issue in this case, it is helpful to trace its historical context.

4. The First Non-life Insurance Directive, [3] in 1973, provided for a minimal coordination of the criteria which an insurer had to satisfy in order to be able to offer its services in the field of direct non-life insurance, either in the Member State of its primary establishment or through a branch or agency established in another Member State. The First Directive was thus limited to promoting freedom of establishment in that sector.

5. At the time of adoption of the Second Non-life Insurance Directive in 1988, Article 6 of the First Non-life Insurance Directive provided: [4]

'1. Each Member State shall make the taking-up of the business of direct insurance in its territory subject to an official authorisation.

1 — Original language: English.

2 — Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ 1988 L 172, p. 1. The Second Directive has been 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 Directive 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ 1992 L 228, p. 1.

3 — 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.

4 — Article 6 was subsequently replaced by Article 4 of the Third Non-life Insurance Directive, cited in note 1.

2. Such authorisation shall be sought from the competent authority of the Member State in question by:

(a) Any undertaking which establishes its head office in the territory of such state;

(b) Any undertaking whose head office is situated in another Member State and which opens a branch or agency in the territory of the Member State in question;

...'

6. Article 23 of the First Non-life Insurance Directive provides:

'1. Each Member State shall make access to the business referred to in Article 1 [the self-employed activity of direct insurance] by any undertaking whose head office is outside the Community subject to official authorisation.

2. A Member State may grant an authorisation if the undertaking fulfils at least the following conditions:

...

(b) It establishes an agency or branch in the territory of such Member State

...'

7. The Second Non-life Insurance Directive sought in particular to make it easier for insurance undertakings having their head office in the Community to provide services in the Member States, thus making it possible for policy-holders to have recourse not only to insurers established in their own country but also to insurers which have their head office in the Community and are

established in other Member States.[5] The Second Directive has two limbs (see Article 1): first, the First Directive is supplemented 'in order particularly to clarify the powers and means of supervision vested in the supervisory authorities'[6] (Title II, 'Provisions supplementary to the first Directive') and secondly, specific provisions are laid down 'regarding the taking-up, pursuit and supervision of activity by way of freedom to provide services'[7] (Title III, 'Provisions peculiar to the freedom to provide services').

8. Articles 2 and 3 are in Title I, 'General provisions'.

9. Article 2 of the Directive provides, in so far as relevant to the present case:

'For the purposes of this Directive:

...

(b) "undertaking":

— for the purposes of applying Titles I and II, means:

any undertaking which has received official authorisation under Article 6 or 23 of the first Directive;

— for the purposes of applying Title III and Title V [Final provisions], means:

any undertaking which has received official authorisation under Article 6 of the first Directive;

(c) "establishment":

means the head office, agency or branch of an undertaking, account being taken of Article 3;

5 — See the first recital in the preamble.
6 — Fourth recital in the preamble.
7 — Fourth recital in the preamble.

(d) "Member State where the risk is situated" means:

— the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same insurance policy,

— the Member State of registration, where the insurance relates to vehicles of any type,

— the Member State where the policy-holder took out the policy in the case of policies of a duration of four months or less covering travel or holiday risks, whatever the class concerned,

— the Member State where the policy-holder has his habitual residence or, if the policy-holder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated, in all cases not explicitly covered by the foregoing indents;

(e) "Member State of establishment" means:

the Member State in which the establishment covering the risk is situated;

(f) "Member State of provision of services" means:

the Member State in which the risk is situated when it is covered by an establishment situated in another Member State.'

10. Article 3 provides:

'For the purposes of the first Directive and of this Directive, any permanent presence of an undertaking in the territory of a Member State shall be treated in the same way as an agency or branch, 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 [of] a person who is independent but has permanent authority to act for the undertaking as an agency would.' [8]

8 — Article 3 is mistranslated in the English version, which uses the word 'by' instead of my '[of]'.

11. Article 12 is the first article in Title III. Article 12(1) provides:

'This Title shall apply where an undertaking, through an establishment situated in a Member State, covers a risk situated, within the meaning of Article 2(d), in another Member State; the latter shall be the Member State of provision of services for the purposes of this Title.'

12. The first paragraph of Article 25 of the Directive provides, in so far as is relevant:

'Without prejudice to any subsequent harmonisation, every insurance contract concluded by way of provision of services shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated within the meaning of Article 2(d) ...'

13. Article 25 was repealed by the Third Non-life Insurance Directive.[9] Article 46(2) of that directive however re-enacted Article 25 in similar terms, albeit not limited to insurance contracts concluded by way of provision of services. The Third Directive required Member States to adopt implementing measures by the end of 1993 and bring them into force not later than 1 July 1994. Since the main proceedings concern the period from 1 July 1990 to 31 May 1994, it appears that Article 25 was applicable; that is moreover assumed by the referring court. Nothing however in these proceedings turns on the difference between Article 25 and Article 46.

The facts and the main proceedings

14. Kvaerner plc, a company incorporated under the law of England and Wales and established in the United Kingdom, holds, via John Brown plc, a subsidiary also incorporated in England, all the shares in John Brown Engineers and Constructors BV (JB BV), a limited liability company incorporated under Netherlands law and established in that country.

15. Kvaerner took out professional indemnity insurance, worldwide umbrella insurance and worldwide catastrophe insurance with an insurer established in the United Kingdom. The contracts of insurance mention as the insured Kvaerner and/or its subsidiaries and/or associated companies as instructed by the policy-holder. Without

9 — Cited in note 1.

being instructed to do so by JB BV, Kvaerner also included JB BV's business operations within that cover. Kvaerner paid the premiums and invoiced JB BV via John Brown plc for that part of the premiums attributable to cover for JB BV's business operations.

16. A charge to insurance tax was imposed on Kvaerner under Article 25(3) of the Wet op belastingen van rechtsverkeer (Law on transaction tax) in connection with that part of the premiums paid by JB BV (via its parent company) to Kvaerner in respect of the cover for its business operations for the period from 1 July 1990 to 31 May 1994. The charge was contested by Kvaerner but confirmed by the inspector of taxes. On appeal, the Gerechtshof (Regional Court), Amsterdam, upheld the Inspector's decision. Kvaerner appealed in cassation to the Hoge Raad.

17. The Hoge Raad repeats in the order for reference the findings of the Gerechtshof that, since Kvaerner, the policy-holder, is a legal person, the insurance contracts are subject to Netherlands insurance tax only if the insurance risk is situated in the Netherlands. That is the case with insurance contracts taken out by a legal person only if the legal person's establishment to which the insurance contract relates is situated in the Netherlands. Both those findings flow from Articles 20 and 21 of the Law on transaction tax, as amended with effect from 1 July 1990 in line with Articles 2(d) and 25 of the Second Non-life Insurance Directive.

18. Under Article 21(4) of the Law, which seeks to give effect to Articles 2(c) and 3 of the Directive, 'establishment' is defined as the legal person's primary establishment or any permanent presence of an undertaking. The issue before the Hoge Raad, as it was before the Gerechtshof, is whether JB BV, an independent legal person in its own right, can be regarded as an establishment of Kvaerner with the result that, since the insurance contracts related to the carrying-on of business by JB BV, that part of the premiums attributable to JB BV's cover is subject to insurance tax in the Netherlands.

19. Since that issue raises matters of Community law, the Hoge Raad has referred the following questions to the Court:

'1. Is it permissible under Articles 2(c) and (d) and 3 of Second Council Directive 88/357/EEC of 22 June 1988 for a

Member State to levy insurance tax on a legal person established in another Member State in respect of premiums paid to an insurer also established in another Member State for the business insurance of a subsidiary or sub-subsidiary established in the Member State making the levy?

2. Does it make any difference to the reply to Question 1 if the policy-holder is not the overall parent company but some other company in the group (for example a captive insurance company)?

3. Does it make any difference to the replies to Questions 1 and 2 or to the interpretation of the terms "policy-holder" or "Member State where the risk is situated" if the insurance premium relating to the insured risk is not (wholly or in part) passed on to the subsidiary or sub-subsidiary?'

20. Written observations have been submitted by the French, German, Netherlands and United Kingdom Governments and the Commission. Kvaerner, the French Government and the Commission were represented at the hearing.

The first and second questions

21. As a preliminary point, I would note that the first question referred by the national court appears to be asking about the lawfulness of levying insurance tax on premiums paid for business insurance generally ('verzekering van bedrijfsrisico's'), a term presumably intended to comprise the three types of insurance (professional indemnity insurance, worldwide umbrella insurance and worldwide catastrophe insurance) individually mentioned in the order for reference. As the Commission notes, however, the final indent of Article 2(d) at issue in the main proceedings is merely a residual rule. To the extent that the other categories of insurance taken out cover risks for example relating to buildings, it will be the first indent of Article 2(d) which applies.

22. With regard to the first question, only the United Kingdom and Kvaerner consider that the Netherlands may not charge tax. The United Kingdom submits that the definition of establishment in Article 2(c) makes it clear that a subsidiary cannot constitute an establishment for the purposes of Article 2(d), although it adds that in its view JB BV may itself be the policy-holder. Kvaerner submits that, since the definition at issue in Article 2(d) applies

only where the policy-holder is a legal person, it makes no sense to interpret that person's establishment as encompassing subsidiaries, which are legal persons in their own right.

23. The French, German and Netherlands Governments and the Commission in contrast all take the view that the Netherlands may tax the transaction. The French Government argues that JB BV is to be considered to be the policy-holder for the purposes of the Directive; the Member State where the risk is situated is accordingly the Netherlands. The German Government submits that any permanent presence, therefore including subsidiaries, constitutes establishment for the purpose of Article 2(d). The Netherlands Government is of the view that the establishment of a policy-holder for the purpose of Article 2(d) is to be determined by reference to Article 43 of the Treaty and hence includes subsidiaries. Both those Governments also conclude that the Netherlands is therefore the Member State where the policy-holder's establishment, to which the contract relates, is situated, and hence also where the risk is situated. The Commission considers that, while Article 2(c) cannot be construed as including subsidiaries within the definition of 'establishment', Article 2(d) is to be interpreted by reference to the place where the activities giving rise to the risks covered are carried out and accordingly 'Member State where the risk is situated' means the Member State of establishment of the branch or agency or, in the case of group insurance, the company in the policy-holder's group to whose activities the relevant part of the policy relates.

24. Before turning to the analysis of Article 2(c) and 2(d) which to my mind provides the answer to the national court's first question, I would mention that I do not accept the French Government's argument that JB BV is to be considered to be the policy-holder for the purposes of the Directive. That argument amounts to equating the terms 'insured person' and 'policy-holder'. As the Commission pointed out at the hearing, although those terms are not defined in the Directive (or indeed in the First or Third Directives) it is current usage in the insurance world, not only in the context of life assurance, to distinguish between the two. That usage reflects the fact that the policy-holder is not necessarily the same person as the insured. The Second Life Assurance Directive [10] moreover uses the term 'insured person' where it wishes to describe a person other than the policy-holder who is covered by the contract. [11] The undesirability of interchanging the two terms even in the non-life insurance sector is demonstrated by the comment made by the Economic and Social Committee on Article 2 of the Commission's original proposal for the Second Non-life Insurance Directive. The Committee '[drew] the Commission's attention to the fact that the French version talks about the Member

10 — Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ 1990 L 330, p. 50.

11 — Article 2".

State of the "policy-holder" whereas the Italian version speaks of the "insured person". When the law governing insurance contracts is being aligned, one or other of these concepts should be chosen for the sake of uniformity.' [12]

25. Moreover I do not consider it necessary to give an interpretation of 'policy-holder' in order to answer the questions referred by the national court since in my view it becomes clear from an analysis of the wording of Article 2(c) and the final indent of Article 2(d) that the concept of establishment is used in the Second Directive in general and in Article 2 in particular in two different contexts: Article 2(c) is concerned with the establishment of an undertaking providing insurance, while Article 2(d) is concerned with the establishment of a policy-holder. It is regrettable that the same word is used in successive provisions in two different senses; it is consequently, as the Netherlands Government and the Commission both stress, crucial to distinguish between the two usages.

Article 2(c) of the Second Non-life Insurance Directive

26. First and principally, the concept of establishment is used in the Directive to distinguish between the pursuit of non-life insurance business by way of cross-border establishment, guaranteed and essentially regulated by the First Directive, and the pursuit of non-life insurance business by way of the cross-border provision of services, guaranteed and essentially regulated by the Second Directive. Thus the preamble to the Second Directive states that:

'it is desirable to define the provision of services taking into account both the *insurer's* establishment and the place where the risk is situated [and] to distinguish between the activity pursued by way of establishment and the activity pursued by way of freedom to provide services'. [13]

27. That of course is what Article 2(e) and (f) seek to do. The word 'establishment' used in those paragraphs has the meaning given to it by Article 2(c), namely 'the head office, agency or branch of an undertaking'. 'Undertaking' is itself defined by Article 2(b) as 'any undertaking which has received official authorisation under ... the first Directive'. The definition of 'establishment' in Article 2(c) is thus confined to the establishment of an insurer, as envisaged by the preamble. That is wholly consistent with the aim of Article 2(e) and (f), namely to distinguish between the situation where

12 — OJ 1976 C 204, p. 13, at p. 16 (paragraph 3.2.2).

13 — Third recital; emphasis added.

an insurer is exercising its activity across a frontier by way of establishment and the situation where an insurer is doing so by way of the provision of services.

28. The Commission's original proposal for the Second Non-life Insurance Directive [14] included no definition of the Member State of establishment or the Member State of provision of services; indeed the Explanatory Memorandum relates that no attempt was made to distinguish between freedom to provide services and freedom of establishment. [15] Nor did it contain a definition of 'establishment'. That definition must accordingly have been added at some point in the legislative process, which was long and slow (over 12 years elapsed between submission of the proposal and adoption of the directive).

29. It may be wondered why the definition in Article 2(c) of the Second Non-life Insurance Directive does not include subsidiaries. The answer again may be found in the historical context of that directive. The First Non-life Insurance Directive drew a sharp distinction between an insurer which operated in a Member State as an undertaking established in that Member State (originally subject to the control of that Member State) and an insurer established in one Member State which operated in another Member State through a branch or agency (originally subject to the control of the second Member State). [16] An insurer established in one Member State which operated in another Member State through a subsidiary would have been dealt with in accordance with the first approach rather than the second, i.e. the subsidiary would have been regarded as an undertaking in its own right and would have needed authorisation from the Member State where its own head office was established. That follows from the terms of Article 6(2)(a) of the First Directive, which in its original version provided that any undertaking which established its head office (*siège social* in the French version) in a Member State was to seek authorisation from the competent authority of that State. The amendments to the First Directive made by the Second Directive did not affect the fundamental structure put in place by the First Directive, which remained in place until a new text of Article 6 was introduced by the Third Non-life Insurance Directive. [17] The new text of Article 6 essentially requires authorisation to be sought from the Member State where the undertaking's head office is established.

30. The clear wording of the provision and the scheme of the First and Second Non-life Insurance Directives thus support the view that the definition in Article 2(c) does not extend to subsidiaries. The German Government however appears to suggest that the effect of Article 3 of the Second Directive, to which the definition of establishment in Article 2(c) is expressly subject and

14 — Proposal for a second Council Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services, COM(75) 516 final; 22 December 1975.

15 — Paragraph III.2(b).

16 — See Article 6 of the First Non-life Insurance Directive, cited in note 2.

17 — Cited in note 1, Article 4.

which requires 'any permanent presence of an undertaking in the territory of a Member State [to] be treated in the same way as an agency or branch', is that a subsidiary is to be treated as an 'agency or branch' since it falls within the concept of 'any permanent presence'. The German Government accordingly concludes that a subsidiary constitutes an establishment for the purpose of the Directive.

31. I do not accept that argument. In my view, and as submitted by the United Kingdom, Article 3 simply confirms that certain types of establishment which are in substance equivalent to a company's branch or agency, although not formally so described, are to be taken into account. That interpretation is supported by the fact that the wording used in Article 3 is taken almost verbatim from the Court's judgment in *Commission* v *Germany*, [18] decided a year and a half before adoption of the Second Directive. The words in the judgment were used in the context of deciding what presence falling short of the formal establishment of a branch or agency would nevertheless be sufficiently permanent to show that the undertaking had established itself in another Member State and hence fell within the establishment rather than the services provisions of the Treaty. Article 3 thus correctly interpreted simply extends the definition of 'agency or branch' in Article 2(c) to mean 'whether in form or in substance'.

32. Moreover, equating a subsidiary to an agency or branch within the meaning of Article 2(c) would pose a serious problem of interpretation of the Third Non-life Insurance Directive. [19] That directive defines the term 'branch' as 'agency or branch of an insurance undertaking, having regard to Article 3 of Directive 88/357/EEC'. [20] In addition however it has a separate definition of 'subsidiary'. [21]

33. It is accordingly unquestionable in my view that the definition of 'establishment' in Article 2(c) of the Second Non-life Insurance Directive does not include subsidiaries.

Article 2(d) of the Second Non-life Insurance Directive

34. The concept of 'establishment' is also used in Article 2(d), which defines 'the Member State where the risk is situated'.

18 — Case 205/84 [1986] ECR 3755, paragraph 21 of the judgment.

19 — Cited in note 1.

20 — Article 1(b).

21 — Article 1(i). The definition refers to the definition of 'subsidiary undertaking' in Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts, OJ 1983 L 193, p. 1.

The fourth indent of that paragraph defines that phrase as:

'the Member State where the policy-holder has his habitual residence or, if the policy-holder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated, in all cases not explicitly covered by the foregoing indents'.

35. Although as a general rule the same term used in the same article of the same measure must be given the same meaning, [22] that general rule may exceptionally be defeated where it is clear from the article itself that the same meaning cannot have been intended. In my view that is the case of the provisions at issue. As I have demonstrated, Article 2(c) is concerned with the establishment of an undertaking which is authorised to pursue insurance activities. Since the fourth indent of Article 2(d) is not concerned with the establishment of such an undertaking, being on the contrary expressly concerned with the establishment of the policy-holder, it follows that 'establishment' in the fourth indent of Article 2(d) cannot have the sense ascribed to it by Article 2(c). [23] It must therefore have another meaning.

36. Again, some slight assistance may be gleaned from the Commission's proposal. Although that proposal did not distinguish between the provision of services and establishment, the concept of 'Member State in which the risk is situated' was none the less significant: it was relevant for determining (i) the law applicable to an insurance contract, [24] (ii) certain national rules with which an undertaking providing cross-border insurance services had to comply [25] and (iii) competence to tax insurance contracts. [26] Article 2(d) of the proposal set out six definitions of the concept. The first five concerned insurance of property, persons and vehicles. The final indent of Article 2(d) read:

'— the Member State in which the policy-holder habitually resides where any other form of insurance is involved ...'

37. The Commission stated in the Explanatory Memorandum: 'Under this provision, the place where the risk is situated depends on the type of insurance involved; in some cases, as for insurance covering persons, it is taken to be the place where the policy-holder is established ...' [27]

38. Again, this definition evolved during the legislative process; it was in particular

22 — See paragraph 35 of my Opinion in Case C-258/99 *BASF v Bureau voor de Industriele Eigendom*, delivered on 30 November 2000.

23 — It may be noted that in the Danish version of the Directive different terms are used in the two provisions.

24 — Article 4.

25 — Articles 9 and 10.

26 — Article 14.

27 — Paragraph III.2(a).

expanded to cater explicitly for policy-holders who are legal persons.

39. The historical context of the definition thus suggests that 'establishment' was intended to have a broader meaning than that laid down by Article 2(c), more in line with the sense in which it is used in Article 43 of the Treaty, namely 'agencies, branches or subsidiaries'. That interpretation essentially reflects the approach of the Netherlands Government and the Commission and is borne out by a number of further elements.

40. Article 2(d) defines the 'Member State where the risk is situated' by reference to four circumstances. The first indent concerns the insurance of (principally) buildings, and defines the 'Member State where the risk is situated' by reference to the locus of the property insured. The second indent concerns vehicle insurance, and defines the 'Member State where the risk is situated' by reference to the place of registration of the vehicle. The third indent concerns travel or holiday insurance, and defines the 'Member State where the risk is situated' as the Member State where the policy-holder took out the policy. The fourth indent — at issue in these proceedings — is a residual category, applying to 'all cases not explicitly covered by the foregoing indents'.

41. Determination of the Member State where the risk is situated is relevant for several purposes. First, the Member State whose law is applicable to contracts of insurance may be determined by reference to the location of the risk; [28] moreover the mandatory rules of the Member State in which the risk is situated may be applied, irrespective of the law otherwise applicable. [29] Article 7(1)(b) refers to the situation where a policy-holder does not have his habitual residence or central administration in the Member State in which the risk is situated, thus envisaging that a corporate policy-holder may have its central administration in one Member State while the risk — and hence the establishment to which the contract relates — is situated in another Member State. 'Establishment' must therefore be more extensive than 'central administration'.

42. Second, the concept of 'Member State where the risk is situated' is, as the Commission points out, used in conjunction with the concept of 'establishment' as defined in Article 2(c) in order to determine whether an insurance undertaking is in given circumstances exercising its freedom to provide services or its right of establishment. [30]

43. In the circumstances of the present case, a United Kingdom parent company has taken out insurance with a United

28 — Article 7(1).
29 — Article 7(2).
30 — Article 12(1), set out in paragraph 11 above.

Kingdom insurer to cover the professional liability of a Netherlands subsidiary. Such a situation can hardly be unusual. If the 'establishment' for the purposes of Article 2(d) of a policy-holder which is a parent company does not include a subsidiary of that policy-holder, it will be impossible to determine where the risk is situated in such circumstances. That result can hardly have been intended by the legislature.

44. Third — and of particular relevance in the present case — Article 25 of the Second Directive confers fiscal competence with regard to insurance contracts and premiums on the Member State in which the risk is situated. That provision is intended to mitigate the danger that differences in the structure and rates of tax and parafiscal charges on insurance transactions will lead to disturbances of competition in insurance services between Member States. [31]

45. The legislature accepted that there were wide differences in the fiscal treatment of insurance transactions: the preamble notes that 'some Member States do not subject insurance transactions to any form of indirect taxation, while the majority apply special taxes and other forms of contribution, including surcharges intended for compensation bodies; whereas the structure and rate of these taxes and contributions vary considerably between the Member States in which they are applied'. [32]

46. The legislature must therefore have been seeking to ensure that, in so far as possible, an objective and verifiable criterion should be used to allocate fiscal competence; opting for the situation of the risk as that criterion eliminates distortions of competition between undertakings offering insurance from different Member States. It also, as the United Kingdom points out, eliminates the danger of double taxation or the creation of an opportunity or loophole for tax avoidance, as each risk is allocated to one establishment and thus to a Member State: no risk can be allocated to more than one establishment and therefore double taxation cannot take place, nor can a policy-holder avoid liability to tax in any particular Member State because the existence of an establishment depends upon objectively ascertainable criteria.

47. Interpreting 'establishment' in Article 2(d) as excluding subsidiaries would, as the Commission points out, enable the situation of the risk, and hence the liability to tax, to be artificially exploited, which would be contrary to the objective of reducing distortions of competition. It could even — as the present case demonstrates — give rise to circumstances where

31 — See the 15th recital in the preamble to the Second Non-life Insurance Directive and the 30th recital in the preamble to the Third Non-life Insurance Directive.

32 — Ibid.

the situation of the risk was impossible to determine. Such a possibility cannot be reconciled with the obvious intention underlying the provision.

48. Thus to my mind it is clear from the objectives and wording of the Second Non-life Insurance Directive and the scheme of the insurance directives generally that the term 'establishment' in Article 2(d) must be interpreted so as to include subsidiaries.

49. As the Commission submits, however, those objectives would not be attained if the only members of a corporate group which were covered by the notion of 'establishment' were the parent company's subsidiaries. If that interpretation were exhaustive, the rules could be circumvented by the simple expedient of allocating all group insurance to a company which was not in a direct parental relationship to the other insured companies in the group. It is accordingly appropriate to interpret that notion as covering all companies linked to others within a group of companies where one company in the group takes out a policy of insurance which covers other companies in the group.

50. That interpretation entails an affirmative answer to the referring court's first question, which asks whether a Member State may charge a legal person established in another Member State to insurance tax in respect of premiums paid to an insurer also established in another Member State for the professional indemnity insurance of a sub-subsidiary established in the Member State making the levy, and a negative answer to its second question, which asks whether it makes any difference to the reply to Question 1 if the policy-holder is not the overall parent company but some other company in the group.

51. Finally in the context of the first and second questions it is appropriate to deal with the United Kingdom's argument that it would be excessively difficult in practice to determine at what point a subsidiary became sufficiently independent to cease being regarded as part of its parent undertaking. That argument was adduced against deeming a subsidiary to be an agency or branch under Article 3 of the Second Directive. It could however equally be raised against the interpretation of Article 2(d) which I have advocated, by which the policy-holder's 'establishment' is regarded as including all companies linked to others within a group of companies where one company in the group takes out a policy of insurance which covers other companies in the group.

52. In my view, it will not in practice be problematic to determine which companies

are sufficiently linked to a company which takes out an insurance policy covering another company in the same group so that the latter will constitute an establishment of the former within the meaning of the final indent of Article 2(d) since the mere fact that a company takes out an insurance policy covering another company will adequately demonstrate the existence of the requisite nexus.

The third question

53. By its third and final question the Hoge Raad asks whether it makes any difference to the replies to Questions 1 and 2 or to the interpretation of the terms 'policy-holder' or 'Member State where the risk is situated' if the insurance premium relating to the insured risk is not (wholly or in part) passed on to the sub-subsidiary.

54. As the German, Netherlands and United Kingdom Governments and the Commission submit, the interpretation of the Community legislation at issue cannot be affected by internal arrangements within the group as to invoicing and payment. If such subjective criteria were to be relevant to the determination of the Member State where the risk is situated, and hence the Member State with competence to tax the insurance transaction, that would give rise to a possibility of tax avoidance.

Conclusion

55. I accordingly consider that the questions referred by the Hoge Raad should be answered as follows:

Articles 2(c) and (d) and 3 of Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions

relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC permit a Member State to levy insurance tax on a legal person established in another Member State in respect of premiums paid to an insurer also established in another Member State for the business insurance of a company in the same group as the policy-holder and established in the Member State making the levy. It makes no difference how the premium relating to the insured risk is (wholly or in part) invoiced or paid within the group.