REPORT FOR THE HEARING
delivered in Case 206/84 *

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 1973, 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 within 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) . . .'.

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 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

* Language of the Case: English.

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 1978, 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 subparagraph 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 is to apply 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 those 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 (which does not include life insurance) '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 statement 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 [1974] ECR 1299*).

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) That 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 undertakings 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 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 are to be treated. The same is true of tax problems (methods of collection and supervision). Finally, differences of opinion 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, *Ireland* adopted the *European Communities (Co-insurance) Regulations* 1983 (SI No 65 of 1983) (hereinafter referred to 'the 1983 regulations').

(a) The effect of *Article 4 (1)* of the 1983 regulations is that no Community insurer may participate in the co-insurance of an Irish risk unless the leading insurer is authorized by the Irish supervisory authorities. To obtain such an authorization the undertaking in question must, by virtue of *Article 9* of the European Communities (Non-life Insurance) Regulations 1976 (SI No 115 of

1976) (hereinafter referred to as 'the 1976 regulations'), either have established itself in Ireland or propose to do so.

(b) There are exceptions in the case of certain transport risks under *Article 4 (2)* ('Railway rolling stock', 'Aircraft', 'Sea, lake and river and canal vessels', 'Goods in transit', 'Aircraft liability' and 'Liability for . . . sea, lake and river and canal vessels'). However, it is apparent from the combined provisions of Article 8 (1) of the 1983 regulations and of Article 4 (6) of the 1976 regulations that the leading insurer must in those cases first notify the Irish Minister for Trade, Commerce and Tourism of his intention to participate in the co-insurance operation and must obtain his consent.

(c) Furthermore, *paragraph 3 of the schedule* to the 1983 regulations purports to restrict the right of Community insurance undertakings to carry out co-insurance in Ireland to contracts which exceed a certain value. Thus, in the case of risks in classes 8, 9 and 16, defined in *paragraph 2* of the said schedule ('Fire and natural forces', 'Other damage to property' and 'Miscellaneous financial loss'), the total sum insured under any one contract must not be less than 50 million units of account. In the case of risks in class 13, as set out in paragraph 3 of the said schedule ('General liability'), the turnover of the insured in respect of the activities giving rise to cover must not be less than 200 million units of account.

(d) Finally, it is apparent from *Article 9* of the 1983 regulations that any person (including legal persons) who fails to comply with any provision of the regulations is to be liable to criminal proceedings.

3. Considering that the Irish regulations described above were contrary to Articles 59 and 60 of the Treaty and Directive 78/473, on 6 October 1983 the Commission addressed a *formal letter* to the Irish Government pursuant to the first paragraph of Article 169 of the Treaty, calling upon it to submit its observations.

In its reply of 26 December 1983 the Irish Government raised the argument, in particular, that according to the case-law of the Court Member States may impose restrictions of the type in question where they are required in the public interest, in a situation where the particular subject-matter has not been harmonized. Ireland claimed that the requirement of establishment was a restriction which was objectively necessary in order to ensure the adequate protection of the insured and third parties. Moreover, Article 2 (1) of Directive 78/473 allowed the requirement of establishment to be imposed upon the leading insurer, having regard in particular to the provisions of Directive 73/239. Finally, Ireland asserted that, as far as co-insurance in respect of contracts below the thresholds set out in the schedule to the 1983 regulations was concerned, the exclusion of Community co-insurance in the circumstances indicated was specifically permitted by Article 1 (2) of Directive 78/473, in conjunction with Article 8 thereof.

On 22 May 1984 the Commission issued a reasoned opinion under the first paragraph of Article 169 of the Treaty in which it maintained, on the basis of the case-law of the Court, in particular that Member States were not entitled to make the provision of co-insurance services in their territory dependent either upon a requirement that the leading insurer be established there or receive the consent of the government of the State in which the services were rendered or upon the observance of certain thresholds. In the Commission's view, Articles 59 and 60 of the Treaty clearly prohibited such restrictions.

The Commission requested Ireland to take the appropriate measures to comply with its

reasoned opinion within a period of two months of receipt thereof.

By a letter of 30 July 1984, the Irish Government replied to the Commission's reasoned opinion. It maintained its position and argued in particular that the 1983 regulations were justified in view of the need to protect the public interest.

4. By an application received at the Court Registry on 14 August 1984, the Commission brought the present action.

By applications lodged at the Court Registry on 29 November and 4 December 1984 respectively, the United Kingdom and the government of the Kingdom of the Netherlands applied to intervene in support of the conclusions of the Commission. By applications received at the Court Registry on 22 October, 22 November and 10 December 1984 respectively the governments of the Kingdom of Belgium, the Kingdom of Denmark and the French Republic applied to intervene in support of the conclusions of the defendant.

By orders of 24 October and 12 December 1984, the Court, upon hearing the views of the Advocate General, allowed the applications to intervene.

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, it asked the Commission to state which provisions of Directive 78/473 had, in its view, been infringed by the contested regulations.

In reply to that question, the Commission stated in particular that by requiring that, in the case of risks situated in the Member State concerned, the leading insurer must be established there and authorized to cover those risks as sole insurer, the regulations in question constituted an incorrect transposition into national law of Article 2 (1) (c) and an infringement of Article 3 of Directive 78/473. Article 2 (1) (c) was somewhat vague in regard to the problem in question, namely the requirement that the leading insurer must be established and authorized in the country of the risk. That article must, however, be interpreted in the light of Articles 59 and 60 of the Treaty, as the Council itself had emphasized in the abovementioned statement in the minutes relating to the adoption of the directive in question. Furthermore, Article 2 (1) (c), referred to the first coordination directive, Directive 73/239, which did not require an insurer to apply for authorization and to establish himself in the Member State in which the risk was situated and did not permit such a requirement to be imposed on him. The expression 'in the Member State in which the risk is situated' was to be found nowhere in the directives. According to Article 6 of the first coordination directive, authorization was required in the place where the undertaking carried on its business, that is to say where it established its head office, a branch or agency in order to conduct insurance business, irrespective of the place in which the risks were situated or the insurers resided. According to Article 3 of the co-insurance directive, the right of Community undertakings to participate in co-insurance covered by the directive, whether as leading insurer or simple co-insurer, may not be made subject to requirements in addition to those prescribed by the directive itself. As far as co-insurance below the thresholds was concerned, this was permitted by Article 59. It was clear that Ireland was seeking to use the directive and its interpretation thereof to impede this

freedom. To this extent Irish legislation constituted a distortion and therefore an infringement of the co-insurance directive, in particular Article 1 (2).

II — Conclusions of the parties

The *Commission*, supported by the United Kingdom as regards the claims set out under head 1 (a), and by the Netherlands Government, claims that the Court should:

1. Declare that,

   (a) by adopting the provisions of Section 4 of the European Communities (Co-insurance) Regulations 1983, which oblige Community insurance undertakings which wish to provide insurance services in Ireland in the role of leading insurer either to be authorized and therefore established or, as the case may be, to give notice to the Minister and obtain his consent, Ireland has failed to fulfil the obligations incumbent upon it pursuant to Articles 59 and 60 of the Treaty and of Directive 78/473;

   (b) to the extent to which the provisions of paragraph 3 of the schedule to the said regulations prevent Community insurers from providing co-insurance services in Ireland for contracts of a total amount less than that specified in the said paragraph 3, Ireland has failed to fulfil the obligations incumbent upon it pursuant to Articles 59 and 60 of the Treaty and Directive 78/473;

   (c) by applying the provisions of national law cited above, instead of the provisions of Articles 59 and 60 of the Treaty, Ireland has failed to fulfil the obligations incumbent upon it arising from the direct effect of the said articles of the Treaty and the primacy of Community law; and

2. Order Ireland to pay the costs.

Ireland, supported by the Belgian Government, the Danish Government and the French Government, contends that the Court should:

1. Declare the application to be inadmissible in its entirety or in part;

2. Dismiss the proceedings in so far as they may be found to be admissible;

3. Order the Commission to pay the costs.

III — Submissions and arguments of the parties

1. *Admissibility*

(a) *Ireland* states that by its application the Commission is attempting to pre-empt the constitutional procedures already set in train by the Council under Article 57 (2) of the Treaty. It states that the Council is currently engaged in its work on the second draft directive on direct insurance other than life assurance and, *inter alia*, co-insurance. Consequently, the Commission is asking the Court to perform the task assigned by the Treaty to the Council. To that extent, the Commission's application should fail *ratione materiae*.

(b) The *Commission* states that the coordination directives provided for in Article 57 (2), read in conjunction with Article 66, are intended to facilitate freedom to provide services, not to achieve it. Freedom to provide services already stems directly from Articles 59 and 60. It cannot therefore under any circumstances be considered to be deferred until the entry into force of such coordination directives as may prove appropriate or even necessary. That is the legislative background of the second directive.

(c) The *United Kingdom* states in particular that the Council's task under Article 57 (2) of the Treaty is to adopt coordination directives and that the Commission's application does not allege that Ireland is in breach of its obligations deriving from the proposal for a second coordination directive, but rather alleges infringement of Articles 59 and 60 of the Treaty. In consequence, it cannot be maintained that, in delivering a judgment in favour of the Commission in these proceedings, the Court would be performing a task assigned to the Council under Article 57 (2). Moreover, the programme of directives envisaged in Article 57 (2) was intended to be completed by the end of the transitional period. This proved impossible. The proposal for a second directive has been under discussion for over nine years. In those circumstances, the Commission cannot be criticized for taking action to compel Ireland to comply with Articles 59 and 60 of the Treaty and Directive 78/473.

2. *The substance of the case*

(i) *General observations on the Treaty provisions regarding the freedom to provide services and on the harmonization directives*

(a) The *Commission* maintains that Articles 59 and 60 of the Treaty require the Member States to permit freedom to provide services in all fields, including that of co-insurance, after the transitional period. Any national measure restricting the freedom of the leading insurer, as of the other co-insurers, to provide services is therefore in principle contrary to the Treaty. Consequently, those articles abolish in particular any requirement that a person providing a service must be habitually resident in the territory where the services are to be provided since such a requirement would have the result of depriving Article 59 of all effectiveness.

In the context of the third paragraph of Article 60 of the Treaty — a provision which covers only the case where the person providing a service must, in order to do so, pursue his activity in the country where the service is provided and only in so far as the activity is pursued there temporarily by a physical presence — the Court has recognized that certain restrictions may still be imposed on the freedom to provide services in so far as the restrictions are objective, are required for the general good, are necessary for the protection of the particular activity or sector of the economy in question and are imposed on all persons or undertakings operating within the State. Such restrictions may not, however, be imposed where the provider of the services is already subject to similar provisions in his State of establishment.

The Commission also points out that the coordination directives provided for in Article 57 (2) and Article 66 of the Treaty are intended not to achieve but merely to facilitate the freedoms provided for by the Treaty. As far as co-insurance is concerned, it follows that neither the first coordination directive, namely Directive 73/239, nor, in particular, Directive 78/473 can be interpreted as having had as its objective the achievement in the field of insurance of the freedoms provided for in the Treaty. *A fortiori* they cannot be interpreted as limiting or excluding (temporarily) certain activities from the freedom to provide services. Both directives must be interpreted in a manner consistent with the provisions of the Treaty.

As regards more particularly Directive 78/473, the Commission states that it submitted its first proposal to the Council in

May 1974. It based its draft on the assumption that it was lawful for a Member State to require that the leading insurer be established in the country of risk. However, following the judgment of the Court of 3 December 1974 (Case 33/74 *Van Binsbergen* [1974] ECR 1299), the Commission, for reasons clearly set out in the statement of the grounds for the modified proposal, took the view that it was not lawful, having regard to Articles 59 and 60 of the Treaty, to require the leading insurer to be established in that country. It was for that reason that the Commission omitted that provision of its original proposal from the modified proposal submitted to the Council in May 1975. All the other provisions which were in the original proposal and which remained in the proposal as modified and subsequently adopted by the Council must be read in the light of this fundamental change of position of the Commission. In particular, none of them can be prayed in aid of an interpretation of Article 2 (1) (c) of Directive 78/473 to the effect that that provision authorizes the Member States to require that the leading insurer be established in the State of the risk. The Commission emphasizes that the text left that question unanswered, as is clearly shown by the declaration of the Council of 23 May 1978 cited above and recorded in the minutes of the meeting of the Council at which the directive was adopted.

(b) The *Netherlands Government* states that the Court has clearly held on several occasions that the provisions of Article 59 of the Treaty became directly and unconditionally applicable at the end of the transitional period. According to the well-established case-law of the Court, it is nevertheless permissible, owing to the special nature of certain services, to lay down specific rules which may restrict the freedom to provide services. That means in particular that in particularly sensitive fields, in order to protect the public interest, legislation may be enacted which applies to any person or undertaking operating in the territory of the Member State in which the service is provided if that interest is not already protected by the rules to which the provider of the service is subject in the Member State in which he is established.

The Netherlands Government considers, however, that, although coordination in that field is not yet complete, complete coordination cannot constitute a precondition for the full application of Article 59 of the Treaty and of the provisions of Directive 78/473 (see judgment of 27 February 1980 in Case 171/78 *Commission* v *Denmark* [1980] ECR 447, 466), particularly since the essential conditions for appropriate control in the State of establishment have already been coordinated by Directive 73/239.

(c) The *United Kingdom* stresses that the present state of harmonization does not affect the primary prohibition on discrimination contained in the Treaty, in particular in Article 59 thereof. In view of the direct effect of the Treaty provisions after the end of the transitional period, the role of programmes of directives envisaged by the Treaty has been to facilitate the exercise of the freedoms which it guarantees but not to introduce such freedoms. To that extent, the absence of Community measures coordinating national requirements cannot justify the imposition of restrictions on the freedom to provide services. Directives are still necessary in order to secure the mutual recognition of diplomas, certificates and

other evidence of formal qualifications and the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons. However, where the general good is adequately protected by measures applied in the Member State where a person or undertaking is established, the Member State in which that person or undertaking is providing services cannot rely on the absence of coordinating measures to justify imposing restrictions on the freedom to provide services.

(d) *Ireland* submits that Articles 59 and 60 of the Treaty should be interpreted both in the context of the case-law of the Court of Justice, in particular the judgments of 3 December 1974 (*Van Binsbergen, supra*), of 26 November 1975 (Case 39/75 *Coenen* [1975] ECR 1547), of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305) and of 10 February 1982 (Case 76/81 *Transporoute* [1982] ECR 417) and in the light of the negotiations set in train by the Council in pursuance of Article 57 (2) of the Treaty.

According to that case-law, Articles 59 and 60 are directly applicable and create rights which the national courts must protect, even without the prior adoption of harmonizing directives by the Council. *Prima facie*, it is contrary to the Treaty rules for a Member State to require that the provider of a service who is established in one Member State should, as a precondition for the freedom to provide services in another Member State, be established in the latter State. Nevertheless, the Court has held in a number of cases that there may be exceptions.

Thus, the need to protect the public interest may justify the imposition by a Member State of certain requirements including, where appropriate, a requirement that the undertaking should hold an official authorization issued by that State.

(e) The *Belgian Government* states that Articles 59 and 60 of the Treaty, which are directly applicable, are not absolute in character. In the first place, 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 were 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.

Moreover, the provisions of the Treaty cannot be interpreted without reference to the coordination 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.

Finally, the Belgian Government maintains that the Court has on several occasions upheld the principle whereby certain national rules or requirements, although impeding or hindering the freedom to provide services, may be in conformity with the Treaty if they are justified by the public interest and are objectively necessary to ensure the achievement of the objectives which they are intended to safeguard.

(f) The *Danish Government* draws particular attention to the fact that the Community rules and the decisions of the Court concerning goods and services are based on the same considerations and prin-

ciples and that the levels of protection laid down by the Member States for political reasons, both for goods and for services, must be respected where the protection is in the public interest and in addition satisfies specific conditions which have been laid down by the Court in its decisions.

It is clear from the scheme of the Treaty that, in principle, such differences should be abolished by the harmonization of national laws. If the Member States were always under a duty to permit the importation of services or goods, provided merely that they had been lawfully provided in the State of origin, there would be unforeseeable consequences with regard to the Member States' ability to fix, independently, the desired level of protection in the individual Member States. With respect to the movement of goods, the Court has held, in particular in its judgment of 17 December 1981 (Case 272/80 *Frans-Nederlandse Maatschappij* [1981] ECR 3277), that an additional authorization may be required in the State of importation in order to protect certain interests of a general nature, regard nevertheless being had to the controls carried out in the exporting State. Transposed to the field of services, the effect of that decision is that, in the absence of Community harmonization, a Member State may adopt a system requiring providers of services to obtain prior authorization, provided that the system is based on grounds relating to the public interest, in areas deserving protection, it is not discriminatory and it is necessary to ensure the desired level of protection, *inter alia* on the ground that the provisions in the State of establishment of the provider of services are inadequate in that respect. The Danish Government considers that those criteria correspond to those which may be inferred from the decisions of the Court regarding the provision of services.

(g) According to the *French Government* the freedom to provide services is a freedom which is neither unconditional nor absolute since, in the absence of harmonization, the Member States retain their power to enact legislation and, by definition, that power is bound to have a restrictive effect on the activity to which it extends. Moreover, the Member States are entitled to apply such legislation to non-established providers of services. That is apparent in particular from the third paragraph of Article 60 of the Treaty, which refers expressly to the pursuit of an activity by the provider of services and not to his moving physically from one place to another. Consequently, in the absence of harmonized rules, or for so long as such harmonization continues to be limited, the Member States are empowered to adopt legislation governing the provision of services. Such national legislation is equally applicable to non-established providers of services, provided that account is taken of the specific nature of the activity carried out on a temporary basis in comparison with the same activity carried out on a permanent basis. Moreover, and in view of the particular nature of certain services, specific requirements may be imposed on the providers of services so long as they are for the protection of the public interest, are motivated by the application of rules governing that type of activity, are applied in a non-discriminatory fashion and the interest in question is not already protected by the rules to which the provider of services is subject in the Member State where he is established.

(ii) *The leading insurer's obligation to obtain authorization and therefore to be established in Ireland or, as the case may be, to inform the competent Minister and obtain his consent.*

(a) In the opinion of the *Commission* the leading insurer's obligation either to be

authorized, and therefore established in Ireland (in accordance with Article 4 (1) of the 1983 regulations) or, in certain cases, to inform the Minister for Industry and to obtain his consent (in accordance with Article 4 (2) of those regulations) constitutes an unjustified restriction on the freedom to provide services which is contrary to Articles 59 and 60 of the Treaty and is not authorized by Directive 78/473.

With respect to the Irish Government's arguments based on the interpretation of Directive 78/473, the Commission refers in particular to the origin and history of that directive, as described above. The basic text of the co-insurance directive is itself essentially neutral and the point in dispute in this case can only be resolved by reference to the fundamental interpretation of Articles 59 and 60.

The Commission states that insurance services are cross-frontier transactions which may be divided into three types:

(i) the insurer may go physically to the country of the risk (type 1);

(ii) the insured may go to the place of business of the insurer in another Member State and there transact the business in question (type 2);

(iii) neither may move at all and the contract may be arranged by one of the various methods of modern communication (type 3).

In the opinion of the Commission, any requirement that the leading insurer either be established in Ireland or at least obtain the consent of the appropriate Irish Minister renders the freedom to provide all three types of services illusory. Furthermore, with respect to transactions of types 2 and 3, Ireland would appear to seek to control, by the requirement of establishment, not only the activities of insurers who come physically to its territory to transact business but also the conduct of insurers who never leave their place of establishment. However, it is not open to Member States to decide which methods of providing a service they will permit and which they will in effect forbid in a situation where the freedom to provide that service is guaranteed by the Treaty.

As regards those cases where the Court has in fact recognized that restrictions may be imposed upon the freedom to provide services, the Commission points out that they largely involved type 1 transactions, as described above. However, the scope of the present problem extends much further, since the provision of services by the leading insurer in the context of co-insurance, namely to assume the risk, or provide or offer cover for a risk, does not require the provider of the service to cross any frontier. No exception developed by the Court on the basis of the third paragraph of Article 60 could be applicable to the other two types of services referred to above.

The Commission appreciates that the Member States retain to some extent the power to supervise co-insurance business in the public interest. Such supervision may not, however, under any circumstances result in the leading insurer's being deprived of his right to perform his functions by way

of freedom to provide services. In so far as it has a restrictive effect, the supervision must also be essential. In that respect, the Commission cannot accept that the requirement to be established or indeed, as regards the transport risks in question, to receive the consent of the Minister, is objectively necessary in order to protect the insured and third parties. By its very nature, co-insurance relates as a rule mainly to larger risks, principally of an industrial, commercial and transport nature, so there is no fundamental inequality between the insurer and the policy-holder such that the latter requires special protection. Moreover, the business of insurance was subject to extensive control in all Member States even before the first coordination directive. Insurers established in the Member States are therefore at all events undertakings authorized to carry on the business of insurance in their own countries. In any event, moreover, since the adoption of the first directive the financial interests of policy-holders and third parties are adequately protected within the scope of the existing harmonized provisions of Community law. It is quite clear that overall competence to supervise and indeed control the financial aspects of the operation of insurance undertakings is conferred upon the State of establishment. The transposition of that directive into national law therefore entails the consequence that all insurers established in a Member State already meet the requirements dictated by the public interest. The Member States in which the insurance services are provided can and must put their trust in the Member States of establishment upon which the responsibility is incumbent by virtue of the directive. As regards the aspects of supervision which are not covered by the first directive, the Member States are not entitled to impose a measure of which the restrictive effect on the freedom to provide services is disproportionate with respect to the objective pursued. Finally, the Commission considers that there is nothing inherently 'sensitive' about insurance as an industry. It does indeed occupy an important place in the commercial life of developed States but that that reason alone is not enough to bring it within the extended exception to Article 59 of the Treaty, as laid down by the Court.

(b) The *Netherlands Government* cannot subscribe to the Irish intepretation of Directive 78/473, according to which Article 2 (1) (c) thereof requires the leading insurer to be authorized and established in the Member State in which the risk is situated. In that respect, the Netherlands Government bases its views on the history of the directive, as described above.

Moreover, if the Irish Government's view were correct, Article 59, which is specifically intended to remove obstacles to freedom to provide services for persons not established in the Member State where the service is to be provided, would be deprived of all effectiveness.

According to the Netherlands Government, as a result of the coordination brought about by Directive 73/239, there is no justification for the requirement of authorization and establishment under the contested regulations. The requirement of authorization and establishment laid down by Ireland leads to dual supervision which results in unjustifiable discrimination against insurers established in other Member States by comparison with Irish insurers. Such supervisory measures are also contrary to

the principle of proportionality since they go further than is strictly necessary for achieving the desired objective. Thus, the supervisory authority in the Member State in which the service is provided can at any time subsequently request any information it desires from the insurer concerned and, if necessary, confer with the supervisory authority in the Member State in which the insurer is established.

(c) The *United Kingdom* submits that Directive 78/473 does not on its true construction justify a requirement that the leading insurer in Community co-insurance be authorized in the country of the risk.

More particularly, the United Kingdom observes that, under Article 3 of Directive 78/473, undertakings which have their head office in a Member State and which are subject to and satisfy the requirements of Directive 73/239 are entitled to participate in co-insurance operations as defined in Article 2 (1) of Directive 78/473 without being subject to provisions other than those set out in the latter directive. In consequence, a requirement that the leading insurer be authorized and established in the Member State where the risk is situated cannot be imposed unless provided for expressly or by implication in the directive. Directive 78/473 does not provide expressly that the leading insurer must be authorized or established in the Member State in which the risk is situated. In particular, as far as Article 2 (1) (c) of the directive is concerned, the United Kingdom is of the opinion that the conditions set out in Article 2 (1) of the directive are descriptive and not prescriptive and that they set out the characteristics of the category of Community co-insurance operations to which Articles 4 to 7 of that directive apply. Whilst Article 2 (1) (c) refers to the 'conditions laid down' in Directive 73/239, it is nowhere provided in the directive that a special authorization is required for business transacted by the provision of services. Furthermore, to interpret Directive 78/473 as requiring the leading insurer to be established in the country of the risk makes co-insurance unworkable when the risk is situated in more than one Member State. Risks which span Community frontiers are the very type of risk likely to need the benefit of Community co-insurance. If the leading insurer had to be authorized in the State where the risk was situated, there would have to be more than one leading insurer, which would be contrary to Article 2 (1) (a) of the directive.

Moreover, Article 4 (1) of the 1983 regulations entails a restriction on the freedom to provide services which is discriminatory and is not justified by the public interest. In that connection, the United Kingdom draws attention to the fact that where a foreign insurer wishes to act as a leading insurer in Ireland the costs of doing so are artificially increased by the additional costs incurred in order to comply with Article 4. This affects the competitive position of foreign insurers and favours the use of insurers already established in Ireland as leading insurers in Community co-insurance operations. Moreover, in view of the nature of co-insurance, it cannot be said that protection of the consumer justifies restrictions in that sector of the kind imposed by Article 4. In addition, Directive 73/239 has already introduced appropriate financial supervision.

Finally, in the case of the transport risks to which Article 4 (2) of the 1983 regulations applies, the requirement to obtain the prior

consent of the Irish Minister has a clearly restrictive effect; it prejudices the insurer's opportunity to provide insurance services in Ireland as leading insurer and also overtly discriminates between insurers in Ireland and those established in other Member States.

(d) *Ireland* claims that Article 4 of the 1983 regulations satisfies the obligations imposed upon it by Directive 78/473 and that it is justified by the public interest.

More specifically, it states that the express terms of Directive 78/473 support the authorization requirements of Article 4 (1). Since, under the provisions of Directive 73/239, all insurers in a Community co-insurance contract must be authorized somewhere within the Community, something more particular must be envisaged in the case of the leading insurer by the express provisions of Article 2 (1) (c) of Directive 78/473. Consequently, the inevitable interpretation points to the leading insurer's being authorized in the Member State where the risk is situated. That interpretation is supported by the fourth recital and by Article 2 (1) (e) and Article 4 of Directive 78/473, which could only make sense in the context of a leading insurer established in the State where the risk is situated, where that leading insurer is familiar with the relevant provisions and where he is subject to supervision.

Ireland also submits that it is clear from the sensitive nature of the insurance sector and from the reasons of public interest which oblige national authorities to regulate this area that in the absence of prior harmonization of national laws in the insurance sector unrestricted freedom to provide insurance services would involve a serious threat to the public good. Directive 73/239 is not designed to harmonize all aspects of the required supervision of insurance business or the legal provisions applicable thereto. The need for prior harmonization is apparent from the discussions on the proposal for a second directive. In the absence of prior harmonization, the requirement of authorization, as provided for in Article 4 (1) of the 1983 regulations, is therefore necessary in order to ensure adequate protection of the insured and third parties. In that connection, Ireland states that it is in the first instance the Member State in which the risk is situated which must decide what is in the public interest in relation to activities within its territory, that the situation which arises where an insurer is familiar with the difficulties affects everybody insured with the insurer in question and that it is therefore one of the situations which must be avoided in the public interest and, finally, that the requirement that the leading insurer is to be established in the State of the risk is the least restrictive measure to ensure correct supervision of the activities of insurers.

Ireland also states that the Court of Justice has acknowledged in its decisions the importance of the protection of the public interest in the sphere in question and the interplay of that interest with Articles 59 and 60 of the Treaty. It contends in particular that there is no apparent support in any of the Court's decisions for the distinctions drawn by the Commission between the so-called type 1, type 2 and type 3 transactions. Those distinctions are artificial and contrived and there is no logical reason why the principle laid down in the third paragraph of Article 60 of the Treaty should stand or fall solely on the fact that the technical aspects of the provision of the service do not involve the physical displacement of the provider.

Finally, as regards the consent of the Minister provided for in Article 4 (2) of the 1983 regulations, Ireland points out that the consent is general and that in practice the consent is given in all cases.

(e) The *Belgian Government* considers that the contested rules are in conformity with Directive 78/473. A more detailed examination of the text of that directive shows in fact that its drafting was based on the hypothesis of the leading insurer's being authorized in the country of the risk, in accordance with Directive 73/239.

That view derives 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, by virtue of 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'.

In addition, the Belgian Government considers that the specificity of the field of insurance and the very limited degree of harmonization achieved justify the maintenance of national supervision requirements in the country where the service is provided. Those requirements are justified by the public interest, which in this case coincides with the protection of consumers, and they are objectively necessary to ensure compliance with the professional rules imposed upon the established undertakings, without which equality of competition would be impossible.

Finally, the Belgian Government considers that the contested rules are in conformity with Articles 59 and 60 of the Treaty. It states that the Irish regulations, like Directive 78/473, are not intended to compel the leading insurer to establish himself or obtain authorization in Ireland but rather to grant facilities to the co-insurers in cases where the leading insurer is established or authorized.

(f) The *Danish Government* considers that the obligations of establishment and authorization in force in Ireland are lawful under the Community rules. Rules which ensure an adequate common level of protection and make it possible to abolish national requirements have yet to be adopted by the Council; in particular, the harmonization effected by the first directive, No 73/239, was not intended to lay down comprehensively a common level of protection and thereby provide a satisfactory basis for the freedom to provide services.

The Danish Government considers that it is worth referring to experience in the United States of America where it is still recognized that individual states of the federation can lay down rules for all insurance companies which conduct business in the state concerned, including companies from other states. That power includes the right to impose requirements of establishment and authorization.

(g) The *French Government* considers that it is undeniable that insurance services are of a special nature and that the considerations of public policy and public interest involved justify the adoption of professional rules and their application to the providers of services. Accordingly, the coordination brought about by Directive 73/239 is only partial. Consequently, the Member States are entitled, according to the decisions of the Court, to impose upon a non-established provider of services specific requirements which are justified by the public interest and motivated by the application of professional rules.

From an analysis of the provisions of Directive 78/473, the French Government concludes that the transposition into national law effected by Ireland is in

conformity with the directive. The French Government also considers that neither the directive nor the transposition thereof effected by Ireland is contrary to the Treaty. It maintains that whilst it is imperative that the rules of public policy or relating to the public interest laid down by the Member States should be applied and respected, it is not open to the State of origin of the provider of the services to supervise compliance by the latter with the rules in force in the State where the services are rendered. Moreover, the requirement of prior authorization or a permanent establishment or both is not disproportionate to the aim pursued and in no way overlaps the authorization which the insurer must obtain in his State of origin pursuant to Directive 73/239. The authorization which the insurer has had to obtain in his State of origin is valid only for the business which he carries on within the territory of that State.

(3) *The prohibition regarding co-insurance operations in respect of risks below certain thresholds*

(a) The *Commission* maintains that Ireland has not fulfilled its obligations under Articles 59 and 60 of the Treaty in so far as the provisions adopted by Ireland for the transposition of Directive 78/473 into national law exclude services in the field of co-insurance in respect of risks below the thresholds specified in those provisions.

The Commission acknowledges that the coordinated régime of Directive 78/473 extends only to contracts of a particular size. It states that it is not objecting to the financial thresholds which Member States have set in order to delimit the field of application of Directive 78/473. However, in view of the fundamental freedom provided for in Articles 59 and 60 of the Treaty, the Commission cannot accept that, by virtue of Directive 78/473, any Member State has the right to prevent co-insurance in a situation in which those thresholds are not met. Co-insurance in respect of contracts below those thresholds remains subject to the basic freedom of the Treaty and as such is permissible without the leading insurer's being subject to the requirement of establishment or even the consent of the relevant Minister.

(b) *Ireland* rejects the argument that co-insurance in respect of contracts beneath the thresholds provided for in the 1983 regulations should remain subject to the basic freedoms of the Treaty. It states in particular that as a matter of first principle Directive 78/473 applies only to risks which, by reason of their nature or size, call for the participation of several insurers for their coverage. If such is the case, it is reasonable to provide for thresholds. Finally, the thresholds provided for in the Irish regulations were not unilaterally or arbitrarily fixed. On the contrary, they were arrived at in the context of the conference of insurance supervisory authorities of the Community.

(c) The *Belgian Government* states that according to Article 1 (2) of Directive 78/473, which is confirmed by Article 8 (2) thereof, the directive only applies to a certain category of risks. It therefore follows automatically that only risks of a size in excess of the thresholds may benefit from the facilities granted by the directive. Co-insurance operations in respect of other risks therefore remain subject, by virtue of Article 2 (2) of Directive 78/473, to the national legislation of the Member States existing when the directive entered into force. The Belgian Government concludes, as a result, that the Irish regulations are in conformity with the directive.

Moreover, pending further coordination, operations not covered by the directive are covered by general conditions applicable to the provision of services. Those conditions include temporary limitations on that freedom, and in so doing are perfectly compatible with the Treaty and the

decisions of the Court. Consequently, the Belgian Government maintains that the contested regulations are also not contrary to Articles 59 and 60.

(iv) *Failure to have due regard for the direct effect and primacy of Community law*

(a) The *Commission* states that Ireland has failed to fulfil its obligations deriving from the direct effect of Articles 59 and 60 of the Treaty and the rule that priority is to be given to Community law, in so far as the Irish authorities are applying national regulations which are contrary to those provisions. Where a provision of Community law is directly applicable, it is incumbent upon the national authorities to apply it, national law notwithstanding. In the Commission's opinion, failure by a Member State to give priority to Community law in such circumstances gives rise to a separate and distinct breach of Community law.

(b) *Ireland* maintains that it has transposed into its national law the obligations imposed upon it both by Articles 59 and 60 of the Treaty and by Directive 78/473. It also refers to its earlier observations, which apply *mutatis mutandis* to the Commission's third head of claim.

(c) The *Belgian and French Governments* take the view that since the Irish regulations are in conformity with Community law, the application of them cannot constitute an infringement.

IV — Oral procedure

Ireland, the defendant in the proceedings, represented by J. D. Cooke, SC, and J. O'Reilly, Barrister, the Belgian Government, represented by R. Hoebaer, the Danish Government, represented by L. Mikaelsen, assisted by C. Gulmann, the French Government, represented by R. de Gouttes, the Netherlands Government, represented by D. J. Keur, the United Kingdom, represented by N. Phillips, QC, and P. Lasok, and the Commission of the European Communities, the plaintiff in the proceedings, represented by D. Gilmour, assisted by E. Steindorff and A. Philip, presented oral argument 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.

O. Due
Judge-Rapporteur