JUDGMENT OF THE COURT
4 December 1986 *

In Case 252/83

Commission of the European Communities, represented until 30 January 1985 by Erich Zimmermann and from that date, by its Legal Adviser, Johannes Føns Buhl, acting as Agents, assisted by Allan Philip, Advocate, 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. **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,

2. **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 Embassy of the United Kingdom, 28 boulevard Royal,

interveners,

v

Kingdom of Denmark, represented by Laurids Mikaelsen, Legal Adviser in the Ministry of Foreign Affairs, assisted by Professor Claus Gulmann, with an address for service in Luxembourg at the office of Ib Bodenhagen, Chargé d'Affaires at the Danish Embassy, 11 B boulevard Joseph-II,

defendant,

supported by

1. **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,

2. **Ireland**, represented by L. J. Dockery, Chief State Solicitor, with an address for service in Luxembourg at the Irish Embassy, 28 route d'Arlon,

interveners,

* Language of the Case: Danish.

APPLICATION for a declaration that the Kingdom of Denmark has failed to fulfil its obligations under Community law, and in particular under Articles 52, 59 and 60 of the EEC Treaty, with regard to freedom of establishment and 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 11 November 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 Decree No 459 of 10 September 1981 requiring insurance undertakings to become established in Denmark in order to be able to provide co-insurance services in that State as leading insurers, the Kingdom of Denmark has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

(b) by adopting Decree No 459 of 10 September 1981, which prevents Community insurance undertakings not established in Denmark from participating in co-insurance activities which, by reason of their nature or size or the insured's turnover, are not covered by the aforesaid decree, the Kingdom of Denmark has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty;

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

(d) by applying, by way of decisions adopted by the national authorities, the provisions mentioned in paragraphs (a), (b) and (c) above instead of Articles 59 and 60 of the EEC Treaty, the Kingdom of Denmark has failed to fulfil the obligations which ensue from the direct effect of the aforesaid provisions of the EEC Treaty and from the rule of the primacy of Community law.

2 The Commission has also brought actions against the French Republic (Case 220/83) 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 and Ireland have intervened in support of the Kingdom of Denmark.

4 Reference is made to the Report for the Hearing for the provisions of the Danish 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 Belgian 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 voice 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, according to the Commission, the directive can in no way be regarded as requiring the leading insurer to be established in the Member State in which the risk is situated. It follows, in the Commission's view, that the Kingdom of Denmark 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 Danish 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 Danish territory to have a permanent establishment in that Member State. Directive 78/473 requires the abolition of those requirements only for co-insurers other than the leading insurer. On the other hand, 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 Danish Government's view, the Danish 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 another Member State and which wishes to provide services solely as a leading insurer must have a permanent establishment in the State in which the service is provided 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 that requirement 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* [1986] ECR 3793, 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 it was also contrary to Articles 59 and 60 of the Treaty to require the leading insurer to be established in the State in which the service was provided.

22 In those circumstances the requirement imposed by the Danish legislation that the leading insurer must have a permanent establishment in the State in which the service is provided, which requirement is the sole subject of the first head of claim, 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 a requirement is contrary to Articles 59 and 60 of the Treaty.

23 It must therefore be held that the Kingdom of Denmark has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty by requiring Community insurance undertakings to become established in Denmark in order to be able to provide Community co-insurance services there as leading insurers.

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

24 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

Denmark for certain risks which are the subject of Community co-insurance nor against the fact that that level was fixed by Denmark 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.

25 In that respect it should be recalled that in its judgment delivered this day in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3793 the Court held that in the Community co-insurance sector to which Directive 78/473 referred both the requirement of authorization and the requirement of establishment were contrary to Community law, whereas, 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.

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

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

27 The third head of claim comprises two elements. In the first place, the Commission would seem to regard as contrary to the Treaty the mere fact that the Danish legislation requires insurance undertakings established in Denmark and Danish branches of insurance undertakings established in another Member State to obtain a special authorization in order to be able to provide services in other Member States. Secondly, the Commission maintains that the conditions for obtaining that authorization are more rigorous for Danish branches of insurance undertakings

established in another Member State than for insurance undertakings established within Danish territory, and that that difference of treatment constitutes an infringement of Community law.

28 With regard to the first complaint, it must be stated that no provision of Community law prevents a Member State from requiring insurance undertakings and their branches which are established on its territory to obtain an authorization not only in respect of business conducted on its territory but also for business conducted in other Member States in the context of the provision of services. On the contrary, such a requirement is consistent with the principles laid down in Directive 73/239. Article 7 (1) of that directive provides that an insurance undertaking may request and obtain an official authorization to carry on its business only in a part of the national territory. In that case, if it wishes to extend its business beyond such part, it is required under Article 6 (2) (d) to request further authorization and, in accordance with Article 8 (2), a new scheme of operations must be submitted with that request.

29 Those provisions, read in conjunction with the rules on the supervision of the financial position of the undertakings concerned and on the withdrawal of authorizations, show that the directive is based on the principle that the State of establishment is authorized to take into account all the business activities of undertakings constituted within its territory in order to be able to carry out an effective supervision of the conditions in which such activities are pursued. Moreover, Article 8 (1) of the proposal for a second directive expressly provides that any undertaking wishing to extend its business by way of the exercise of freedom to provide services to the territory of another Member State must seek authorization for that purpose from the supervisory authority of the authorizing Member State.

30 That part of the head of claim must therefore fail.

31 With regard to the alleged discrimination between insurance undertakings established in Denmark and Danish branches of insurance undertakings established in another Member State, it is true that as a result of the structure of the Danish decrees in question, the rules concerning the authorization to extend insurance business outside the national territory are contained in separate provisions according to whether the undertakings concerned have their registered office in Denmark or whether they have only a branch in that State.

32 The Danish Government has nevertheless denied that those provisions are discriminatory. It has explained in that respect that, as applied in practice, the legislation complained of in fact subjects the branches of undertakings established in other Member States to more flexible rules than those which apply to undertakings established in Denmark because the former are already subject to the rules of their State of origin. The Commission, for its part, has neither refuted nor even attempted to refute the Danish Government's contention in that respect. It has merely asserted that *prima facie* it would appear that the conditions for obtaining the authorization are more favourable to Danish undertakings than to branches of foreign undertakings and that it is for the Kingdom of Denmark to prove the contrary. However, it has adduced no concrete evidence capable of justifying its doubts.

33 In those circumstances it must be held that the Commission has not proved the alleged discrimination. It follows that that part of the head of claim must also fail.

34 Consequently, the third head of claim must fail in its entirety.

D — *The Commission's fourth head of claim*

35 By its fourth head of claim the Commission seeks a declaration that, by applying the provisions complained of in the first three heads of claim, the Kingdom of Denmark 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.

36 In that respect it is sufficient to note that that complaint concerns the implementation of the legislation 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

37 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 Kingdom of Denmark has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty by requiring Community insurance undertakings to become established in Denmark in order to be able to provide Community co-insurance services there as leading insurers;

(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