OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 20 March 1986

My Lords,

In this case the Commission has brought infringement proceedings against Ireland with respect to certain restrictions imposed by that State on co-insurance operations. This case has much in common with, and was heard at the same time as Cases 220/83 *Commission* v *France*, 252/83 *Commission* v *Denmark* and 205/84 *Commission* v *Germany*.

In its application the Commission requests that the Court find that Ireland:

'(a) By adopting the provisions of Section 4 of the European Communities (Co-insurance) Regulations 1983 which oblige Community insurance undertakings which wish to provide insurance services in Ireland in the role of leading insurer either to be authorized and therefore established or, as the case may be, to give notice to the Minister and obtain his consent, has failed to fulfil the obligations incumbent upon it pursuant to Articles 59 and 60 of the Treaty and Directive 78/473/EEC;

(b) To the extent to which the provisions of paragraph 3 of the schedule to the regulations prevents Community insurers from providing co-insurance services in Ireland for contracts of a total amount less than that specified in the said paragraph 3, has failed to fulfil the obligations incumbent upon it pursuant to Articles 59 and 60 of the Treaty and Directive 78/473/EEC;

(c) By applying the provisions of national law cited above, instead of the provisions of Articles 59 and 60 of the Treaty, has failed to fulfil the obligations incumbent upon it arising from the direct effect of the said Articles of the Treaty and the primacy of Community law.'

Directive 73/239 on the taking-up and pursuit of the business of direct insurance other than life insurance (Official Journal 1973, L 228, p. 3) and Directive 78/473 relating to Community co-insurance (Official Journal 1978, L 151, p. 25) having been summarized in my Opinion in *Commission* v *France*, I do not repeat them here.

The European Communities (Co-insurance) Regulations 1983 were adopted to give effect in Ireland to the 1978 directive. Article 4(1) requires the leading insurer to be the holder of an authorization from the Irish authorities. It does so in the following terms:

'Notwithstanding anything to the contrary in the "Insurance Acts" 1909 to 1981, or in the European Communities (Non-life Insurance) Regulations 1976, an insurer

established in another Member State may participate with a leading insurer who is the holder of an authorization in a Community co-insurance operation in respect of a risk situated in the State, if the first-mentioned insurer is operating through a head office which is the holder of an authorization granted by the supervisory authority of another Member State or through a branch which is the holder of an authorization granted by the supervisory authority of another Member State, the head office of which is also the holder of such an authorization.'

Such authorization must be granted pursuant to the European Communities (Non-life Insurance) Regulations 1976 adopted to implement the 1973 directive. These require by Article 4(1) that the insurer be established as well as authorized before he can carry on non-life insurance. Thus the leading insurer in general is subject both to the requirement of authorization and to the requirement of establishment. The other co-insurers are exempt from both these requirements by virtue of Article 4 (1) of the 1983 regulations.

Article 4 (2) of the 1983 regulations, however, appears to exempt from these requirements leading insurers who have duly obtained an authorization in another Member State pursuant to the 1973 directive, where the risk being covered falls within classes 4 (railway rolling stock), 5 (aircraft), 6 (ships), 7 (goods in transit), 11 (aircraft liability) or 12 (liability for ships). However, this is to be read subject to Article 8 of the same regulations. According to that provision, the leading insurer must first notify to the Minister for Trade, Commerce and Tourism its intention of covering such risks as are referred to in Article 4(6) of the 1976 regulations (namely classes 5, 6, 7, 11 and 12 in the annex, and certain parts of classes 1 and 10, insurance for passengers in marine and aviation vehicles and carriers' liability insurance) in this manner and obtain the Minister's consent.

Article 3 of the 1983 regulations provides: 'These regulations apply to Community co-insurance operations as defined in the schedule to these regulations'. According to paragraph 1 of the schedule:

'1. An insurance operation is a Community co-insurance operation for the purposes of these Regulations if

(a) it relates to any of the classes specified in paragraph 2 of this schedule, and

(b) in the case of a risk situated in the State, it meets the criteria specified in paragraph 3 of this schedule, and

(c) it satisfies all the conditions specified in paragraph 4 of this schedule.'

Paragraph 2 of the schedule sets out the classes of risk to which the regulations apply and reflects Article 1(1) of the 1978 directive. It follows that life insurance is not at issue in these proceedings.

The criteria specified in paragraph 3 of the schedule include thresholds below which the 1983 regulations do not apply. For risks in classes 8 (fire and natural forces), 9 (other damage to property) and 16 (miscellaneous financial loss) the total sum insured under any one contract must not be less than 50 million units of account. For the risks in class 13 (general liability other than risks

concerning damage arising from nuclear sources or medicinal products) the turnover of the insured in respect of the activities giving rise to the cover must not be less than 200 million units of account. In respect of risks in classes 4, 5, 6, 7, 11 and 12 there is no restriction on the nature or the size of a risk which may be the subject of a Community co-insurance operation.

Paragraph 4 stipulates, in so far as is relevant, that: 'The conditions referred to in paragraph 1(c) of this schedule are ... (b) that the risk is situated (within the meaning of paragraph 5 of this schedule) within a Member State, ...'. Paragraph 5 reads as follows: 'For the purposes of paragraph (4)(b) of this schedule, a risk is situated in a Member State (a) in the case of insurance relating to immovable property, if the property is situated in that Member State, (b) in the case of insurance relating to a registered vessel, aircraft or vehicle (including railway rolling stock), if the vessel, aircraft or vehicle is registered in that Member State, and (c) in any other case, if the policy-holder is incorporated or has his habitual residence in that Member State.'

The scope of these provisions is not clear. At the hearing counsel for the Irish Government said that the requirements only applied if the risk was situated in Ireland, yet he felt bound to point out to the Court that the schedule to the 1983 regulations contains certain provisions for determining where the risk is situated. By paragraph 5(c) (for the purpose of deciding whether an insurance operation is a Community co-insurance operation under paragraphs 1(c) and 4) a risk is situated in a Member State if the policy-holder is incorporated or has his habitual residence in that Member State, other than in respect of immovable property or registered vessels, aircraft or vehicles.

It is for the national court to construe these regulations if there is a dispute. It may be that, for the purposes of Article 4(1), a risk is deemed to be situated in Ireland if the policy-holder is incorporated or has his habitual residence there, even if the risk has no connection with Ireland; on the other hand, it may be that Article 4 is to be read as limited to risks situated in Ireland. For the purposes of this Opinion I take first the narrower, the latter, interpretation.

Admissibility

On 30 December 1975 the Commission submitted to the Council a proposal for a second directive on the coordination of the laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services (Official Journal 1976, C 32, p. 2). This draft is still before the Council, albeit in a considerably amended form. The aims of this draft directive are, *inter alia*, to supplement the provisions of the first directive in relation to technical reserves and to determine the law applicable to the contract.

Ireland contends that, by bringing these proceedings while the second draft directive is still in discussion before the Council, the Commission is 'attempting to pre-empt the constitutional procedures already set in train by the Council under Article 57(2) of the

EEC Treaty ... The Commission is asking the Court of Justice to perform the task assigned by the EEC Treaty to the Council under Article 57(2) of the said Treaty'. Yet it is plain that the effect of a judgment of the Court is different from that of a directive adopted by the Council. What is more, Ireland's argument amounts to saying that the Commission should have withdrawn its draft directive before commencing these proceedings. That course of action could only have the effect of delaying the creation of a common market in insurance. Consequently, the view canvassed by Ireland does not accord with the structure of the Treaty. I would therefore reject this contention.

Also, at the hearing the agent for Ireland claimed that in its first head of claim the Commission was attacking the wrong instrument, since the 1983 regulations were in fact a liberalizing measure. The establishment and authorization requirements were contained instead in the European Communities (Non-Life) Regulations 1976. This argument is itself inadmissible, since it was raised at the hearing for the first time. Nevertheless, the Court should consider it of its own motion.

To my mind Ireland's contention is unfounded. In so far as is relevant Article 4(1) of the 1983 regulations states that 'an insurer established in another Member State may participate with a leading insurer who is the holder of an authorization in a Community co-insurance operation ...'. This provision therefore directly reaffirms the pre-existing authorization requirement for the leading insurer. It also indirectly reaffirms the establishment requirement. I do not therefore consider that the Commission's first head of claim is inadmissible on the grounds suggested by Ireland.

Nor do I consider that any part of the Commission's application is inadmissible on any other grounds.

The leading insurer

By its first head of claim the Commission requests the Court to rule that the establishment and authorization requirements imposed on the leading insurer by Article 4 of the European Communities (Co-insurance) Regulations 1983 infringe Articles 59 and 60 of the Treaty and Directive 78/473.

In view of the exemption contained in Article 4 (2) of those regulations, the establishment requirement in Article 4 (1) applies only to risks falling in classes 8, 9, 13 and 16. For the reasons set out in my Opinion in *Commission* v *France*, I consider that this requirement is contrary to Articles 59 and 60.

In addition, Article 4 (1) requires the leading insurer to obtain an authorization from the Irish authorities pursuant to the 1976 regulations for the same classes of risk. For the reasons set out in the French case, this clearly constitutes a restriction on the provision of services within the meaning of Article 59.

The same applies to the obligation imposed on the leading insurer by Articles 4 (2) and 8 of the 1983 regulations to obtain the Minister's prior consent for risks falling in classes 4, 5, 6, 7, 11 and 12. It is no answer for Ireland to say, as it has done in its rejoinder, that in practice consent is given in all cases and that it is given generally for a whole class of risks. The fact remains that the Minister may refuse to give his consent. Even an automatic licensing system can give rise to delay, be it intentional or unintentional.

For the reasons given in the same Opinion I do not consider that the authorization requirement has been shown to be justified

under Article 56(1) or in the general interest in this case either. The dividing line between 'authorization' and 'consent' can be very narrow and in my view the requirement of consent has not been shown to be justified either.

Despite the arguments advanced as to the sensitive nature of insurance business in Ireland and as to the need to protect the insured and third parties against the bankruptcy of the insurer, I am not satisfied that there is any fundamental difference between the position in Ireland and in the other Member States. The financial standing of companies falls to be surveyed by Member States under the 1973 directive. Other matters fall to be dealt with, following notification, by national law, but they have not been shown to justify establishment, prior authorization or prior consent.

If the Irish rules as to leading insurers apply to risks outside Ireland, deemed to exist there simply because the policy-holder is incorporated or has his residence there, they are even less justified.

It may be that the purpose of applying restrictions of this type where the policy-holder is incorporated in Ireland or has his habitual residence there is to curb or control movements of capital or current payments. For the reasons given in *France*, those are not in my view valid grounds in Community law for restricting the provision of insurance.

Finally, the Commission contends that the establishment and authorization requirements also infringe Article 3 of Directive 78/473. The same argument is advanced in the German case, though not in the French or Danish cases. I refer to my Opinion in *Germany* on this point.

The thresholds

As already mentioned, paragraph 3 of the schedule to the European Communities (Co-insurance) Regulations 1983 lays down thresholds for risks in classes 8, 9, 13 and 16; below those thresholds Community co-insurance is not permitted. Throughout these proceedings the Commission has claimed that paragraph 3 infringes Articles 59 and 60 of the Treaty as well as Directive 78/473. It has not sought to argue that the level of the thresholds set is too high. As I understand it, it maintains in this case simply that the provisions referred to prohibit the fixing of any thresholds at all.

In its reply the Commission has stated that: 'The Commission is not in the present context pursuing the financial thresholds which the Member States have set in order to delimit the field of application of the co-insurance directive'. In its rejoinder Ireland deduced from this that the second head of the Commission's application had been withdrawn. Read in isolation the sentence just quoted appears to convey this meaning. However, when read in context it seems to me that this sentence does not have that meaning: it merely signifies that the Commission is not attacking the actual levels at which the thresholds were set. Indeed in the final sentence of its reply the Commission states that it 'maintains its statement of claim per Article 20 of its

application'. It follows that the Commission has not withdrawn this head of claim.

For the reasons given in my Opinions in *France* and *Germany* I consider that the fixing of thresholds for co-insurance is contrary to Articles 59 and 60 of the Treaty and has not been shown to be justified and that thresholds may not be fixed by Ireland under Directive 78/473/EEC. If thresholds may be fixed and, contrary to my reading, the Commission does say that the thresholds are too high that has not been established in this case.

Direct effect

The Commission's third head of claim must be dismissed on the grounds which I have specified in my Opinion in *France*.

Conclusion

In the light of these considerations I take the view that:

(a) By adopting the provisions of Section 4 of the European Communities (Co-insurance) Regulations 1983 which oblige Community insurance undertakings which wish to provide insurance services in Ireland in the role of leading insurer either to be authorized and established or, as the case may be, to give notice to the Minister and obtain his consent, Ireland has failed to fulfil the obligations incumbent upon it pursuant to Articles 59 and 60 of the Treaty and Directive 78/473/EEC.

(b) By fixing levels below which co-insurance may not be carried out the European Communities (Co-insurance) Regulations 1983 infringe Articles 59 and 60 of the Treaty. Directive 78/473/EEC does not empower the fixing of thresholds by a Member State in respect of the classes of insurance covered by that directive.

In my opinion Ireland should pay the Commission's costs and those of the Netherlands and the United Kingdom. Ireland, Belgium, Denmark and France should bear their own costs.