REPORT FOR THE HEARING
delivered in Case 220/83 *

I — Facts and written procedure

1. The co-insurance sector, that is to say, insurance in which several insurers take part, has been the subject of the following harmonizing directives:

(a) Council Directive 73/239 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 L 228, p. 3) was adopted on the basis of Article 57 (2) of the Treaty and is designed to facilitate the setting-up of branches and agencies of insurance undertakings of other Member States by coordinating the conditions governing the taking-up and pursuit of the activities of direct insurance undertakings whose head offices are situated within the Community (Articles 6 to 22) and the activities of agencies or branches established within the Community and belonging to undertakings whose head offices are outside the Community (Articles 23 to 29).

Under that directive, the taking-up of the business of direct insurance on the territory of a Member State both for undertakings whose head offices are situated within the Community and for those whose head offices are outside the Community is subject to an official authorization (Articles 6 and 23).

More specifically, Article 6 (1) and (2) of the directive provides, with respect to undertakings whose head offices are situated within the Community, that:

'1. Each Member State shall make the taking-up and the business of direct insurance in its territory subject to an official authorization.

2. Such authorization shall be sought from the competent authority of the Member State in question by:

(a) Any undertaking which establishes its head office in the territory of such State;

(b) Any undertaking whose head office is situated in another Member State and which opens a branch or agency in the territory of the Member State in question;

(c) Any undertaking which, having received the authorization required under (a) or (b) above, extends its business in the territory of such State to other classes;

(d) Any undertaking which having obtained in accordance with Article 7 (1) an authorization for a part of the national territory, extends its business beyond such part.'

The authorization in question is 'valid for the entire national territory unless, and in so far as the national legislation permits, the applicant seeks permission to carry out his business only in a part of the national territory' (Article 7 (1)).

Directive 73/239 also regulates supervision of compliance with the conditions governing the exercise of the business of direct insurance and, in particular, the financial position of the undertakings concerned (Article 13). In that connection, the supervisory authority of the Member State in

* Language of the Case: French.

whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business (Article 14). Moreover, the directive lays down rules relating to the establishment of an adequate solvency margin in respect of the entire business of the undertaking, corresponding to the assets thereof (Articles 16 to 18). As regards technical reserves, the directive provides that they must be sufficient and represented by equivalent and matching assets localized in each country where business is carried on (Article 15), whilst reserving the question of coordination in that respect for later directives.

With regard to supervision of the undertakings in question, Article 19 provides:

'1. Each Member State shall require every undertaking whose head office is situated in its territory to produce an annual account covering all types of operation, of its financial situation and solvency.

2. Member States shall require undertakings operating in their territory to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision. The competent supervisory authorities shall furnish each other with the documents and information necessary for exercising supervision.'

Finally, the directive provides that the Commission and the competent authorities of the Member States are to collaborate closely 'for the purpose of facilitating the supervision of direct insurance within the Community and of examining any difficulties which may arise in the application of this directive' (Article 33).

(b) Council Directive 78/473 of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (Official Journal L 151, p. 25) was adopted on the basis of Articles 57 (2) and 66 of the Treaty, and specifically governs Community co-insurance operations. According to the first paragraph of Article 1 (2), it applies to 'risks . . . which by reason of their nature or size call for the participation of several insurers for their coverage'. Article 2 (1) provides that the directive applies only to those Community co-insurance operations which satisfy the following conditions:

'(a) the risk, within the meaning of Article 1 (1), is covered by a single contract at an overall premium and for the same period by two or more insurance undertakings, hereinafter referred to as "co-insurers", each for its own part; one of these undertakings shall be the leading insurer;

(b) the risk is situated within the Community;

(c) for the purpose of covering this risk, the leading insurer is authorized in accordance with the conditions laid down in the first coordination directive, i.e. he is treated as if he were the insurer covering the whole risk;

(d) at least one of the co-insurers participates in the contract by means of a head office, agency or branch established in a Member State other than that of the leading insurer;

(e) the leading insurer fully assumes the leader's role in co-insurance practice and in particular determines the terms and conditions of insurance and rating.'

On the other hand, co-insurance operations which do not satisfy those conditions or which cover risks other than those listed in Article 1 are to 'remain subject to the national laws operative at the time when this directive comes into force' (Article 2 (2)).

The adoption of Article 2 (1) is the source of the following declaration which appears in the minutes of the Council's meeting of 23 May 1978:

'The Council emphasizes that the adoption of this directive and in particular Article 2 (1) thereof is entirely without prejudice to the resolving of the dispute between the Member States and the Commission on the interpretation to be placed on the rulings of the Court of Justice on freedom to provide services (Case 33/74 *Van Binsbergen*).

This text is without prejudice to national provisions relating to the establishment of the leading insurer, which are to be appraised on the basis of the Treaty, by the Court of Justice as a last resort if necessary.'

The right of undertakings which have their head office in a Member State and which are subject to and satisfy the requirements of Directive 73/239 to participate in Community co-insurance may not be made subject to any provisions other than those of Directive 78/473 (Article 3).

The conditions and procedures for Community co-insurance are dealt with in the following provisions:

'Article 4

1. The amount of the technical reserves shall be determined by the different co-insurers according to the rules fixed by the Member State where they are established or, in the absence of such rules, according to customary practice in that State. However, the reserve for outstanding claims shall be at least equal to that determined by the leading insurer according to the rules or practice of the State where such insurer is established.

2. The technical reserves established by the different co-insurers shall be represented by matching assets. However, relaxation of the matching assets rule may be granted by the Member States in which the co-insurers are established in order to take account of the requirements of sound management of insurance undertakings. Such assets shall be localized either in the Member States in which the co-insurers are established or in the Member State in which the leading insurer is established, whichever the insurer chooses.

Article 5

The Member States shall ensure that co-insurers established in their territory keep statistical data showing the extent of Community co-insurance operations and the countries concerned.

Article 6

The supervisory authorities of the Member States shall cooperate closely in the implementation of this directive and shall provide each other with all the information necessary to this end.'

Directive 78/473 also provides for close cooperation between the Commission and the supervisory authorities in the Member States (Article 8):

'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 of 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.'

Finally, according to the first four recitals in the preamble to the directive, the main reasons for its adoption were as follows:

'... the effective pursuit of Community co-insurance business should be facilitated by a minimum of coordination in order to prevent distortion of competition and inequality of treatment, without affecting the freedom existing in several Member States;

... such coordination covers only those co-insurance operations which are economically the most important, i.e. those which by reason of their nature or their size are liable to be covered by international co-insurance;

... this directive thus constitutes a first step towards the coordination of all operations which may be carried out by virtue of the freedom to provide services; whereas this coordination in fact is the object of the proposal for a second Council directive 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 ... ;

... the leading insurer is better placed than the other co-insurers to assess claims and to fix the minimum amount of reserves for outstanding claims.'

(c) The proposal for a second Council directive (Official Journal 1976, C 32, p. 2) was submitted by the Commission on 30 December 1975. That proposal, as amended in February 1978 in the light of the opinions of the Economic and Social Committee and the European Parliament, seeks to lay down specific provisions facilitating the effective exercise of the freedom to provide services on the part of the undertakings and in respect of the branches of insurance covered by Directive 73/239, particularly as regards the method of calculating technical reserves, the rules governing insurance contracts and supervision of the undertaking concerned.

It appears from the documents before the Court that significant progress has been achieved on certain points, namely definition of major risks, choice of the applicable law, compulsory insurance and the procedures for the taking-up and pursuit of business in respect of major risks and mass risks.

On the other hand, other questions of a more technical nature, such as the provisions dealing with transfers of portfolios or calculation of technical reserves are still under consideration. Furthermore, the discussions undertaken have not to date produced a unanimously acceptable solution regarding the application of rules on matching assets or the way in which certain types of insurance, such as building insurance in France or fire insurance on immovable property in Denmark, should be treated. The same is true of tax problems (methods of collection and supervision). Finally, differences of opinion still persist as to the demarcation line, in the field of direct insurance, between freedom to provide services and establishment.

2. In order to transpose Directive 78/473 into its internal law, the French Republic adopted Law No 81-5 of 7 January 1981 on insurance contracts and capitalization operations (*Journal officiel de la République française*, 8. 1. 1981, p. 194) and Decree No 81-443 of 7 May 1981 amending the Insurance Code in regard to Community co-insurance (*Journal officiel de la République française*, 9. 5. 1981, p. 1303).

(a) Article 36 of the Law of 7 January 1981 provides that 'French or foreign insurance undertakings which act as leading insurer in regard to a Community co-insurance contract must be authorized in accordance with Article L 321-1 [of the Insurance Code]'. According to the latter article, 'undertakings subject to State supervision . . . may not begin trading until they have received an official authorization'.

Moreover, Article R 321-7 (1) of the Insurance Code provides that 'application for an official authorization submitted by a foreign undertaking whose registered office is in the territory of a Member State of the European Economic Community must . . . include . . . proof that the undertaking has, in the territory of the French Republic, for its operations on that territory, a branch where it elects domicile'.

It should also be noted that Article 1004 of the Tax Code provides that 'foreign insurers must have a French representative who has been approved by the taxation authorities and who will be personally liable for taxes and penalties'.

(b) The Decree of 7 May 1981, adopted for the purpose of implementing the abovementioned law, provides for the fixing of guarantee thresholds above which Community co-insurance operations may take place.

3. Since it considered that the French legislation was contrary to the provisions of the Treaty on freedom to provide services, the Commission, on 7 January 1982, sent a letter to the French Government under the first paragraph of Article 169 of the Treaty, calling upon it to submit its observations.

In that letter, the Commission stated *inter alia* that the obligation imposed on undertakings to establish themselves in France or, in the case of undertakings which were not established in France and which intended to act as leading insurer, to obtain prior authorization constituted a restriction on the freedom to provide services contrary to Articles 59 and 60 of the EEC Treaty and that the fixing of guarantee thresholds above which Community co-insurance operations were permitted had the effect of excluding all provision of services in respect of risks other than those referred to in the said decree and therefore infringed the rights derived from Articles 59 and 60 of the Treaty.

In its reply of 6 April 1982, the French Government contended, *inter alia*, that the Law of 7 January 1981, and in particular Article 36 thereof, merely repeated the terms of Article 2 (1) (c) of Directive 78/473 and for that reason could not be contrary to the provisions of the Treaty. The Decree of 7 May 1981 merely laid down maximum amounts calling for the implementing measures to be adopted by the Minister for Economic Affairs and Finance.

On 3 September 1982, the Commission delivered a reasoned opinion pursuant to the first paragraph of Article 169 of the Treaty. In that opinion it argued that the obligation of establishment or prior authorization imposed by the French legislation constituted a restriction which was prohibited by Article 59 of the Treaty. That restriction was not justified since all

insurance undertakings in the Community, in all the Member States, were nowadays subject to a common authorization procedure established by Article 6 of Directive 73/239.

By virtue of the principle of mutual recognition of authorizations thus granted, the Member States are required to permit Community undertakings not established on their territory to exercise without restriction services. For the same reasons, freedom to provide services could not be limited by reference to the size or the nature of the risks.

The French Government was called upon to bring the infringement to an end within two months from the notification of the reasoned opinion.

By letter of 17 December 1982, the French Government replied to the reasoned opinion. It maintained its point of view and referred in particular to the specific requirements of supervision in regard to taxation and essential rules as well as to the fact that it would be impossible for the Member State in which the undertaking is established to supervise adequately the activities in question.

By application of 29 September 1983, the Commission brought the present proceedings.

4. The application was received at the Court Registry on 3 October 1983.

By applications lodged at the Court Registry on 6 and 9 February 1984 respectively, the United Kingdom and the Kingdom of the Netherlands sought leave to intervene in support of the Commission's conclusions. By applications lodged at the Court Registry on 22 December 1983 and 3, 8 and 14 February 1984 respectively, the Italian Republic, the Kingdom of Belgium, the Federal Republic of Germany and Ireland sought leave to intervene in support of the defendant's conclusions.

By orders of 18 January and 29 February 1984, the Court, after hearing the Advocate General, decided to allow the interventions in accordance with Article 93 of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, pursuant to Article 21 of the Statute of the Court of Justice of the EEC, the Court asked the Commission and the French Government to reply in writing, before the hearing, to certain questions and to supply certain information dealing essentially with the interpretation of Directive 78/473, the stage reached in regard to the preparation of the draft of a second directive on direct insurance other than life insurance, the development of Community co-insurance, the national rules and practices concerning authorization of co-insurance activities and the thresholds for application of the co-insurance rules. In reply to those questions, certain information and documents were supplied to the Court and account has been taken of them in all essential respects in the statement of facts and in the presentation of the submissions and arguments of the parties.

II — Conclusions of the parties

The *Commission*, supported by the United Kingdom and the Kingdom of the Netherlands, claims that the Court should:

1. Declare that the French Republic,

(a) by adopting Law No 81-5 of 7 January 1981 and Decree No 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, 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 transactions for risks which, by reason of their nature or size, are not within the scope of Article 1 of the decree in question, 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, has failed to fulfil its obligations under the aforementioned provisions of that Treaty and under the rule of the primacy of Community law.

2. Order the French Republic to pay the costs.

The *French Republic*, supported by the Italian Republic, the Kingdom of Belgium, the Federal Republic of Germany and Ireland, contends that the Court should:

1. Dismiss the application;

2. Order the Commission to pay the costs.

III — Submissions and arguments of the parties

1. *Admissibility*

(a) The *French, Italian and Irish Governments* have doubts as to the admissibility of the application in so far as it constitutes an indirect challenge, made after the expiry of the period laid down in Article 173 of the Treaty, to Directive 78/473. In reality, the Commission is contesting the validity of that directive in the light of Articles 59 and 60 of the Treaty.

(b) The *Commission* replies that the purpose of the coordinating directives in this matter is to facilitate the freedom to provide insurance services and that, for that reason, they must be interpreted in accordance with the provisions of the Treaty.

2. *The substance of the case*

(a) *General observations on the provisions of the Treaty concerning freedom to provide services and on the harmonizing directives*

(aa) The *Commission* claims that Articles 59 and 60 of the Treaty are designed to bring about the immediate removal of restrictions on the freedom to provide services. The Court has consistently held that those provisions have direct effect and confer rights on individuals which the national courts are obliged to protect. Since they contain no limitation *ratione materiae*, they also apply to the insurance sector without regard to the nature or size of the risks covered.

Their scope cannot be limited by provisions of secondary Community law or subordinated to the implementation of coordi-

nation directives adopted in accordance with Article 57 (2) of the Treaty, since the purpose of those directives is not to implement but merely to facilitate the freedoms laid down in the Treaty by eliminating disparities between non-discriminatory national laws.

The third paragraph of Article 60 of the Treaty, which provides that the person providing a service is subject to the same conditions as are imposed by Member States on their own nationals, is not applicable in this instance because it deals only with the case in which the person providing a service must pursue his activity by means of a physical presence in the country where the service is provided and not with the fact that the service provided produces effects in the country of the recipient of the service, as is the case when the risk covered is situated in that country.

With regard to Directive 78/473 (the co-insurance directive), the Commission explains that it first submitted its proposal to the Council in May 1974, that is to say, before the judgment of 3 December 1974 (Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299). The text of that proposal is therefore still based on the principle that the Member States had a right to adopt and maintain in force legislation on the establishment of leading insurers and that the right freely to provide services in the field of co-insurance, both for the leading insurer and for the other co-insurers, depended on the adoption by the Council of appropriate directives.

Ever since its amended proposal of May 1975, however, the Commission has supported the proposition that the purpose of the directive could not be to liberate Community co-insurance but merely to facilitate it and that the national provisions concerning the determination of the place of establishment of the leading insurer were no longer applicable because they did not comply with the Treaty. Since several Member States did not accept that proposition, the Commission considered the possibility of amending the text so that the Community co-insurance transactions covered by the directive would be limited to those in respect of which the contract had been concluded under the auspices of a leading insurer established either in the country in which the risk was situated or in the country in which the insured was ordinarily resident. It was, however, made clear that the leading insurer could also be established in a country other than that of the risk or of the insured, in which case it would not have the benefit of the facilities provided for in the directive.

In that connection, the Commission refers to the aforesaid declaration of the Council of 23 May 1978 (see p. 3667). The Commission thus excludes the possibility that Article 2 (1) (c) of Directive 78/473 might be interpreted as meaning that the leading insurer must be established in the country in which the risk is situated or that the Member States are entitled to require that he be so established.

(bb) The *United Kingdom* adds that according to the judgments of 18 January 1979 (Joined Cases 110 and 111/78 *Ministère public* v *Van Wesemael* [1979] ECR 35) and of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), the essential requirements of Article 59 include the abolition of discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided. That

requirement also includes abolition of covert discrimination.

Although the Court's case-law leaves the Member States free to apply their national law to persons established elsewhere in the Community who provide services in their territories where that law is objectively justified, that freedom involves two reservations: firstly, the requirement to obtain a licence is not justified when the person providing the service established in another Member State holds in that State a licence issued under conditions comparable to those required by the State in which the service is provided and his activities are subject to proper supervision whatever may be the Member State in which the service is provided. Secondly, any justification put forward by a Member State must be looked at objectively. Consequently, the least restrictive measures must be chosen and those measures must be proportionate to the end result to be achieved. The existence of directives harmonizing national laws in the field under consideration reduces *pro tanto* the scope of national competence.

(cc) The *French Government*, on the other hand, considers that Community co-insurance is a service of a particular nature within the meaning of the judgment of 17 December 1981 (*Webb*, cited above). It consists of spreading the burden of a risk between several direct insurers each one of whom receives a share of the premium proportionate to its share of the liability. The leading insurer is the insurer who is responsible for determining the conditions upon which the risk is accepted (drafting of the contract and fixing of the premium). During the performance of the contract, he acts on behalf of the other co-insurers (assessment of damages and expert opinions thereon; conduct of legal proceedings; calculation of technical commitments).

The harmonization established in the insurance field by Directives 73/239 and 78/473 is only partial and important differences remain between the national laws, particularly with regard to the practical procedures for supervising undertakings. In that context, the French Government makes the following points:

(i) Procedures for evaluating technical commitments (determination of the provisions to be entered in the balance sheet) are fixed by the Member States and are therefore subject to a variety of rules and practices. Those procedures influence in particular the results shown in the accounts (profit or loss).

(ii) The constitution of the assets is harmonized only to a limited degree by Article 15 (2) of Directive 73/239. That provision merely states that 'technical reserves shall be required to be covered by equivalent and matching assets localized in each country where business is carried on', while allowing the Member States to agree to relaxations in the rules as to matching assets and the localization of assets. In certain Member States (France, Belgium, Denmark, Italy and Luxembourg), the obligation to cover technical commitments (acquisition and holding of assets equivalent to those commitments) applies to all technical commitments without deduction of the re-insurer's share of those commitments (gross coverage), while in other Member States (Germany, the United Kingdom and the Netherlands), it applies only to the insurer's share to the exclusion of the part for which the re-insurers are responsible (net coverage).

(iii) Significant differences exist between the legal systems of the Member States in regard to the relationship between the insurer and the insured. That different approach concerns mainly the legal consequences of a failure on the part of the insured to inform the insurer of the nature of the risk (contract void *ab initio* in English law; contract void only if the insured did not act in good faith in French law). There are also differences between the legal systems with regard to warranties, that is to say, the provisions of the contract which if they are not strictly applied by the insured will cause the contract to be void, and to the 'basis of the contract clauses'.

(dd) The *Italian Government* agrees essentially with the French Government's observations but adds the following: the need for a greater degree of coordination was accepted in the recitals in the preamble to Directive 78/473 according to which that directive was merely 'a first step towards the coordination of all operations which may be carried out by virtue of the freedom to provide services'. Until a sufficient degree of harmonization has been achieved at Community level, freedom to provide insurance services can only be achieved by complying with certain conditions within the limits of the provisions of the Treaty.

(ee) The *Belgian Government* states that Articles 59 and 60 of the Treaty, which are directly applicable, are not absolute. Firstly, the freedom to provide services is of a residual nature inasmuch as the practical realization of that freedom must be set aside where the exercise of an activity is governed by the provisions relating to freedom of movement for goods, capital and persons (first paragraph of Article 60 of the Treaty).

Furthermore, by virtue of the third paragraph of Article 60 of the Treaty, the freedom to provide services may be exercised only if the laws and regulations in force in the country in which the service is performed are respected, whether the person providing the service is physically present in the country or acts through intermediaries or by correspondence.

Finally, the provisions of the Treaty cannot be interpreted without reference to the harmonizing directives provided for in Article 57 (2) of the Treaty with the result that an absence of harmonization may justify the temporary maintaining in force of specific measures which are adapted to meet objective situations arising from that deficiency.

(ff) The *German Government* considers that the definition of the principle of freedom to provide services may raise difficulties when the provision of services in one Member State by a person established in another Member State runs up against rules to which persons providing the same services and established in the former State are also subject. In that case, the extent and the limits of the freedom to provide services must be determined having regard simultaneously to the purpose of the freedom to provide services as one of the four fundamental principles of the common market, to the protective purpose of the national legislation, to the general principles of Community law (free competition and equality) and to the degree to which the law is harmonized.

(gg) *Ireland* adds that although the direct application, in accordance with the case-law of the Court, of Articles 59 and 60 cannot be questioned, and the applicability of those provisions to services in insurance *ratione materiae* cannot be denied, there are none the less objective differences between the different categories and types of insurance which call for different treatment under

those articles in the public interest. The decision of the Court should therefore be strictly limited to the field of co-insurance.

(b) *The imposition on the leading insurer of an obligation to have an establishment in France or to undergo a procedure for prior authorization*

(aa) The *Commission* claims firstly that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the Treaty inasmuch as French law requires Community insurance undertakings to be established in France or to undergo a procedure for prior authorization in order to be able, as leading insurers, to offer co-insurance services. In reply to a question from the Court, it states that, in its opinion, the infringement of Articles 59 and 60 of the Treaty also implies a defective transposition into national law of Directive 78/473, which must be interpreted in the light of the provisions of the Treaty.

The restrictions imposed by French legislation in regard to establishment and authorization of the leading insurer are not justified by the possibility that undertakings not established in France might not comply with mandatory provisions laid down in the public interest.

On the one hand, no preventive measure can provide total protection against offences deliberately committed. On the other hand, as regards a possible lack of knowledge of the mandatory provisions of national law, it would suffice if the French authorities were to establish a list of those provisions. This would in particular meet the obligations under Article 5 of the Treaty and the various provisions of secondary law requiring the Member States to cooperate with and assist each other (see Article 33 of Directive 73/239 and Articles 6 and 8 of Directive 78/473).

Furthermore, verification of compliance with mandatory rules can only reasonably take place after the services have been provided and not before, that is to say, attention should be directed to controls. From that point of view, the obligation to obtain prior authorization appears disproportionate.

That obligation also appears to be unjustified inasmuch as it duplicates the prior authorization which undertakings must obtain from the public authorities of the State in which they are established (Article 6 of Directive 73/239) and it deprives of all real significance the principle of the mutual recognition of documents and certificates which have been coordinated at Community level.

The only function that prior authorization could perform is to make it possible to verify the good professional reputation and the professional competence generally required and the financial standing of undertakings not established in France. However, it follows from Articles 8 (3), 10 (3), 13, 14, 15 and 19 of Directive 73/239 as well as from Article 5 of Directive 78/473 that such verifications are now exclusively matters for the authorities of the State in which the undertaking is established.

Finally, it must be emphasized that the obligation to obtain prior authorization gives rise to indirect or covert discrimination inasmuch as undertakings which are not in the same situation are subject to the same treatment. French undertakings are only required to obtain authorization when they begin to carry on business, whereas under-

takings established in another Member State and which are already authorized there are obliged to seek a further authorization.

The argument to the effect that it is impossible for the Member State in which the undertaking is established to supervise adequately activities pursued in another country is not relevant in this case in view of the means of detection and taking action at the disposal of the Member State in which the service is performed.

On the one hand, there are a great many means of exercising direct supervision through the various contacts which both insured and insurer are necessarily obliged to have with the authorities of the State in which the service is performed, for example, when taxes are paid and when a company's foreign exchange transactions or accounts are controlled.

On the other hand, the duty on the part of the supervisory authorities of the Member States to cooperate closely with each other and the duty of undertakings to provide information (see Articles 13, 14, 19 and 33 of Directive 73/239 and Articles 5 and 6 of Directive 78/473) provide means of exercising indirect supervision.

At the request of the Court, the Commission also submitted a table of the national rules and practices applicable in the Member States, other than France and Denmark, concerning the provision of co-insurance services. That summary shows a great divergence between the laws of the various Member States.

With regard to the obligation to obtain an authorization, it appears from the table that certain Member States (the Netherlands, the United Kingdom) generally permit an undertaking which has not been authorized in those States to cover risks situated on their territory or to conclude contracts with parties resident on their territory either as a leading insurer or as a co-insurer other than the leading insurer. On the other hand, other Member States (Belgium, the Federal Republic of Germany, Ireland, Luxembourg) permit that sort of activity only under certain conditions, notably when the risk insured is of a certain minimum size. Finally, certain Member States (Greece, Italy) seem generally to prohibit such activities by undertakings not authorized in those States.

The Commission states that in so far as authorization is required, it is always an authorization of the type provided for by the first coordination directive (73/239), which is granted to the insurance undertakings themselves (and not to any intermediaries they may have) and is linked in one way or another to a requirement of establishment.

With regard to the financial guarantees required of insurance undertakings, the Commission emphasizes that in all the cases in which an insurance undertaking established in one Member State and not authorized in another is permitted to conclude an insurance contract with a resident of the latter State or to cover a risk situated on its territory, that Member State does not itself require the observance of any financial guarantee. It is thus left to the Member State in which the undertaking is established or the State in which it has its head office, or both of those States, to supervise the financial security of the contract and of the undertaking. That is in conformity with the Commission's interpretation of Directive 73/239, according to which it is for the Member State in which the undertaking is established and the Member State in which it has its head office to carry out that financial supervision.

(bb) The *United Kingdom* observes that the insured in co-insurance business are usually commercial and industrial companies of substantial size and with substantial resources. They thus have access to skilled professional advice and need no special protection. Moreover, by contrast with the labour market, for example, there is no danger of social unrest resulting from co-insurance operations.

For that reason, Article 2 (1) (c) of Directive 78/473 dealing with authorization of the leading insurer must be interpreted so as to accord with the Treaty, that is to say, as referring only to an authorization granted in any Member State of the Community.

The French measures constitute discrimination inasmuch as they require undertakings from other Member States to obtain double authorization in the Community whereas French undertakings are only required to obtain a single authorization. That is particularly true if it is borne in mind that an insurer may participate only occasionally in co-insurance and that the requirement to be established would make this uneconomic.

The French Government's argument as to the alleged difficulty of interpreting French law would seem to ignore the right of policy holders domiciled in France to bring proceedings there (see Articles 8 and 9 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters).

Collection of taxes could take place at one of the many points of contact between insurer or insured and the collecting State. It could occur, for example, when premium payments leave the country or it might be provided that the policy-holder must deduct the tax due from the premium payable to the insurer.

Finally, it should be pointed out that an authorization requirement is only apposite to ensure the financial standing, trustworthiness and probity of insurance undertakings and cannot prevent breaches of national law, which can only be dealt with if and when they occur.

(cc) The *Netherlands Government* observes that it is clear from the history of Directive 78/473 that Article 2 (1) (c) of that directive does not require the leading insurer to obtain an authorization from the Member State in which the risk is situated.

The initial draft proposal submitted to the Council by the Commission still permitted the Member States to require that the leading insurer be established in the State where the risk was situated. In the amended draft, however, that provision was removed as a result of the judgment of 3 December 1974 (Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299), since the Commission considered that national legislation requiring the leading insurer to be established on the territory of a particular Member State was contrary to Article 59 of the Treaty as interpreted by the Court.

There is no justification for requiring establishment or authorization in the Member State in which the service is provided. Firstly, the essential conditions for responsible supervision of direct insurance operations other than life insurance are coordinated by the harmonizing directives (see Articles 13, 14, 19 (2) and 33 of Directive 73/239 and Article 6 of Directive 78/473).

Secondly, the consequence of the requirement that leading insurers be established or authorized is a double supervision which constitutes unjustified discrimination against insurers established in other Member States as compared with French insurers.

Nor, finally, is the requirement of establishment or authorization in the Member State in which the service is provided necessary for the collection of taxes relating to insurance contracts because it is sufficient for that purpose to require that the tax be paid by the policy-holder. Co-insurance is concerned only with insurance in which the insured carries on a profession or an industrial activity and is obliged for that reason to keep accounts. It is thus possible to verify at any time whether insurance contracts have been entered into and whether any tax which may be due in respect of them has been paid.

(dd) According to the *French Government*, Directive 78/473 may be interpreted in two ways:

According to the first interpretation, Article 2 (1) (c) of that directive, read together with Article 6 of Directive 73/239, must be construed as requiring authorization in the Member State in which the risk is situated, and Article 2 (1) (d) of Directive 78/473 must be understood as meaning that at least one of the co-insurers must act as a provider of services.

That interpretation constitutes a pragmatic approach to the freedom to provide services in which the conditions under which the right to act as leading insurer may be exercised are counter-balanced by the possibility available to the other co-insurers providing services on a permanent basis on a market in which they are not established. Authorization of the leading insurer also meets a technical imperative peculiar to the insurance industry which requires, for direct insurance, the existence of a permanent structure in the State in which the service is provided because of the long duration of the relationship between insurer and policy-holder and of the nature of the service rendered (compensation for the financial consequences of an event).

According to the second interpretation, the sole purpose of Directive 78/473 is to harmonize certain technical requirements concerning Community co-insurance transactions which meet the criteria laid down in Articles 1 and 2 of that directive. On the basis of that interpretation, Article 2 merely determines the scope of the directive which extends only to transactions in which the leading insurer is authorized in the State in which the risk is situated.

According to that interpretation, the directive is merely intended to coordinate certain financial conditions of co-insurance which are the only ones that may be imposed on co-insurers wishing to participate in a co-insurance transaction in exercise of their right freely to provide services.

In its judgment of 17 December 1981 (*Webb*, cited above), the Court, in acknowledging that the requirement to obtain an authorization before providing services was lawful, based itself, firstly, on the particular nature of certain services and, secondly, on the fact that unlike natural or legal persons, the provider of services is able to escape the control of the authorities of the country in which the services are provided with regard to observance of professional conduct, liability, the protection of third parties and the provisions of public policy. In this case, it must be considered that prior authorization in the co-insurance field answers requirements relating to the public interest,

particularly in the fields of public policy and in the economic, monetary and financial spheres, as well as to the protection of the insured parties and the victims of loss or damage. Freedom to provide services in the insurance field concerns exclusively companies and not, as in other sectors of non-salaried activity, natural persons. The insurance sector does not therefore encounter any of the physical limitations characteristic of the provision of services by individuals but is able to operate on a permanent basis on a given market without being represented there.

The authorization requirement does not go beyond the objective which the French legislation seeks to achieve since subsequent verification does not make it possible to ensure compliance with fiscal legislation, and in particular in regard to exchange control relating to the transfer of premiums. It is not therefore possible to rely on the various contacts between the insurer and the supervisory authorities in the State in which the service is provided at the time when taxes are paid precisely because the objective of persons seeking to evade taxation is to avoid all contact with the tax authorities. Nor is it possible to rely on verifications of the accounting documents and accounts of the policy-holder because supervision of the insured cannot be substituted for supervision of the insurer.

Finally, authorization of the leading insurer is the least restrictive measure capable of ensuring compliance with provisions meeting objective necessities. Since only the leading insurer, and not the other co-insurers, needs an authorization, an insurer can always participate in a Community co-insurance contract without being required to obtain an authorization.

In reply to a question put to it by the Court, the French Government adds that the authorization accorded to the leading insurer is analogous to that accorded to co-insurers established in France. It is not specifically limited to a particular co-insurance transaction and permits the undertaking to which it has been accorded to participate in transactions at any time in the classes of insurance specified either individually or within the framework of co-insurance. In the latter case, the undertaking may be either the leading insurer or merely a participant.

Authorization is granted under the conditions laid down in Article 6 *et seq.* of the first coordination directive (73/239). Undertakings are entitled to an authorization if they fulfil the conditions laid down by the directive and they have a right of action before the French courts against a refusal to grant them an authorization. In contrast to the principles which apply to branches of non-Community undertakings, Directive 73/239 does not make it a condition for the grant of an official authorization that a deposit be put up or a bank guarantee provided, nor, in general, does it require that Community undertakings must have any assets on the territory of the Member States.

(ee) The *Italian Government* emphasizes that the provision of insurance services is an activity whose special nature makes it advisable, in the present situation of insufficiently harmonized national laws, for the State in which the risk is situated to require the leading insurer to be established in that State. Such a requirement satisfies the public interest without restricting disproportionately the freedom to provide services.

In that connection, the Italian Government refers in particular to Article 61 (2) of the Treaty according to which 'the liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive

liberalization of movements of capital'. It is clear from that provision that freedom of movement for capital and freedom of investment must first be established. Insurance against loss or damage may involve major transfers of capital both for the settlement of claims and for the investment in foreign currencies of technical reserves the financial return on which may have an influence on the fixing of rates and, consequently, on free competition between undertakings established in different countries.

(ff) The *Belgian Government* maintains that Directive 78/473 is based on the premise that the leading insurer has obtained an authorization in the country in which the risk is situated. It is only by virtue of that premise that co-insurers whose head office is in another Member State do not require a specific authorization.

This becomes clear in particular from Article 2 (1) (c) of Directive 78/473, in conjunction with Directive 73/239, and from Article 4 (1) of Directive 78/473, according to which the reserve for outstanding claims is to be at least equal to that determined by the leading insurer 'according to the rules or practice of the State where such insurer is established'.

The obligation to obtain prior authorization in the State in which the service is provided is justified by the specific nature of the insurance sector and in particular, of the co-insurance sector. An insurance contract, because of its complexity and its frequently arcane terminology, cannot be understood by the great majority of those taking out insurance, who are thus unable to deal on equal terms with the insurer. On the other hand, insurance is a highly technical product which relies on the laws of probability and interest, and which thus represents a high risk for the insurer.

In the absence of complete harmonization, the authorization requirement is necessary both to protect the insured, who is unable to verify himself if the undertaking is financially sound, and to avoid distortions of competition between undertakings established in a given Member State and those which are not and, consequently, disturbances in the field of public policy and in the economic and monetary situation in a Member State.

(gg) The *German Government* emphasizes the importance of the decision in this case for the whole of the insurance sector. It will have consequences in particular for civil liability motor insurance which, under German law, can only be obtained from an insurance undertaking authorized in the country in which the insurance transaction takes place. The obligation to obtain an authorization is the necessary *quid pro quo* of the obligation to accept business which makes it possible for the owners of all vehicles to obtain civil liability motor insurance. Since that obligation cannot be imposed on foreign insurance undertakings, such undertakings could choose the most favourable risks and that would lead to entail a distortion of competition.

The requirements that the leading insurer must obtain an authorization in the Member State in which the insurance is effected is a consequence of the provisions of Article 2 (1) (c) of Directive 78/473, in conjunction with Article 6 of Directive 73/239. Since under the latter directive all undertakings are required to obtain an authorization, a special provision dealing with authorization of leading insurers would not have been necessary if authorization in any Member State had been regarded as sufficient.

Furthermore, if the leading insurer did not require an authorization in the State in which the insurance was effected, the rule in Article 2 (1) (d) of Directive 78/473 would not make sense because the requirement that at least two of the co-insurers wishing to conclude jointly an insurance contract in another Member State, namely the leading insurer and one co-insurer, must be established in different Member States would be incomprehensible.

The obligation on the leading insurer to obtain an authorization is in conformity with Articles 59 and 60 of the Treaty because it is an indispensable measure intended to ensure compliance with a rule laid down in the public interest. In several Member States, the insurance sector is among the sectors of the economy which are subject to special rules and close supervision by the State. In the Federal Republic of Germany, that supervision includes, *inter alia*, the legal bases of insurance contracts, including the general conditions of insurance, and verification of forms of application for insurance and of insurance policies.

Such supervision cannot be carried out by the authorities of a Member State other than the State in which the service is provided since the authorization provided for by Directive 73/239 has no effect outside the territory of the State in which it is granted and also since the harmonizing directives do not provide for compulsory verification of the good professional reputation of the undertaking or of the technical qualifications of the directors.

(hh) *Ireland* considers, as do the French, Belgian and German Governments, that the requirement that the leading insurer be authorized and established in the State of the risk stems directly from the terms of the harmonizing directives. That interpretation is supported, *inter alia*, by the recitals in the preamble to Directive 78/473 which recognizes that 'the leading insurer is better placed than the other co-insurers to assess claims and to fix the minimum amount of reserves for outstanding claims'. That statement implies that the leading insurer has more than a merely temporary link with the insurance market in the country of the risk.

The requirement to obtain an authorization and to be established is compatible with Articles 59 and 60 of the Treaty, particularly in the light of the judgment of 17 December 1981 (*Webb*, cited above). The insurance sector is a particularly sensitive area which has an impact on the public interest. With a view to the protection of that interest, the provision of insurance is subject to detailed regulation in all Member States, including strict governmental controls.

It must also be recalled that insurance transactions involve the transfer of large amounts of capital both for the payment of claims and for the investment of technical reserves in foreign currency. That circumstance would be liable to give rise to important capital movements which might affect some Member States in an adverse manner.

(c) *The prohibition of co-insurance transactions in respect of risks below certain thresholds*

(aa) The *Commission* and the *United Kingdom* also claim that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the Treaty inasmuch as the French legislation (Decree of 7 May 1981) prohibits co-insurance transactions in respect of risks below the

thresholds therein provided for. Under Articles 59 and 60 of the Treaty, Community undertakings are free to enter into any co-insurance transaction in respect of any risk, whatever its nature or size.

An analysis of the French provisions shows that there are some co-insurance transactions which fall within the scope of Directive 78/473 by virtue of the thresholds unilaterally fixed by the French authorities, and which thus have the benefit of the advantages resulting from the coordination brought about by that directive, and other co-insurance transactions which are unable to benefit from the provisions of the directives and which thus remain subject to the general law, that is to say, the national legislation.

In reply to a question put to it by the Court, the Commission stated that in its view, the co-insurance referred to by Directive 78/473 is only a part of co-insurance in the broader sense, by which must be understood coverage of a risk by several insurance undertakings (co-insurers) of which one is the leading insurer, without there being any joint liability as between them, by means of a single contract for the same duration requiring payment of an overall premium. The co-insurance to which Directive 78/473 applies does not include, for example, coverage of risks regarded as forming part of certain branches of insurance nor does it refer to the co-insurance of any risk where all the insurance undertakings participate through a head office or an agency or branch established in a single Member State.

The Commission considers that Articles 59 and 60 of the Treaty apply to any situation in which a co-insurer, including a leading insurer, covers a risk or an insured party located in a Member State other than a Member State in which the insurer is established (head office, agency or branch), whereas the provisions of the directive deal only with risks which by their size or nature require the participation of several insurers in order to be covered. Consequently, the French Republic wrongly excludes the application of Articles 59 and 60 of the Treaty to co-insurance operations falling below the thresholds it has fixed.

(bb) In the view of the *French, Italian, German* and *Irish Governments*, the thresholds were not unilaterally fixed but are the direct consequence of Article 1 (2) of Directive 78/473. The limits imposed by the Decree of 7 May 1981 merely adopt the figures arrived at by the Conference of Supervisory Authorities.

The fixing of thresholds meets a logical necessity. As the recitals in the preamble to Directive 78/473 indicate, the sole *raison d'être* of Community co-insurance is to cover risks which 'by reason of their nature or their size are liable to be covered by international co-insurance', that is to say, those which represent commitments which an insurer could not reasonably undertake alone.

In reply to a question put to it by the Court, the French Government states that the thresholds fixed by the French legislation were determined in accordance with the report drawn up by the first working party on Community co-insurance, pursuant to the Council's first declaration in the minutes of the meeting at which the directive was adopted. That declaration reads as follows:

'The Council calls upon the supervisory authorities of the Member States to join with the Commission in taking all possible steps to establish by common agreement within 12 months of the date of notification of the directive the broad lines of what is meant by "nature" and "size" of the risks justifying recourse to the technique of co-insurance.

The Council recognizes that for legal and administrative reasons it may be necessary for Member States to include in the instruments giving legal force to this directive criteria for interpreting the first subparagraph of Article 1 (2).'

The members of the working party, without exception, considered it necessary for the implementation of the directive to fix not only a qualitative criterion concerning the professional activities of the policy-holder but also quantitative thresholds which would vary according to the branch dealt with by the Community legislation. The figures chosen by the French Government are those approved by a majority of the supervisory authorities and correspond to the risks covered by each class of insurance. The French Government also indicates that the figures contained in Article R 321-2 of the Insurance Code are merely upper limits and that the final amounts of the thresholds will be determined later by a decree of the Minister for Economic Affairs and Finance.

(cc) According to the *Belgian Government*, Article 1 (2) and the second paragraph of Article 8 of Directive 78/473 make clear that it is only to the extent that the directive completed coordination in respect of certain transactions that co-insurers can be dispensed from the requirements imposed on any person who provides services in the country in which the service in question is provided. On the other hand, the other transactions fall under the general rules regarding freedom to provide services, which are provisionally subject to certain limitations.

(d) *Breach of the principles of direct effect and of the primacy of Community law*

(aa) Finally, the *Commission* claims that the French Republic has failed to fulfil the obligations resulting from the direct effect of Articles 59 and 60 of the Treaty and from the rule of the primacy of Community law inasmuch as the French authorities are applying national rules which are contrary to the said provisions of the Treaty.

As the Court held in its judgment of 9 March 1978 (Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629), the national authorities are under a duty to give full effect to the directly applicable provisions of Community law by refusing of their own motion to apply any conflicting provision of national legislation.

According to the Commission's information, the French authorities are continuing to require compliance with the French rules concerning both the leading insurer's obligation to be established in France — or to obtain an authorization — and the prohibition on taking part in co-insurance transactions in respect of risks not referred to in the French rules.

In reply to a question put to it by the Court, the Commission adds that it was pursuing two objectives by seeking a declaration that France has failed to fulfil its obligations under the principles of direct effect and the primacy of Articles 59 and 60 of the Treaty, namely that of ensuring immediate implementation of the said articles by the national authorities and that of saving individuals from the need to have recourse to the preliminary ruling procedure in order to obtain immediate recognition of their rights under those provisions.

(bb) *The French, Belgian, German* and *Irish Governments* reply essentially that since the French rules are in conformity with Community law, their implementation cannot constitute a breach of obligation.

IV — Replies to questions put by the Court

In addition to the facts already referred to above, it emerges from the Commission's replies to the questions put to it by the Court that the report on the development of Community co-insurance provided for in Article 9 of Directive 78/473 has not yet been submitted to the Council.

The Commission also indicated that it did not have sufficient statistical information to be able to advise the Court of developments in the volume of Community co-insurance.

V — Oral procedure

The Commission of the European Communities, represented by D. Gilmour and J. Delmoly, assisted by E. Steindorff and A. Philip, the French Government, represented by R. De Gouttes, the United Kingdom, represented by N. Phillips and P. Lasok, the Netherlands Government, represented by D. J. Keur, the Italian Government, represented by O. Fiumara, the Belgian Government, represented by R. Hoebaer, G. Vernaillen and Ph. Beaufay, and Ireland, represented by J. D. Cooke and J. O'Reilly, presented oral argument and answered questions put to them by the Court at the hearing on 6 and 7 November 1985.

The Commission stated at the hearing that the second head of claim was not directed against the unilateral fixing of the level of the thresholds but against the very existence of such thresholds. It was based on the premise that any requirement of authorization and establishment in the matter of freedom to provide services in the insurance sector was contrary to Articles 59 and 60 of the Treaty and that it was not open to the Member States, when transposing the directive into their national law, to limit the exemption from the obligations of establishment and authorization to co-insurers participating in insurance business which, according to the view taken by each State, came within the scope of the directive.

The Advocate General delivered his Opinion at the sitting on 20 March 1986.

U. Everling
Judge-Rapporteur