JUDGMENT OF THE COURT

14 June 2001 *

In Case C-191/99,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Kvaerner plc

and

Staatssecretaris van Financiën,

on the interpretation of Articles 2(c) and (d) and 3 of the 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),

* Language of the case: Dutch.

THE COURT,

composed of: C. Gulmann, President of the Third and Sixth Chambers, acting for the President, A. La Pergola, M. Wathelet (Rapporteur) and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General: F.G. Jacobs,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, acting as Agent;

— the German Government, by W.-D. Plessing, acting as Agent;

— the French Government, by R. Abraham and S. Seam, acting as Agents;

— the United Kingdom Government, by M. Ewing, acting as Agent, and A. Robertson, Barrister;

— the Commission of the European Communities, by C. Tufvesson and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kvaerner plc, represented by F. Bracht, belastingadviseur; of the French Government, represented by R. Abraham and S. Seam; and of the Commission, represented by H.M.H. Speyart, at the hearing on 8 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2001,

gives the following

Judgment

1 By judgment of 19 May 1999, received at the Court on 25 May 1999, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 2(c) and (d) and 3 of the 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 Directive').

2 The three questions have been raised in proceedings between Kvaerner plc ('Kvaerner') and the Staatssecretaris van Financiën (Netherlands State Secretary for Finance) concerning a revised assessment to tax relating to the part of the insurance premiums paid by Kvaerner which covered the business risks of an

indirect subsidiary, established in the Netherlands, for the period from 1 July 1990 to 31 May 1994.

Legal context

Community rules

3 At the material time, the Directive constituted the relevant Community rules. It was the second directive adopted in respect of non-life insurance. According to Article 1 thereof, the object of the Directive was, first, to supplement the first directive in this field, namely 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), and, second, to lay down special provisions relating to freedom to provide services for the undertakings and in respect of the classes of insurance covered by that first Directive.

4 According to the first and third recitals in the preamble to the directive,

'... it is necessary to develop the internal insurance market and, to achieve this objective, it is desirable to make it easier for insurance undertakings having their head office in the Community to provide services in the Member States ...

...

... for practical reasons, 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; ... therefore a definition of the situation of the risk should also be adopted; ... moreover, it is desirable to distinguish between the activity pursued by way of establishment and the activity pursued by way of freedom to provide services.'

5 Articles 2 and 3 of the Directive belong under Title I, 'General provisions'.

6 Article 2 of the Directive provides:

'For the purposes of this Directive:

(a) "first Directive" means:

Directive 73/239/EEC;

(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, 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;

(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.'

7 Article 3 of the Directive 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 With regard to the taxing of insurance transactions, the 15th recital in the preamble to the Directive states:

'... 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; ... the structure and rate of these taxes and contributions vary considerably between the Member States in which they are applied; ... it is desirable to avoid a situation where existing differences lead to disturbances of competition in insurance services between Member States; ... pending future harmonisation, the application of the tax system and of other forms of contributions provided for by the Member State in which the risk is situated is likely to remedy such mischief ...'.

9 The question of Member States being able to charge taxes on insurance premiums is regulated in the first paragraph of Article 25 of the Directive as follows:

'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) ...'

The national legal context

10 The taxation of insurance contracts is governed in the Netherlands by the Wet op belastingen van rechtsverkeer (Netherlands Law on Transaction Tax). That legislation was amended by a Law of 20 June 1990 (*Staatsblad* No 332), which entered into force on 1 July 1990 and transposed the Directive.

11 Pursuant to Article 20 of the Wet op belastingen van rechtsverkeer, as amended by the Law of 20 June 1990 ('the WBR'):

'A tax entitled "tax on insurance agreements" shall be levied on insurance covering a risk situated in the Netherlands.'

12 Article 21 of the WBR defines where a risk covered by insurance is situated:

'1. The risk covered by the insurance shall be situated in the Netherlands if the policy-holder is resident in the Netherlands, or, if the policy-holder is a legal person, if the establishment of that legal person to which the contract relates is situated in the Netherlands.

2. Where paragraph 1 is not applicable, the risk covered by the insurance shall also be situated in the Netherlands if the insurance relates to:

   a. buildings situated in the Netherlands and their contents other than goods intended for transit;

   ...

3. In derogation from paragraph 1, the risk covered by the insurance shall not be situated in the Netherlands if the insurance relates to:

   a. buildings situated in another Member State of the European Union and their contents other than goods intended for transit;

   ...

4. For the purposes of paragraph 1, "establishment" shall mean the principal establishment of the legal person and any other permanent presence of that legal person in whatever form.'

The dispute in the main proceedings

13 Kvaerner, a company established in the United Kingdom, holds all the shares in John Brown plc, a company also established in the United Kingdom. Through that subsidiary, Kvaerner holds all the shares in John Brown Engineers en Constructors BV ('John Brown BV'), a company established in the Netherlands.

14 Kvaerner took out professional indemnity insurance, worldwide umbrella insurance and worldwide catastrophe insurance with an insurance company established in the United Kingdom to protect the undertakings in its group.

15 The insurance contracts provide that the insured persons may be Kvaerner itself and/or its subsidiaries and/or associated companies, as instructed by the policy-holder. Kvaerner pays the premiums relating to those contracts directly to the insurance company and passes on to the insured undertakings the share of the total corresponding to the operating risks of each of them.

16 Without being instructed to do so by John Brown BV, Kvaerner included John Brown BV's business operations within that insurance cover. The part of the premiums paid by Kvaerner relating to the risks linked to John Brown BV's business operations is invoiced to it through John Brown plc.

17 On 17 November 1995, the Netherlands tax authorities assessed Kvaerner to tax under Article 25(3) of the WBR. Kvaerner was asked to pay a total of

NLG 50 142 on the insurance contracts, relating to the part of the premiums paid to it by John Brown BV through John Brown plc for cover for risks linked to its business operations in the period from 1 July 1990 to 31 May 1994, in so far as those risks were situated in the Netherlands.

18 Kvaerner contested the levy, but the Netherlands tax authorities confirmed it. Kvaerner appealed against that decision to the Gerechtshof te Amsterdam (Netherlands). By judgment of 16 May 1997, that court upheld the tax authorities' decision. Kvaerner then appealed in cassation to the Hoge Raad der Nederlanden.

19 In its order for reference the Hoge Raad observes that there are two possible approaches. First, as the Gerechtshof held, the term 'establishment' in Article 2 of the Directive may be taken to include not only the head office, agencies and branches but also subsidiaries, in so far as Article 3 of the Directive extends that concept to any permanent presence in the forms there mentioned. In that way account will be taken of the freedom provided for in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) to choose an appropriate legal form for carrying on business in another Member State. Alternatively, it may be argued, as Kvaerner does, that a legal person's place of establishment is determinant for the levying of tax on insurance agreements and that an interpretation which enabled a subsidiary, with its separate legal personality, to be deemed to be an establishment of the legal person which is the policy-holder could be contrary to the purpose of the Directive. The Hoge Raad considers that, in a situation such as the present, to interpret the concept of the establishment of the legal person which is the policy-holder as not including subsidiaries or sub-subsidiaries would make it impossible to determine the situation of the risk, unless the subsidiary or sub-subsidiary to which the premium is passed on must be regarded as a policy-holder for the purposes of Articles 2 and 3 of the Directive.

The questions referred for a preliminary ruling

20 The Hoge Raad der Nederlanden took the view that the case before it raised questions of interpretation of Community law and so, by judgment of 19 May 1999, it stayed proceedings and referred the following questions to the Court:

'1. Is it permissible under Articles 2(c) and (d) and 3 of the 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 passed on (wholly or in part) to the subsidiary or sub-subsidiary?'

Questions 1 and 2

21 By its first and second questions, which it is appropriate to examine together, the national court asks essentially whether Articles 2(c) and (d), final indent, and 3 of

the Directive permit a Member State to levy insurance tax on a legal person established in another Member State in respect of premiums which that legal person has paid to an insurer, also established in another Member State, to cover the business risks of its subsidiary or sub-subsidiary established in the Member State making the levy. It asks whether it would make any difference if the legal person which paid the premiums and the legal person whose business risks are covered were two companies in the same group linked by a relationship other than than that of parent and subsidiary company.

22 Kvaerner and the United Kingdom Government consider that the Directive precludes the levying of Netherlands insurance tax on Kvaerner for the premiums which it paid in the United Kingdom to cover the business risks of John Brown BV and which the latter reimbursed to Kvaerner through John Brown plc. The United Kingdom Government maintains that it is clear from the definition of 'establishment' in Article 2(c) of the Directive that a subsidiary cannot constitute an 'establishment' for the purposes of Article 2(d) of the Directive. The United Kingdom Government nevertheless accepts that John Brown BV could itself be the policy-holder if it appears that Kvaerner in fact acted for it as its agent in taking out those insurance contracts. Kvaerner considers that, since Article 2(d) uses the term 'establishment' of the policy-holder only where the policy-holder is a legal person, the policy-holder's establishment cannot be interpreted as also covering all subsidiaries, which are wholly separate legal persons.

23 Using different arguments, the Netherlands, German and French Governments and the Commission maintain, however, that the Netherlands authorities are entitled to levy tax on the premiums paid to cover risks linked to the business activities of John Brown BV.

24 The Netherlands Government submits that the term 'establishment' is used in different contexts in Article 2(c) and Article 2(d) of the Directive. The combined

provisions of Articles 2(c) and 3 of the Directive define the establishment of the insurer solely in the context of the non-life insurance directives, whereas Article 2(d) concerns the establishment of the policy-holder. That latter term, which is not defined by the Directive, should be interpreted by reference to Article 52 of the Treaty and therefore includes subsidiaries.

25 On the basis of the combined provisions of Articles 2(c) and 3 of the Directive, the German Government considers that any permanent presence, including a subsidiary, constitutes an establishment for the purposes of Article 2(d) of the Directive.

26 Both the Netherlands Government and German Government therefore argue that, in the present case, the Kingdom of the Netherlands is, for the purposes of the Directive, the Member State in which the policy-holder's establishment to which the contract relates is situated and in which, therefore, the State where the risk is situated.

27 The French Government submits that John Brown BV must be regarded as the policy-holder for the purposes of the Directive, so that the Kingdom of the Netherlands is the Member State in which the risk is situated.

28 The Commission submits that Article 2(c) of the Directive cannot be interpreted as including subsidiaries in the definition of 'establishment', but that the term 'establishment' in Article 2(d) of the Directive should be interpreted differently, giving weight to the place where the activity the risks of which are to be covered is carried on. Consequently 'the Member State where the risk is situated' is the Member State of establishment of the branch or agency or, in the case of insurance relating to a group, the Member State where the company in the policy-holder's group to whose activities the relevant part of the policy relates is established.

Assessment of the Court

29 In order to reply to the first and second questions raised, it must first be ascertained whether the subsidiary or sub-subsidiary of a company which takes out insurance, or an undertaking belonging to the same group as that company without constituting either a subsidiary or branch or agency thereof, can be regarded as an 'establishment' of that company within the meaning of Article 2(d), second indent, of the Directive.

30 It should be remembered, at the outset, that the Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part (See Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50).

31 An analysis of Article 2(c) and Article 2(d), final indent, of the Directive shows that the term 'establishment' is used there in two different contexts. In the light of the definition of 'undertaking' in Article 2(b) of the Directive, Article 2(c) concerns the establishment of the undertaking which provides insurance. Article 2(d), final indent, concerns the establishment of the policy-holder. As the Netherlands Government and the Commission point out, those two meanings must be distinguished.

32 Article 2(c) of the Directive defines 'establishment' as the head office, agency or branch of 'an undertaking', Article 2(b) specifying that, for the purposes of

applying in particular Article 2 of the Directive, 'undertaking' means an undertaking which has received official authorisation to provide insurance services.

33 The Directive uses the term 'establishment' thus defined in order to draw a distinction, as is clear in particular from its third recital, between the exercise of non-life insurance activities by way of an establishment in another Member State, which is guaranteed and regulated by First Directive 73/239, and the exercise of those activities by cross-frontier provision of services, which is guaranteed and regulated by the Directive.

34 That distinction is reflected in Article 2(e) of the Directive, which defines the Member State of establishment as being the Member State in which the establishment covering the risk is situated and by Article 2(f) of the Directive, which defines the Member State of provision of services as being the Member State in which the risk is situated when it is covered by an establishment situated in another Member State.

35 The definition of 'establishment' in Article 2(c) of the Directive therefore relates only to the establishment of an insurance company. The scope of that definition remains to be determined.

36 On this point, it is not possible to accept the German Government's argument that the concept of 'establishment' in Article 2(c) of the Directive should be extended to subsidiaries, in so far as they constitute a form of permanent presence and in so far as Article 3, on which the definition of 'establishment' in Article 2(c) expressly depends, treats any permanent presence of an undertaking in the territory of a Member State in the same way as an agency or a branch.

37 Although Article 3 of the Directive does indeed provide for the permanent presence of an undertaking in the territory of a Member State to be treated as an agency or branch, it specifies that that should be the case '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'.

38 In this respect, the wording of Article 3 of the Directive reproduces the terms of the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21, which was delivered one and a half years before its adoption. In that judgment, the Court had to determine the type of presence which, although not formally constituting a branch or agency, was nevertheless sufficiently permanent to evidence the establishment of the undertaking in another Member State and therefore fell under the provisions of the Treaty relating to the right of establishment rather than those relating to freedom to provide services. At paragraph 21 of the judgment, the Court held that an insurance undertaking of a Member State which maintains in another Member State a permanent presence that 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 authorised to act on a permanent basis for the undertaking, as would be the case with an agency, came within the scope of the provisions of the Treaty on the right of establishment and not within the scope of the provisions on freedom to provide services.

39 Article 3 of the Directive must therefore be interpreted as extending the concept of 'agency or branch' in Article 2(c) of the Directive so that it applies in the broadest sense, whatever the formal term used. It cannot, however, be inferred that a subsidiary constitutes a form of permanent presence which must be treated in the same way as an agency or branch and therefore be regarded as an establishment within the meaning of Article 2(c) of the Directive.

40 Moreover, if a subsidiary were to be treated as an agency or branch within the meaning of Article 2(c) of the Directive, that would create a problem for the

interpretation of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239 and 88/357 (third non-life insurance Directive) (OJ 1992 L 228, p. 1). In Directive 92/49, the term 'branch' is defined in Article 1(b) as 'an agency or branch of an insurance undertaking, having regard to Article 3 of Directive 88/357/EEC', whereas 'subsidiary' is given a separate definition in Article 1(i).

41 In the light of the preceding considerations, the definition of 'establishment' in Article 2(c) of the Directive does not include subsidiaries.

42 As regards Article 2(d), final indent, of the Directive, it must be held that the term 'establishment' is used there to determine 'the Member State where the risk is situated'. The establishment referred to in that provision is expressly stated to be that of the policy-holder and 'establishment' cannot therefore have the meaning given to it in Article 2(c) of the Directive.

43 In order to interpret the term 'establishment' used in Article 2(d), final indent, of the Directive and to determine in particular whether it may be interpreted as referring to a subsidiary or sub-subsidiary of the legal person which is the policy-holder, the context and the objectives pursued by the legislation of which this provision forms part must, as pointed out in paragraph 30 of this judgment, be taken into consideration.

44 It is clear from Article 2(d), first to fourth indents, of the Directive that the Community legislature intended to propose, for all types of risk insured, a

solution enabling the State where the risk is situated to be determined on the basis of concrete and physical, rather than legal criteria. The purpose was that there should be a concrete factor corresponding to each risk which would allow it to be localised in a specific Member State.

45 Thus, where the contract relates to buildings, the Member State where the risk is situated is the Member State in which the property is situated according to Article 2(d), first indent, of the Directive. Under Article 2(d), second indent, if the contract relates to a vehicle, the Member State where the risk is situated is the Member State in which the vehicle is registered, even if that is not the Member State in which the vehicle is used. In accordance with Article 2(d), third indent, of the Directive, where a contract of short duration relates to travel or holiday risks, the Member State where the risk is situated is that where the policy-holder took out the policy.

46 Article 2(d), final indent, of the Directive was intended to enable the Member State where the risk is situated to be determined in all cases not provided for in the previous indents. So, the objective of Article 2(d), final indent, is in particular to lay down a residual rule for the determination of the place where a business risk is situated when that risk is not specifically linked to a building, a vehicle or travel. To that end, emphasis is placed on the place where the activity whose risk is covered by the contract is exercised. For that purpose, the legislature had recourse to the criterion of the policy-holder's habitual residence where he is a natural person and to the criterion of the establishment to which the contract relates where the policy-holder is a legal person.

47 In circumstances such as those at issue here, namely where a parent company established in a Member State has taken out insurance with an insurer of the same Member State to cover risks linked to the activity of a sub-subsidiary established in another Member State, it would not be possible to determine the place where

the risk is situated if the concept of the 'establishment' of the policy-holder, as referred to in Article 2(d), final indent, of the Directive, did not also comprise a subsidiary of that policy-holder. That cannot have been the Community legislature's intention.

48 This is reinforced by the fact that the concept of 'establishment' as referred to in Article 2(d), final indent, of the Directive is determinative for the application of Article 25 of the Directive, which reserves the power to tax insurance premiums to the Member State where the risk is situated.

49 It appears from the fifth recital in the preamble to the Directive that the aim of Article 25 is to attenuate the risk that differences in the structure and rates of indirect taxes on insurance transactions might result in disturbances of competition between Member States as regards insurance services.

50 Making the place where the risk is situated the criterion for determining the State having the power to tax is apt to eliminate disturbances of competition between the undertakings of different Member States offering insurance services.

51 As the United Kingdom Government points out, that choice of criterion also allows the danger of double taxation to be avoided as well as the possibility of tax avoidance, since there is an establishment, and therefore a Member State, corresponding to each risk. On the one hand, no risk can correspond to several establishments and accordingly there can be no double taxation. On the other hand, a policy-holder cannot avoid tax liability in a particular Member State, since the existence of an establishment and an insured risk relating to that establishment is linked to objectively verifiable factors.

52 As the Commission has pointed out, the aim of the Community legislature was to ensure, by the combined provisions of Articles 2(d), final indent, and 25 of the Directive, that as far as possible power to tax should be recognised on the basis of a concrete and objective criterion, ignoring the legal situation of the policy-holder and concentrating on the location of the activities the risks of which are covered. To interpret 'establishment' in Article 2(d), final indent, as excluding subsidiaries would allow the concept of the location of the risk, and therefore tax liability, to be artificially exploited, which would run counter to the objective of attenuating disturbances of competition pursued by the Directive. Such an interpretation could also have the effect of making it impossible in certain circumstances to determine the location of the risk. Such possibilities cannot be reconciled with the intention underlying Article 25 of the Directive.

53 It therefore follows from an analysis of the objectives pursued by Article 2(d), final indent, of the Directive and by the rules of which the provision forms part that the concept of 'establishment' employed there must be interpreted as comprising subsidiaries and sub-subsidiaries of the legal person which is the policy-holder.

54 Such an interpretation of Article 2(d), final indent, of the Directive finds support in the declaration on the interpretation of that provision which was given by the Insurance Committee created pursuant to Article 1 of Council Directive 91/675/EEC of 19 December 1991 setting up an insurance committee (OJ 1991 L 374, p. 32) at its 16th meeting on 8 April 1997. That Committee declared that:

'In the event that a single insurance contract covers risks/commitments belonging to a policy-holder's subsidiaries or branches, the location of the various risks/

commitments covered by this contract must be determined on an individual basis for each risk/commitment, according to the provisions of Article 2(d), in particular the final indent, of Second non-life [insurance] Directive 88/357/EEC, and of Article 2(e), in particular the final indent, of the Second life [assurance] Directive 90/619/EEC.'

55 Indeed, as the Commission points out, the objectives of the Directive would also not be attained if only subsidiaries in respect of which the parent company has concluded an insurance contract came within the concept of 'establishment' as used in Article 2(d), final indent, of the Directive and not, more generally, all the members of a group of companies. If that were the case, the rules applicable could be avoided by giving a company not in a parent company/subsidiary relationship with regard to the other insured companies in the group the task of concluding all the insurance contracts concerning the group.

56 The term 'establishment' used in Article 2(d), final indent, of the Directive must therefore be interpreted as covering all companies linked to each other within a group where one of those companies takes out an insurance policy covering other companies in the group.

57 The answer to the first and second questions must therefore be that Articles 2(c) and (d), final indent, and 3 of the Directive permit a Member State to levy insurance tax on a legal person established in another Member State in respect of premiums which that legal person has paid to an insurer, also established in other Member State, to cover the business risks of its subsidiary or sub-subsidiary established in the Member State making the levy. It makes no difference if the legal person which paid the premiums and the legal person whose business risks

are covered are two companies in the same group linked by a relationship other than that of parent and subsidiary company.

Question 3

58 By its third question the Hoge Raad der Nederlanden asks essentially whether the passing-on of all or part of the insurance premium relating to the risk insured to a subsidiary or sub-subsidiary affects the interpretation of 'policy-holder' or 'Member State where the risk is situated' in Article 2(d), final indent, of the Directive and, consequently, the answer to be given to the first and second questions.

59 As the Netherlands, German and United Kingdom Governments as well as the Commission have pointed out, interpretation of the Community rules at issue in the main proceedings cannot depend on internal arrangements within a group of companies as regards invoicing and payment. In particular, such subjective criteria cannot affect the determination of the Member State where the risk is situated nor, therefore, of the Member State which is competent to tax the insurance transaction, because they could lead to tax evasion.

60 The answer to the third question must therefore be that, in interpreting 'policy-holder' or 'Member State in which the risk is situated' for the purposes of Article 2(d), final indent, of the Directive, the way in which the premium relating to the risk insured is invoiced or paid within a group of companies is immaterial.

Costs

61 The costs incurred by the Netherlands, German, French, and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 19 May 1999, hereby rules:

1. Articles 2(c) and (d), final indent, and 3 of the 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 which that legal person has paid to an insurer, also established in other Member State, to cover the business risks of its subsidiary or sub-subsidiary established in the Member State making the levy. It makes no difference if the legal person which paid the premiums and the legal person whose business risks are covered are two companies in the same group linked by a relationship other than that of parent and subsidiary company.

2. In interpreting 'policy-holder' or 'Member State in which the risk is situated' for the purposes of Article 2(d), final indent, of Directive 88/357, the way in which the premium relating to the risk insured is invoiced or paid within a group of companies is immaterial.

Gulmann La Pergola Wathelet

Skouris Edward

Puissochet Jann Sevón

Schintgen Macken Colneric

Delivered in open court in Luxembourg on 14 June 2001.

R. Grass G.C. Rodríguez Iglesias

Registrar President