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

My Lords,

These infringement proceedings brought by the Commission against the Federal Republic of Germany relate to certain restrictions imposed by that State on the provision of insurance.

In its application the Commission asks the Court to find that the Federal Republic of Germany:

1. By applying the Insurance Supervision Law as amended by the Law of 29 March 1983 which provides that where insurance undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business other than transport insurance through salesmen, representatives, agents or other intermediaries, such undertakings must be established and authorized in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of Germany may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers established in another Member State, has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

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

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

Article 105(1) of the Insurance Supervision Law as amended requires foreign insurance undertakings wishing to carry out direct insurance operations in the Federal Republic of Germany through brokers, representatives, agents or other intermediaries to be authorized. Article 106(2) stipulates that, to obtain such an authorization, an undertaking must be established in the Federal Republic of Germany and must retain there

all the commercial documents relating to the establishment, for which separate accounts must be kept.

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

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

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

Article 111(3)(2) empowers the Federal Minister for Finance to adopt regulations laying down thresholds below which Community co-insurance is prohibited. No such regulations have in fact been adopted. Instead, thresholds have been laid down by a circular of the Bundesaufsichtsamt dated 31 May 1981. For risks in classes 8 (fire and natural forces), 9 (other damage to property) and 16 (miscellaneous financial loss) the sum insured under any one contract must be not less than DM 125 million. For risks in class 11 (aircraft liability) the sum insured under any one contract must be not less than DM 75 million. The insured must have a turnover of at least DM 500 million where the risk falls within class 13 (general liability), though damage arising from nuclear sources or from medicinal products is not caught either by the 1978 directive or by Article 111(2). The circular does not prescribe any thresholds for risks in classes 4 to 7 or 12. This flows from the exemption contained in Article 111(1) of the Law.

Lastly, Article 144a(1) creates a criminal offence of providing unauthorized insurance. This was the provision which was at issue in the *Schleicher* case which came before the Kammergericht in Berlin. In that case the court upheld the conviction of a German broker who had offered to persons resident in the Federal Republic of Germany insurance coverage from British companies not approved by the German authorities. The court, against whose judgment no appeal lay, found that the German provisions were compatible with Community law, and refused to make a reference for a preliminary ruling on the matter.

Admissibility

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

The second question

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

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

The requirement of authorization in the present German legislation is essentially linked with the obligation to be established, subject again to an exception for those who are exclusively engaged in transport insurance of the categories mentioned. There is undoubtedly detailed examination of many matters before authorization is given. The aim is said to be to achieve 'transparency', the method to require so far as possible that the terms offered by various insurers should be broadly uniform. The facts in Case 251/83 *Haug Adrion* v *Frankfurter Versicherungs-AG* (judgment of 13 December 1984 [1984] ECR 4277) provide an illustration of this.

In the case of co-insurance where the policy-holders are likely to be large commercial or industrial concerns and the policies 'tailor-made' for the particular and often exceptional risk, I do not accept that the requirement of prior authorization of the insurer to carry on business in the Federal Republic has been shown to be justified. The reasons given in my Opinion in *France* seem to apply at least equally here. For these reasons I consider that the Commission is entitled to the declaration it seeks under Articles 59 and 60 of the Treaty.

Article 3 of Council Directive 78/473 (Official Journal 1978, L 151, p. 25) on co-insurance provides that 'the right of undertakings which have their head office in a Member State and which are subject to and satisfy the requirements of the first coordination directive to participate in Community insurance may not be made subject to any provisions other than those of this directive'. The Commission relies upon that in this case and in the case against *Ireland*, though not in the cases against *France* and *Denmark*. I doubt if it adds anything to the obligation existing under Articles 59 and 60 of the Treaty so far as the requirements of establishment and prior authorization are concerned. I would not, however, read it as excluding a Member State's rights to impose legal rules which must be observed in the making of insurance

contracts and which are justified for the general good.

The first question

The first question is of very much wider import, since the law of the Federal Republic bars all insurers from other Member States from offering insurance in the Federal Republic, save where the insurer deals exclusively with transport or is a co-insurer other than the leading insurer, unless established and authorized there in respect of all forms of insurance, whatever their scope and whatever the financial or other status of the insured.

The first matter which arises is whether these proceedings cover life insurance. The reasoned opinion and the application are in general terms and they do not expressly exclude life insurance; none the less, life insurance is not mentioned, nor is there any discussion of Council Directive 79/267 on the taking-up and pursuit of direct life insurance (Official Journal 1979, L 63, p. 1). It is true that its provisions follow closely those of the 1973 directive on non-life insurance but in the cases against *France* and *Denmark* there was no discussion of life insurance and it was only in answer to a written question from the Court that it was said that the claim in this case was intended to cover life insurance. It was only at the hearing that the Commission really addressed itself to the specific question of life insurance.

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

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

There can be no doubt that, pending harmonization at Community level, national law may prescribe specific rules in relation to insurance generally or as to specific branches of insurance. Article 10(3) of the 1973 directive itself recognizes the fact:

'These coordinating measures do not prevent Member States from enforcing provisions requiring for all insurance undertakings approval of the general and special policy conditions, tariffs and any other documents necessary for the normal exercise of supervision.'

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

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

In the first place I find it impossible to accept the argument that whilst a citizen of the Federal Republic can contract directly with an insurer in Paris or Rome or London, it is consistent with Articles 59 and 60 of the Treaty that he cannot do so through the intermediary of a German broker. Nothing that has been said on behalf of the Federal Republic or the Member States intervening on its behalf seems to me to justify such a restriction. Since it may be convenient for a citizen who understands only German to go through a broker who has a continuing business link with an insurer in another Member State, it seems to me if anything to take away one of the grounds of protection which is relied on. It deprives the insurer of the assistance of the German broker: it may deprive the assured of more favourable terms than he could get in the Federal Republic.

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

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

That an insurer who does become established in the Federal Republic of Germany by setting up an agency or branch should be

subject to control by the competent German authorities in respect of its financial standing and solvency seems to me to be justified and necessary. Such control is expressly provided for in the 1973 directive. To go further and to say that it must be established and authorized there to ensure such financial control is quite a different matter and to my mind ignores the control established by the Council in that directive which has not been shown to be insufficient. Despite all the arguments to the contrary, this requirement of German law clearly duplicates to a significant extent the control provided for in that directive in respect of one who is not established in Germany, since the Member State where the head office is established is required to verify the solvency of the undertaking with respect to its entire business (Article 14), and to ensure that the undertaking has equivalent matching assets in each country where business is carried on (Article 15 (2) and (4)) and that the solvency margin is established in respect of its 'entire' business (Article 16 (1)).

Such requirement of German law ignores the degree of cooperation and cross-communication required between Member States in regard to financial standing. It also, as the Commission has shown, and as the Federal Republic has only challenged in detail, substantially increases the cost, thereby inevitably making the non-German insurer less competitive.

But for the 1973 and 1979 directives there would have been a strong, probably irrefutable, case that before an insurer began providing services in another Member State the competent authorities should be able to check on its solvency, after taking account of the checks made and conditions imposed in the Member State where it is established. That I regard as no longer the position since the two directives were made by the Council. It is not justified to ignore the controls to be exercised pursuant to the directive by other Member States; on the contrary it must be accepted as sufficient even if there are some differences in the practice of Member States.

As to matters other than financial standing, it seems to me that, subject to harmonization, national law may impose requirements as to the terms to be included in particular types of policy, indeed perhaps in all policies, and as to the control to be exercised in relation to the conduct of insurance business, so long as they do not discriminate against non-German nationals as such, so long as they are proportional to the aims to be achieved in the public interest, and so long as they take account of controls existing which are adequately enforced in other Member States. Thus provisions as to notification by insurers of their intention to offer insurance in the Federal Republic of Germany, of the kind of business they wish to transact, as to the nomination of an agent for the service of documents, as to the use of the German language and German law for certain types of insurance and as to the deposit of documents, may be justified. Matters other than financial standing which are necessary

in the general good for the protection of the insured and third parties fall to be dealt with by national laws. The person providing the insurance must observe these laws so long as they do not go beyond what the Court in such cases as *Van Binsbergen* and *Webb* has accepted as being justified in the public interest. On the other hand, there is far less need for a personal presence in this sort of case than that which was found to be justified in *Van Binsbergen.*

I do not consider that it has been shown in this case that the adoption of such national provisions falling short of a requirement of establishment and authorization are insufficient or that establishment and prior authorization are justified and indispensable to achieve the aims which it is sought to achieve.

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

The arguments based on violations of national sovereignty in this case seem to me not to be justified in the light of the provisions of the Treaty and the directives.

The fact that much may remain to be harmonized does not mean that establishment and prior authorization are *per se* justified. I would accordingly accept, despite the greater importance of consumer protection and the protection of third parties than appears to exist in the co-insurance cases, that the Commission has established the first claim in this case.

The third question

The claim under Articles 59 and 60 is limited to saying that the thresholds set are too high. It does not say that thresholds may not be set at all. I consider for the reasons given in the case against *France* that it has not been shown to be justified for thresholds to be fixed under Articles 59 and 60 for co-insurance.

If I had come to the opposite view I should have concluded that thresholds may not be fixed so as to exclude (a) cases where the amount involved may not be very large but the likelihood of the risk is so great that it is reasonable to co-insure; or (b) cases which are currently accepted by the market as being the normal subject-matter of

co-insurance. On this basis it does not seem to me that even though the maxima fixed seem in absolute terms high, the Commission has adduced any evidence to show that the figures adopted are so high that they go beyond what is reasonably justified in the general interest and therefore in breach of Articles 59 and 60 of the Treaty. This seems to me to be entirely a matter of evidence.

As to the alternative claim under the directive Article 1(2) of Directive 78/473 provides:

'This directive shall apply to risks referred to in the first subparagraph of paragraph 1 which by reason of their nature or size call for the participation of several insured [i.e. insurers] for their coverage.

Any difficulties which may arise in implementing this principle shall be examined pursuant to Article 8.'

Article 8 reads as follows:

'The Commission and the competent authorities of the Member States shall cooperate closely for the purposes of examining any difficulties which might arise in implementing this directive.

In the course of this cooperation they shall examine in particular any practices which might indicate that the purpose of the provisions of this directive and in particular Article 1(2) and Article 2 are being misused either in that the leading insurer does not assume the leader's role in co-insurance practice or that the risks clearly do not require the participation of two or more insurers for their coverage.'

By a declaration entered into its minutes when adopting this directive, the Council invited the supervisory authorities of the Member States to adopt any measures in cooperation with the Commission to determine by agreement, within a period of 12 months from the notification of the directive, general indications as to what was to be understood by 'nature' and 'size' of the risk justifying recourse to co-insurance. The declaration went on to state that the Council accepted that for legislative and administrative reasons the Member States might incorporate in their legislation implementing the directive criteria for the interpretation of the first subparagraph of Article 1(2).

As I understand it, this led to the setting-up of a working group at which the majority of the supervisory authorities decided on quantitative thresholds below which co-insurance within the directive was not to be permitted. The thresholds set by the four defendant Member States therefore bear a very close similarity to one another. Below these thresholds Community co-insurance is precluded in each of these Member States. It follows that all of the co-insurers are required to be established in the State of the risk and duly authorized by the authorities of that State in respect of co-insurance below these thresholds.

The Commission's claim again here is limited to saying that the thresholds set are too high. It does not say that they may not be set at all. Whether the Member States are entitled independently, or whether a few of them in agreement are entitled, to fix these thresholds under the directive is not immediately clear. I read Article 1(2) of the 1978 directive, however, as leaving it to market forces to decide what risks by reason of their nature and size call for co-insurance. It is only if it is found that the provisions of the directive are being

misused, in that the co-insurance directive is being used for insurance which does not normally call for co-insurance or if difficulties in the application of the directive arise, that Member States and the Commission are to consider those practices. It may be that, if such difficulties were shown to exist, it would be reasonable for the Community to adopt, amongst other measures, the fixing of thresholds. I do not consider, however, that the Council's declaration empowered the Member States to set thresholds under the directive. If thresholds are to be fixed under the directive it seems to me that they have to be fixed by the Council by a further directive or by the Commission if power to do so is delegated to it. The directive does not, and in any event cannot, validly confer an open-ended power on Member States to lay down thresholds and thereby determine the scope of the directive (Case 23/75 *Rey Soda* [1975] ECR 1279). There is accordingly no power under the directive for Member States to fix thresholds.

It seems to me in any event to be strongly arguable that even if there were prior to the making of the directive an inherent power in Member States to fix thresholds by way of a justified limitation on the rights conferred by Articles 59 and 60, the directive pre-empts that power in respect of the classes specified in the 1978 directive. If thresholds are needed they must be fixed by the Community.

If contrary to that view the Member States are empowered to fix thresholds under the directive, then there is again no evidence in this case to show that they are unreasonably high. This is a matter which, if it cannot be agreed, the Commission may need to reconsider.

It would, however, not in any view be an answer to the claim that only maxima had been fixed, since clearly the thresholds could be set at any figure up to those maxima.

Conclusion

In the light of these considerations I am of the opinion that:

1. By applying the Insurance Supervision Law as amended by the Law of 29 March 1983 which provides that where insurance undertakings in the Community wish to provide services in the Federal Republic of Germany in relation to direct insurance business other than transport insurance through salesmen, representatives, agents or other intermediaries, such undertakings must be established and authorized in the Federal Republic of Germany and which provides that insurance brokers established in the Federal Republic of Germany may not arrange contracts of insurance for persons resident in the Federal Republic of Germany with insurers established in another Member State, has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

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

3. The fixing of thresholds for certain classes of insurance, below which co-insurance is prohibited, is contrary to Articles 59 and 60 of the Treaty; it is not open to a Member State to fix those thresholds under Directive 78/473/EEC.

It seems to me that the Federal Republic should pay the Commission's costs and the costs of the Netherlands and the United Kingdom. Belgium, Denmark, France, Ireland and Italy, which intervened on behalf of the Federal Republic, should in my view bear their own costs.