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

*My Lords,*

In this case the Commission has brought infringement proceedings against Denmark with respect to certain restrictions imposed by that State on co-insurance operations. Here, as in Case 220/83 *Commission* v *France*, the claim is limited to co-insurance and my Opinion is concerned only with co-insurance. The United Kingdom and the Netherlands intervened to support the Commission, Belgium and Ireland to support Denmark.

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

1. By issuing Decree No 459 of 10 September 1981 requiring EEC insurance undertakings to become established in Denmark in order to be able to provide co-insurance services in Denmark as leading insurers, has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

2. By issuing Decree No 459 of 10 September 1981 preventing EEC insurance undertakings not established in Denmark from participating in co-insurance activities which, as a result of their nature or size or the insured's turnover, are not covered by that order, has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

3. By inserting into the Danish legislation regulating insurance and into the orders adopted pursuant thereto a requirement that insurance companies whose stated principal place of business is in Denmark and Danish branches of insurance companies whose stated principal place of business is elsewhere in the European Community must have a special authorization in order to provide services in the field of insurance, including co-insurance, in other Member States of the European Community, and by laying down conditions for the granting of such authorization which are not the same for companies whose stated principal place of business is in Denmark as for Danish branches of companies whose stated place of business is elsewhere in the European Community, has failed to fulfil its obligations under Articles 52, 59 and 60 of the EEC Treaty and under Article 6 of Directive 73/239 of 24 July 1973;

4. By applying the provisions mentioned in paragraphs 1 to 3 above, by way of decisions adopted by the national authorities, instead of Articles 59 and 60 of the EEC Treaty, has failed to fulfil the obligations which ensue from the direct effect of the aforesaid provisions of the EEC Treaty and from the rule of primacy of Community law.

Council 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 Council Directive 78/473 relating to Community co-insurance (Official Journal 1978, No L 151, p. 25) are of course important in this case. Since I have already referred to these directives in some detail in my Opinion in *Commission* v *France*, I do not do so in this case.

Danish Decree No 459 of 10 September 1981 on Community co-insurance purports to implement the 1978 directive. Article 1 lays down *inter alia* the classes of risk covered and thus reflects Article 1 (1) of the directive. Article 7 provides that the leading insurer must be established in Denmark for the purposes of covering risks to be regarded as Danish. By virtue of Article 5 a risk is to be regarded as Danish if it is situated in Denmark although there are special rules for goods in transit and means of transport. To be established in Denmark the leading insurer must obtain an authorization from the Danish authorities in accordance with Decrees Nos 455 and 457, also of 10 September 1981. Thus the leading insurer is subject both to an establishment and to an authorization requirement. The other co-insurers are exempted from both these obligations by Decree No 459.

Decree No 459 must be read in the light of Article 220 of the Danish Law of 23 December 1980 on which it is based and which deals, *inter alia*, with the provision of insurance services by foreign companies in Denmark. It follows in the Danish Government's submission that the authorization and establishment requirements do not apply unless the insurer is physically present in Denmark in some way. Thus it is perfectly lawful for a person resident in Denmark to go directly to an insurer in another Member State. But the insurer may not seek business in Denmark or act through an agent or broker there unless he complies with the establishment and authorization requirements.

Furthermore, Article 2 lays down thresholds below which Decree No 459 does not apply and Community co-insurance is therefore prohibited. For risks in classes 4 (railway rolling stock), 5 (aircraft), 6 (ships), 7 (goods in transit), 11 (aircraft liability) and 12 (liability for ships) the total sum insured under any one contract must not be less than 30 million units of account. For risks in classes 8 (fire and natural causes), 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 risks in class 13 (general liability) the turnover of the insured must not be less than 200 million units of account (risks concerning damage arising from nuclear sources or medicinal products fall within class 13 but are not caught by the 1978 directive or by Decree 459).

Lastly, under Chapter III of Decree No 459 Danish branches of insurers established elsewhere in the Community are prohibited from taking part in co-insurance transactions in relation to risks situated in other Member States unless they have been authorized to do so.

**Admissibility**

On the first day of the hearing, the Commission withdrew its second head of claim. The Danish Government then explained that the Commission had acted on the basis of an erroneous reading of the Danish provisions concerned. Accordingly, on the second day of the hearing the Commission sought to reinstate this head of claim. The question therefore arises whether it was entitled to do so. To my mind it was. Denmark was not precluded from advancing any argument which it might otherwise have advanced, indeed was expressly asked if it wished to say more in case the Court ruled that the claim could be reinstated. The rights of the defence were therefore not prejudiced in any way. Nor was anyone else prejudiced. This case is therefore to be distinguished from an attempt to reinstate a claim that has been withdrawn in the written pleadings. I conclude that the Commission's actions do not render its second head of claim inadmissible.

Nor do I consider that the application is inadmissible on the other general grounds considered in the case against France.

**The first claim**

In its first head of claim, the Commission seeks a ruling to the effect that, by requiring an insurer to be established in its territory before acting as leading insurer in a co-insurance operation relating to risks situated there, Denmark has infringed Articles 59 and 60 of the Treaty.

Many of the arguments advanced by the defendant are similar to those advanced in the case of *France* and for the same reasons I do not accept them. In particular the contentions, which are emphasized in this case, (i) that there cannot be freedom to provide services pending further harmonization in the proposed second directive, (ii) that Article 2(1)(c) of the 1978 directive must be interpreted as requiring the leading insurer to set up an establishment in the country of risk, (iii) that the obligation to set up an establishment implies that there must be sufficient technical reserves actually in Denmark to cover the sum of an undertaking's obligations under contracts directly entered into in Denmark, in case of the economic collapse of the undertaking, and (iv) that for such contracts supervision can only effectively be maintained in Denmark if the insured is to be protected, as well as the other reasons put forward, I do not accept as justifying the requirement of establishment. For the reasons given in my Opinion in the case against *France* I consider that the Commission has made out this claim and that the requirement of establishment is in breach of Articles 59 and 60 of the Treaty.

The Commission has not sought a ruling on the authorization requirement, even though it has impugned that requirement in the French, German and Irish cases, and even though it considers that a requirement of authorization implicitly flows from the need to be established. Had it done so I would have accepted that the authorization requirement was restrictive of the provision of services and had not been shown to be

justified for the reasons given in the case against *France*.

**The second claim**

In its preliminary letter and its reasoned opinion, the Commission contended that the Danish provision as to thresholds, below which co-insurance may not be accepted, violated (a) Directive 78/473 in that the limits fixed were too high and (b) Articles 59 and 60 in that it was not open to Denmark to fix any thresholds for co-insurance. In this case too the first claim was abandoned. Although the claim was put in a somewhat different way at the hearing in the light of what the Danish law was understood to be, it has to be treated as being put in the application in the same way as it was put in the French case. For the reasons given in my Opinion in that case I accept that the Commission has made out its claim under Articles 59 and 60.

**The third claim**

Read in isolation, this head of claim appears to apply to insurance generally. Indeed, in its written reply, the Commission has stated that in part this head of claim extends beyond co-insurance. However, it emerges from the Commission's letter of 2 June 1982 initiating the procedure under Article 169 and from the body of the application that this complaint relates solely to Decree No 459 and is therefore confined to co-insurance. It is not open to the Commission to extend the scope of the proceedings in its reply.

This head of claim falls into two parts. The Commission complains firstly that under Decree No 459 insurers established in Denmark and branches in Denmark of insurers established elsewhere in the Community are required to obtain a special authorization before they can provide insurance in other Member States. This, it claims, contravenes Articles 59 and 60 of the Treaty and Article 6 of the 1973 directive.

In its letter of 2 June 1982 the Commission did not refer to Article 6 of the 1973 directive. It did, however, allege a breach of Article 3 of the 1978 directive which refers to compliance with the 1973 directive and the granting of an authorization under it. The reasoned opinion does allege breach of Article 6 of the 1973 directive. This lack of precision in the preliminary letter is unsatisfactory but it seems to me that the point was raised, albeit obliquely, and I consider that this claim is admissible.

Even dealing with this point in relation only to co-insurance, the question is not entirely easy. Neither the 1973 nor the 1978 directive deals in terms with the question of granting an authorization for the provision of services outside the territory in which the undertaking has its head office or a branch or agency. There is force in the argument of the Commission and the Netherlands that once an authorization is granted by one Member State the undertaking can provide services elsewhere in the Community and does not need an authorization to provide services in other specified Member States.

Article 7 contemplates that an undertaking may ask for, and be given, permission only

in respect of part of the territory of a Member State and in respect of only a class or classes of insurance. If it wants to extend its territory in the Member State or the types of business it covers, it must get a further authorization and submit a further scheme of operations pursuant to Article 8(2) of the 1973 directive. A refusal of any authorization under that directive must be accompanied by precise reasoning and be notified to the undertaking; the Member State must provide for a right to apply to the courts if there is a refusal (Article 12).

These provisions do not solve the present question directly. However, they, together with the financial controls set up by the 1973 directive, and the provisions as to the scheme of operations and to the giving of information, the details of which are set out in my Opinion in *France*, do seem to me to contemplate that the supervising State in which the undertaking is established should be aware of the geographic extent, as well as the nature of the classes, of business involved. Only if it does so can it carry out effectively the supervision which is necessary, and which the Commission accepts to be necessary. These seem to me to be reasonable requirements in the public interest which are capable of justifying the need for an authorization in respect of the geographic area involved. Such an authorization outside the territory of the Member State in question could, as I see it, only be refused if the undertaking's assets were likely to be insufficient to cover the co-insurance risks sought to be undertaken in other Member States or if its integrity was in question.

Accordingly, I do not consider that the requirement that an authorization shall be granted in respect of co-insurance in the Community but outside Denmark violates either Articles 59 or 60 of the Treaty or Article 6 of the directive.

Next, the Commission alleges that Danish branches of insurers from other Member States are subject to more rigorous conditions for obtaining authorizations to cover risks situated in other Member States than are Danish insurance companies. This discrimination is said to infringe Articles 52, 59 and 60 of the Treaty.

There is no reference in the preliminary letter to Article 52 of the Treaty even though it is mentioned in the reasoned opinion. On that ground I would not accept the claim under Article 52 of the Treaty as being admissible (Cases 31/69 *Commission* v *Italy* [1970] ECR 25 and 211/81 *Commission* v *Denmark* [1982] ECR 4547).

As to the merits, in respect of the alleged breach of Articles 59 and 60, Denmark admits that the provisions relating to Danish companies are contained in Chapter II of Decree No 459, whereas those concerning Danish branches of companies established in other Member States are to be found in Chapter III. However, it denies the existence of any discrimination. What is more, the Commission has not succeeded in showing that discrimination exists. In its written reply it has sought to shift to the Danish Government the burden of proving that the provisions concerned are not discriminatory. This the Commission plainly cannot do, since it is for the Commission to establish the necessary discrimination.

It may be that the Commission will find it necessary to look at this aspect of the case again, unless agreement can be reached with the Danish Government, but for my part I am not satisfied that the Commission has established its allegation in the application in these proceedings.

**The fourth claim**

For the reasons which I have set out in my Opinion in *Commission* v *France*, I consider that the Commission's fourth head of claim should be dismissed.

## Conclusion

In the light of these considerations I am of the opinion that (1) by requiring a Community insurer to be established in Denmark in order to be able to participate in a co-insurance operation in that State as leading insurer and (2) by preventing EEC insurance undertakings not established in Denmark from participating in co-insurance activities which as a result of their size or the insured's turnover are not covered by Decree No 459 of 10 September 1981, the provisions of that decree infringe Articles 59 and 60 of the Treaty. The balance of the Commission's case in these proceedings should be dismissed.

In my view, Denmark, the Commission, Belgium and Ireland should bear their own costs. Denmark should pay the costs of the Netherlands and the United Kingdom which intervened principally on the first claim.