JUDGMENT OF THE COURT
4 December 1986 *

In Case 220/83

Commission of the European Communities, represented by David Gilmour, Legal Adviser, and Jacques Delmoly, a member of the Commission's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by

1. **United Kingdom**, represented by J. R. J. Braggins, of the Treasury Solicitor's Department, acting as Agent, supported by N. Phillips, QC, and P. Lasok, Barrister, with an address for service in Luxembourg at the United Kingdom Embassy, 28 boulevard Royal,

2. **Kingdom of the Netherlands**, represented by A. Bos, acting as Agent, with an address for service in Luxembourg at the Netherlands Embassy, 5 rue C. M. Spoo,

interveners,

v

French Republic, represented by Gilbert Gillaume, Director at the Ministry of Foreign Affairs, and Alain Sortais, acting as Agents, with an address for service in Luxembourg at the French Embassy, 2 rue Bertholet,

defendant,

supported by

1. **Italian Republic**, represented by Arnaldo Squillante, Presidente di Sezione del Consiglio di Stato, and Oscar Fiumara, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

* Language of the Case: French.

2. **Kingdom of Belgium**, represented by R. Hoebaer, G. Vernaillen and Ph. Beaufay, with an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins,

3. **Federal Republic of Germany**, represented by Martin Seidel, Ministerialrat in the Ministry of Economic Affairs, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 avenue E. Reuter,

4. **Ireland**, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the Irish Embassy, 28 route d'Arlon,

interveners,

APPLICATION for a declaration that the French Republic has failed to fulfil its obligations under Community law, and in particular under Articles 59 and 60 of the EEC Treaty, with regard to freedom to provide services in the co-insurance sector,

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, U. Everling, K. Bahlmann and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing, as supplemented further to the hearing on 6 and 7 November 1985,

after hearing the Opinion of the Advocate General delivered at the sitting on 20 March 1986,

gives the following

JUDGMENT

1 By an application lodged at the Court Registry on 3 October 1983 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that,

(a) by adopting Law No 81-5 of 7 January 1981 and Decree No 81-443 of 7 May 1981, which require Community insurance undertakings either to be established in France or to undergo a procedure for prior authorization in order to be able, as a leading insurer, to offer co-insurance services in France, the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

(b) by adopting Decree No 81-443 of 7 May 1981, which prevents Community insurance undertakings which are not established in France from participating in co-insurance operations for risks which, by reason of their nature or size, are not within the scope of Article 1 of the decree in question, the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

(c) by applying, through the expedient of decisions of the national authorities, the legislation mentioned under (a) and (b) above, instead of Articles 59 and 60 of the EEC Treaty, the French Republic has failed to fulfil its obligations under the aforementioned provisions of the Treaty and under the rule of the primacy of Community law.

2 The Commission has also brought actions against the Kingdom of Denmark (Case 252/83) and Ireland (Case 206/84) in connection with the freedom to provide services in the sector of co-insurance. The Commission's heads of claim in those actions are largely the same as those which are set out in its conclusions in this case. In addition the Commission has brought an action against the Federal Republic of Germany (Case 205/84) in which it formulates similar heads of claim but which is also directed against the requirements of authorization and establishment which are imposed on any provider of services in the sector of insurance in general.

3 In these proceedings, the United Kingdom and the Netherlands have intervened in support of the Commission, whilst the Kingdom of Belgium, the Federal Republic of Germany, Ireland and the Italian Republic have intervened in support of the French Republic.

4 Reference is made to the Report for the Hearing for the provisions of the French legislation in question, the Community coordination directives relating to insurance and the submissions and arguments of the original parties and the interveners, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — Admissibility

5 It is necessary to consider *in limine* certain questions of admissibility which were argued before the Court.

6 The Irish Government maintains that by bringing all the aforementioned actions the Commission is seeking to pre-empt the procedures already set in train by the Council under Article 57 (2) of the Treaty. The proposal for a second directive concerning direct insurance other than life assurance (Official Journal 1976, C 32, p. 2, hereinafter referred to as 'the proposal for a second directive'), which is currently under discussion within the Council, deals with exactly the same problems as are at issue in these proceedings concerning the definition of the scope of the freedom to provide services. The Irish Government considers that in reality the Commission is asking the Court to perform the task assigned by the Treaty to the Council.

7 In that respect it must be borne in mind that, under Article 155 of the EEC Treaty, the Commission is required to ensure that the provisions of the Treaty are applied. It is open to the Commission, in carrying out that task, to bring an action under Article 169 if it considers that a Member State has failed to fulfil one of its obligations under the Treaty. The mere fact that a proposal for a legislative measure, which if adopted and transposed into national law would terminate the infringements alleged by the Commission, has already been submitted to the Council does not prevent the Commission from bringing such an action.

8 The French and Irish Governments maintain that the Commission is in reality calling in issue the conformity of Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (Official Journal 1978, L 151, p. 25) with the Treaty and, therefore, contesting its legality. The Commission failed to bring an action within the period prescribed to have that directive declared void. Those governments accordingly express serious doubts as to the admissibility of the Commission's action, which, in their view, seeks to call in question a measure of Community law which must be deemed to have become definitive.

9 That argument brings to light the existence of differences in the interpretation of the directive. In its application, the Commission construes the directive in accordance with its interpretation of Articles 59 and 60 of the EEC Treaty, whereas the two governments' reading of the directive is not consistent with that interpretation of Articles 59 and 60. Such questions of interpretation can be resolved only when the substance of the case is considered.

10 Consequently, there are no grounds which would prevent the Court from considering the substance of the case.

II — Substance

A — *The Commission's first head of claim*

11 The Commission bases this head of claim essentially on the proposition that it is contrary to Articles 59 and 60 of the EEC Treaty to require an insurance undertaking which is established in a Member State and which wishes to conduct business in the territory of another Member State only in the context of the provision of services to be authorized and to have a permanent establishment in that State. In the Commission's view there are no grounds for distinguishing in that respect between the position of the insurer in general and that of the leading insurer in particular.

12 The Commission admits that Directive 78/473 is ambiguous on that point but it claims that it must be interpreted in a manner consistent with the Treaty. That was acknowledged by the Member States in their joint statement in the minutes of the Council meeting of 23 May 1978. Consequently, the directive can in the Commission's view in no way be regarded as requiring the leading insurer to be authorized and to be established in the Member State in which the risk is situated. It follows, according to the Commission, that the French Republic infringed

Articles 59 and 60 of the Treaty when, in transposing Directive 78/473 into national law, it exempted only the other co-insurers, and not the leading insurer, from those requirements.

13 The French Government disputes the general proposition put forward by the Commission. In its view it is entirely consistent with Articles 59 and 60 to require any insurance undertaking which conducts business on the territory of the French Republic to be authorized by that Member State; such authorization presupposes, under national law, that the undertaking has a permanent establishment on French territory. Directive 78/473 requires the abolition of those requirements only for co-insurers other than the leading insurer. On the contrary, the directive expressly authorizes the retention of those requirements for the leading insurer when it refers in Article 2 (1) (c) thereof to 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 (Official Journal 1973, L 228, p. 3). Consequently, in the French Government's view, the French legislation does not infringe Articles 59 and 60 of the Treaty.

14 It is true that the aforesaid provision of the directive provides that 'the leading insurer is authorized in accordance with the provisions laid down in the first coordination directive, i.e. he is treated as if he were the insurer covering the whole risk'. The directive does not, however, indicate in which Member State the leading insurer must be authorized and, as the Court held in its judgment delivered this day in Case 205/84 *Commission* v *Federal Republic of Germany*, an insurer who was already authorized and established in a Member State need not necessarily be established in another Member State in order to be able to cover the whole of a risk situated in the territory of that State.

15 As the Court held in its judgment of 13 December 1983 (Case 218/82 *Commission* v *Council* [1983] ECR 4063), when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty. Consequently, the directive should not be construed in isolation and it is necessary to consider whether or not the requirements in question are contrary to the abovementioned provisions of the Treaty and to interpret the directive in the light of the conclusions reached in that respect.

16 According to the well-established case-law of the Court, Articles 59 and 60 of the EEC Treaty became directly applicable on the expiry of the transitional period, and their applicability was not conditional on the harmonization or the coordination of the laws of the Member States. Those articles require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a Member State other than that in which the service is to be provided.

17 The Court has nevertheless accepted, in particular in its judgments of 18 January 1979 (Joined Cases 110 and 111/78 *Ministère public and Another* v *van Wesemael and Others* [1979] ECR 35) and 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), that regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered to be incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment. In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.

18 It must be stated that the requirement that an insurance undertaking which is already established and authorized in a Member State and which wishes to provide services solely as a leading insurer must obtain an authorization from the authorities of the State in which the service is provided and have a permanent establishment in that State constitutes a serious restriction of the freedom of that leading insurer to provide services, in particular because, as a rule, insurance undertakings conduct business as leading insurers only occasionally.

19 It follows that those requirements may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not

already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules.

20 In its judgment delivered this day in Case 205/84 *Commission* v *Federal Republic of Germany*, the Court held that in the insurance sector in general there were imperative reasons relating to the protection of the consumer both as a policy-holder and as an insured person which might justify restrictions on the freedom to provide services. The Court also recognized that in the present state of Community law, in particular with regard to the coordination of the relevant national rules, the protection of that interest was not necessarily guaranteed by the rules of the State of establishment. The Court concluded therefrom that, as regards the field of direct insurance in general, the requirement of a separate authorization granted by the authorities of the State in which the service was provided remained justified subject to certain conditions. On the other hand, the Court considered that the requirement of an establishment, which represented the very negation of the freedom to provide services, exceeded what was necessary to attain the objective pursued and that, accordingly, that requirement was contrary to Articles 59 and 60 of the Treaty.

21 As regards more specifically co-insurance, the Court held in the same judgment that the position of the leading insurer referred to in Directive 78/473 could be clearly distinguished from that of insurers in general and that, consequently, neither the requirement of an establishment, nor even that of an authorization, in the State in which the service was provided might be regarded as compatible with Articles 59 and 60 of the EEC Treaty.

22 In the first place it is clear from Article 1 (2) thereof that Directive 78/473 concerns only insurance against risks which by reason of their nature or size call for the participation of several insurers for their coverage. Moreover, according to Article 1 (1) the directive applies only to Community co-insurance operations relating to certain of the risks listed in the annex to Directive 73/239. For example, it does not concern either life assurance or accident and sickness insurance or road traffic civil liability insurance. The directive is concerned with insurance which is taken out only by large undertakings or groups of undertakings which are in a position to assess and negotiate insurance policies proposed to them. Consequently, the arguments based on consumer protection do not have the same force as in connection with other forms of insurance.

23 Secondly, as is clear from the preamble thereto, Directive 78/473 is intended to establish the minimum coordination necessary to facilitate the effective pursuit of Community co-insurance business and to organize special cooperation between the supervisory authorities of the Member States and between those authorities and the Commission which, for the provision of services in the insurance business in general, is provided for only in the proposal for a second directive on direct insurance other than life assurance, a proposal which is still under discussion within the Council. It should therefore be stated that, so far as Community co-insurance is concerned, there exists a mechanism enabling the Member State of establishment to protect the public interest also in respect of services provided in other Member States.

24 Moreover, a difference of treatment in that respect between the leading insurer and other co-insurers does not appear objectively justified. Although it is for the leading insurer to negotiate the contract and to ensure its performance, there is nothing to prevent him from covering a much smaller part of the risk than that covered by the other co-insurers.

25 In those circumstances the requirements at issue, namely that the leading insurer must be authorized in the State in which the service is provided and have a permanent establishment there cannot be justified in respect of an insurance undertaking which is established and authorized in another Member State and which wishes to conduct its business as a leading insurer pursuant to Directive 78/473 solely in the context of the provision of services. Such requirements are contrary to Articles 59 and 60 of the Treaty.

26 It must therefore be held that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty by requiring Community insurance undertakings to be established in France and to undergo a procedure for prior authorization in order to be able to offer Community co-insurance services in France as a leading insurer.

B — *The Commission's second head of claim*

27 In the course of the proceedings before the Court, the Commission stated that its second head of claim was not directed against the level of thresholds fixed in France for certain risks which are the subject of Community co-insurance nor

against the fact that that level was fixed by France unilaterally, but against the very existence of such thresholds. That head of claim is therefore based on the Commission's general proposition that any requirement of authorization and establishment in relation to the freedom to provide services in the insurance sector is contrary to Articles 59 and 60 of the Treaty. Since, in the Commission's view, there can be no difference, with regard to those two requirements, between co-insurance which is subject to the provisions of Directive 78/473 and co-insurance which is not, Member States cannot, when they transpose the directive into national law, limit exemption from the requirements of establishment and authorization to co-insurers who conduct insurance business which, according to the view of each State, comes within the scope of the directive.

28 In that respect it should be recalled that in considering the first head of claim the Court has held that in the Community co-insurance sector to which Directive 78/473 refers both the requirement of authorization and the requirement of establishment are contrary to Community law, whereas, in its judgment delivered this day in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR pp. 3758 and 3793, the Court held that, outside that sector and in the present state of Community law, the requirement of authorization must be regarded as justified. It must therefore be recognized that it is necessary to establish a clear criterion for distinguishing between Community co-insurance and other insurance business; the contested thresholds represent just such a criterion. Since the existence of such thresholds is accordingly justified, the head of claim is not founded.

29 It follows that the Commission's second head of claim must fail.

C — *The Commission's third head of claim*

30 By its third head of claim the Commission seeks a declaration that, by applying the provisions complained of in the first two heads of claim, the French Republic has failed to fulfil its obligation to give direct effect to Articles 59 and 60 of the Treaty and accordingly to respect the primacy of Community law.

31 In that respect it is sufficient to note that that claim concerns the implementation of the rules at issue and cannot therefore be regarded as a separate head of claim. Consequently, it is not necessary to adjudicate on it separately.

III — Costs

32 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. However, according to the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part. Since each of the parties have failed on certain heads, they must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty by requiring Community insurance undertakings to be established in France and to undergo a procedure for prior authorization in order to be able to offer co-insurance services in France as a leading insurer;

(2) For the rest, dismisses the application;

(3) Orders the parties, including the interveners, to bear their own costs.

Mackenzie Stuart Galmot Kakouris O'Higgins Schockweiler

Bosco Koopmans Due Everling Bahlmann Joliet

Delivered in open court in Luxembourg on 4 December 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President