

COMMISSION INTERPRETATIVE COMMUNICATION

Freedom to provide services and the general good in the insurance sector

(2000/C 43/03)

The Third Council Directives 92/49/EEC and 92/96/EEC⁽¹⁾ completed the establishment of the single market in the insurance sector. They introduced a single system for the authorisation and financial supervision of insurance undertakings by the Member State in which they have their head office (the home Member State). Such authorisation issued by the home Member State enables an insurance undertaking to carry on its insurance business anywhere in the European Community, either on the rules on establishment, i.e. by opening agencies or branches in all the Member States, or under the rules on the freedom to provide services. Where it carries on business in another Member State, the insurance undertaking must comply with the conditions in which, for reasons of the general good, such business must be conducted in the host Member State. Under the system set up by the Directives, the financial supervision of the business carried on by the insurance undertaking, including business carried on under the rules on establishment or on the freedom to provide services, is always a matter only for that insurance undertaking's home Member State.

In the course of its contacts with numerous economic agents, the Commission has come to realise that uncertainty surrounds the interpretation of the scope of the Treaty rules and of the provisions of the Insurance Directives, in particular the basic concepts of freedom to provide services and the general good. In many cases this results in the application by the supervisory authorities of measures or penalties in respect of insurance undertakings wishing to do business in the single market or in the imposition by them of certain constraints or conditions regarding the conduct of business on their territory. The situation in which insurance undertakings find themselves is far from clear and they thus face considerable legal uncertainty, both as regards the arrangements applicable to them in the different Member States and as regards the content of the products they wish to offer. The differences of interpretation seriously undermine the workings of the machinery set up by the Third Directives and are thus likely to deter certain insurance undertakings from exercising the freedoms created by the Treaty which the Third Directives set out to promote and, hence, to restrict the free movement of insurance services in the European Union. These differences are also preventing those seeking insurance from having access to insurance undertakings elsewhere in the Community and to the range of insurance products available within the single market in order to select the one that best fits their needs in terms of cover and cost.

In its communication to the Council of 28 October 1998 on financial services⁽²⁾ which was drawn up at the request of the Cardiff European Council of June 1998, the Commission identified differences in interpretation of the Community rules and the resulting legal uncertainty as one of the factors preventing the single market in financial services from functioning properly. At its meeting in Cologne on 4 June 1999, the European Council endorsed the Action Plan⁽³⁾ including the proposals and priorities contained in it, which was presented by the Commission following discussions within a group of personal representatives of the finance ministers which it chaired. This Action Plan includes the adoption of a Commission interpretative communication on freedom to provide services and the general good in the insurance sector among the priority objectives for helping to ensure that the single market operates effectively.

This interpretative communication is the Commission's contribution to the discussions it has held on the problems associated in the insurance industry with the freedom to provide services (Part One) and the general good (Part Two), particularly in the light of the third Council Directive on insurance (92/49/EEC and 92/96/EEC).

The Member States (particularly within the framework of the insurance committee and the sub-group on the interpretation of insurance directives), private operators, the European Parliament and the Economic and Social Committee have been involved in these discussions.

Before adopting the Action Plan, the Commission published in the *Official Journal of the European Communities* a draft

⁽¹⁾ Directives 92/49/EEC (OJ L 228, 11.8.1992, p. 1) and 92/96/EEC (OJ L 360, 9.12.1992, p. 1), as last amended by Directive 95/26/EEC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

⁽²⁾ 'Financial services: building a framework for action' (COM(98) 625).

⁽³⁾ 'Implementing the framework for financial markets: Action Plan' (COM(1999) 232, 11.5.1999).

communication⁽⁴⁾ which marked the beginning of a wide-ranging consultation process. Following publication of that communication, it received numerous contributions from all the groups concerned (Member States, professional associations representing insurers and intermediaries, insurance companies, consumer organisations, law firms, etc.). It also organised hearings with interested parties.

The Commission deems it desirable to draw attention to and to systematise the principles governing the right of establishment and the freedom to provide services, as elucidated by the Court of Justice, and to consider how they apply to the Third Insurance Directives⁽⁵⁾. This interpretation is based on the provisions of the Treaty, the texts of the community Insurance Directives and on the decisions of the Court of Justice, which has set out a large number of principles essential to the observance of the right of establishment and the freedom to provide services⁽⁶⁾.

In publishing this interpretative communication, the Commission is seeking to make transparent and to clarify the common rules which it is its task to see are observed. It is supplying all those concerned — national administrations, economic agents and consumers — with a reference tool which explains the Commission's opinion with regard to the legal framework in which insurance business may be carried on.

The interpretations and ideas set out in the present communication, which concern only the specific problems of the insurance sector⁽⁷⁾ do not claim to cover all possible situations

⁽⁴⁾ OJ C 365, 3.12.1997.

⁽⁵⁾ See in this connection the Commission interpretative communication concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3).

⁽⁶⁾ Where different interpretations of the Insurance Directives are possible, this document follows the interpretation which, in the opinion of the Commission, is closest to the Treaty. It should be noted in this respect that, in accordance with the Court's case law, where a text of secondary legislation can be interpreted differently, preference should be given to the interpretation which would align it with the Treaty, rather than one which would render it incompatible (see Case 205/84 Commission v Germany [1986] ECR 3755)

⁽⁷⁾ As regards the banking sector, the Commission has published an interpretative communication on the freedom to provide service and the general good in the Second Banking Directive (SEC(97) 1193 final, 20.6.1997).

that can arise in the functioning of the single insurance market, but merely the most frequent or most likely.

It should be pointed out straight away that the interpretations given in the present communication do not necessarily represent the often very divergent views put forward by the Member States and should not, in themselves, impose any new obligation on them. Neither do the interpretations prejudice the Commission's subsequent interpretations of the principles of establishment and freedom to provide services with regard to the development of communication technology and its use in the insurance business. European Community policy on the information society and electronic commerce is designed to promote the expansion of information society services and their movement between the Member States, especially electronic commerce⁽⁸⁾. The development of electronic commerce in the insurance and financial business should become very important and should eventually change the machinery for distributing insurance products in the European Community. The current legal framework for the single market in insurance is based on machinery where consideration has not been given to how to use this new technology for carrying out insurance business in the single market, and further work may possibly have to be carried out in the area. In this connection, the proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services⁽⁹⁾ will provide a proper harmonised legal framework for distance transactions carried out with consumers, thereby contributing to the growing use of new remote communication techniques, such as the Internet.

It goes without saying that the Commission's interpretations do not prejudice the interpretation that the Court of Justice of the European Communities, which is responsible in the final instance for interpreting the Treaty and secondary legislation, might place on the matters at issue.

⁽⁸⁾ Council resolution on the new priorities concerning the information society, adopted on 8 October 1996; Commission communication to the European Council entitled 'Putting services to work' (CSE(96) final, 27.11.1996); Commission communication to the European Parliament, the Council and the Economic and Social Committee concerning regulatory transparency in the internal market for information society services and proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (COM(96) 392 final, 30.8.1996); proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market (COM(98) 586 final, 18.11.1998) and amended proposal (COM(1999) 427 final, 17.8.1999); and proposal for a European Parliament and Council directive on a common framework for electronic signatures (COM(98) 297 final, 13.5.1998) and amended proposal COM(1999) 195, 29.4.1999).

⁽⁹⁾ COM(98) 468 final, 14.10.1998, and, for the amended proposal, COM(1999) 385 final, 23.7.1999.

I. FREEDOM TO PROVIDE SERVICES AND RIGHT OF ESTABLISHMENT IN THE INSURANCE DIRECTIVES

A. DEMARCATION BETWEEN THE RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES ⁽¹⁰⁾

1. Freedom to provide services

(a) *Temporary nature*

Article 49 et seq. of the Treaty establish the principle of the free movement of services. The principle acquired direct, unconditional effect on the expiry of the transitional period ⁽¹¹⁾. It confers on the parties concerned rights which the national authorities are required to observe and uphold, by refraining from applying any conflicting provision of national law, whether legislative or administrative, including specific, individual administrative decisions ⁽¹²⁾.

⁽¹⁰⁾ For the purposes of this communication, the terms 'Member States of the provision of services', 'business carried on under the freedom to provide services', 'Member State where the risk is situated', 'home Member State', 'Member State of the branch', etc. are used in accordance with the definitions given in Directives 88/357/EEC, 90/619/EEC, 92/49/EEC and 92/96/EEC.

Member State of the provision of services: the Member State where the risk is situated pursuant to Article 2(d) of Directive 88/357/EEC in cases where it is covered by an insurance undertaking or branch situated in another Member State, or the Member State of the commitment pursuant to Article 2(e) of Directive 90/619/EEC in cases where the commitment is covered by an insurance undertaking or branch situated in another Member State (Article 1(e) of Directive 92/49/EEC and Article 1(f) of Directive 92/96/EEC).

Business carried on under the freedom to provide services: the cover by an insurance undertaking operating from one Member State of a risk or commitment situated pursuant to Article 2(d) of Directive 88/357/EEC or Article 2(e) of Directive 90/619/EEC in another Member State.

Home Member State: the Member State in which the head office of the insurance undertaking covering the risk or the commitment is situated (Article 1(c) of Directive 92/49/EEC and Article 1(d) of Directive 92/96/EEC).

Member State of the branch: the Member State in which the branch covering the risk or commitment is situated (Article 1(d) of Directive 92/49/EEC and Article 1(e) of Directive 92/96/EEC).

Branch: any agency or branch of an insurance undertaking. Any permanent presence of an undertaking in the territory of a Member State is treated in the same way as an agency or branch, even if that presence does not take the form of a branch or agency but consists merely of an office managed by the undertaking's own staff or by a person who is independent but has permanent authority to act for the undertaking as an agency would (Articles 1(b) of Directive 92/49/EEC and Directive 92/96/EEC, and Articles 3 of Directives 88/357/EEC and 90/619/EEC).

⁽¹¹⁾ 1 January 1970 (Case 205/84 Commission v Germany [1986] ECR 3755) or the date of accession in the case of new Member States (judgment of 29 April 1999 in Case C-224/97, Ciola [1999] ECR I-2517).

⁽¹²⁾ See footnote II Case C-224/97 Ciola.

It should be noted that, according to the decisions of the Court of Justice, the freedom to provide services may involve the movement of the provider of the service, as envisaged in the third paragraph of Article 50 of the Treaty, or the movement of the recipient of the service to the Member State of the provider; the service may, however, also be carried out without any movement, either of the supplier or of the recipient ⁽¹³⁾. In other words, Article 49 et seq. of the Treaty apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established. It is only when all the relevant elements of the activity in question are confined within a single Member State that the provisions of the Treaty on freedom to provide services do not apply ⁽¹⁴⁾.

Where business is carried on under the freedom to provide services with the provider present on the territory of the Member State of provision, the concept of the provision of services is basically distinguished from that of establishment by its temporary character, while the right of establishment presupposes a lasting presence in the host country ⁽¹⁵⁾. The distinction stems from the Treaty itself, where the third paragraph of Article 50 stipulates that, in cases involving movement by the service provider to another Member State, the person providing the service may, in order to do so, 'temporarily' pursue his activity in the State where the service is provided. According to the case law of the Court of Justice, the temporary nature of the provision of services is to be assessed in the light of its duration, regularity, periodicity and continuity. The fact that the provision of services is temporary does not mean that the provider of services may not equip himself with some form of infrastructure in the host Member State in so far as such infrastructure is necessary for the purpose of performing the services in question ⁽¹⁶⁾.

The Court has also stated that an activity which consists in providing on a lasting basis services from the home Member State and does not involve movement by the

⁽¹³⁾ Joined Cases 286/82 and 26/83, Luisi and Carbone [1984] ECR 377; Case C-76/90 Säger [1991] ECR I-195; Case C-384/93 Alpine [1995] ECR I-1141.

⁽¹⁴⁾ Joined Cases C-225/95, C-226/95 and C-227/95, Kapasakalis [1998] ECR I-4239; judgments of the Court of 26 February 1991 in three cases concerning tourist guides: C-154/89 [1991] ECR I-659, C-180/89 [1991] ECR I-709, and C-198/89 [1991] ECR I-659.

⁽¹⁵⁾ Joined Cases 286/82 and 26/83, Luisi und Carbon [1984] ECR 377; Case C-55/94, Gebhard [I-1995] ECR I-4165, paragraphs 25 to 27; Case C-221/89 Factortame [1991] ECR I-3905: 'the concept of establishment within the meaning of Article 52 [now Article 43] et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period' (paragraph 20).

⁽¹⁶⁾ Case 55/94, Gebhard [1995] ECR I-4165, paragraph 27; Case C-56/96 VT4 [1997] ECR I-3143.

service provider to the Member State of provision falls within the scope of the rules on the freedom to provide services⁽¹⁷⁾.

(b) *Prohibition of circumvention of national law*

The Court has acknowledged that a host Member State is entitled to take steps to prevent a service provider whose activity is entirely or mainly directed towards its territory (i.e. the host Member State) from improperly exercising the freedom to provide services enshrined in Article 49 of the Treaty in order to circumvent the rules of professional conduct which would be applicable to him if he were established in the territory of that host Member State⁽¹⁸⁾. It adds that such a situation may fall within the ambit of the chapter on the right of establishment and not of that on the freedom to provide services⁽¹⁹⁾.

The criterion of frequency is important in order to determine whether there may be an attempt at 'circumvention' while exercising the freedom to provide services enshrined in Article 49, but it is not sufficient to define business as being carried on under the freedom to provide services (an establishment may also operate on an occasional basis).

The Commission takes the view that a situation where an insurance undertaking is frequently being approached within its own territory — for example, via electronic means of communication — by consumers residing in other Member States could not be regarded as a circumvention, unless it were demonstrated that there was an intention on the part of the provider of services to circumvent the national rules of those other Member States.

2. Right of establishment

If an undertaking carries on business in a Member State for an indefinite period via a permanent presence in that Member State, it is covered in principle by the provisions of the Treaty on the right of establishment. The Court has held that:

'A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that

State comes under the chapter relating to the right of establishment and not the chapter relating to services'⁽²⁰⁾.

In *Commission v Germany*⁽²¹⁾, the Court held that:

'... an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as will be the case with an agency.'

The Court has therefore acknowledged that an undertaking which has recourse to an intermediary established on the territory of another Member State to carry on activities in that Member State on a stable and continuous basis may fall within the scope of the rules on the right of establishment. The Court sought in that judgment to avoid the freedom to provide services being misused in order to circumvent the rules that would apply in the host Member State if the undertaking were established there⁽²²⁾.

Nevertheless, this risk of abuse has been eliminated to a significant degree in the insurance sector as a result of the harmonisation achieved since the above judgment by the Community directives concerning the conditions for taking up and carrying on insurance activities. The prudential and supervisory rules for insurance undertakings have been largely harmonised, whichever way insurance activities are carried out: by way of establishment or through the provision of services.

The Court of Justice recently acknowledged that the temporary character of the provision of services does not mean that the provider may not equip himself with some form of infrastructure (chambers, office, etc.) in the host Member State in so far as is necessary for the purposes of performing the services in question, without coming under the right of establishment⁽²³⁾. In such cases the temporary character of the services provided should be assessed by reference to their duration, frequency, periodicity and continuity⁽²⁴⁾. However, the mere existence of infrastructure in a Member State does not prove straight away that the situation falls within the scope of the rules on the right of establishment.

⁽¹⁷⁾ Case C-56/96, VT4 [1997] ECR I-3143.

⁽¹⁸⁾ Case 205/84 *Commission v Germany* [1986] ECR 3755 (see footnote 6); Case 33/74 *Van Binsbergen* [1974] ECR 1299; Case C-148/91 *Veronica* [1993] ECR I-487; Case C-23/93 *TV 10* [1994] ECR I-4795, paragraphs 56 and 68 of the Opinion of Mr Advocate-General Lenz; Case C-56/96 *VT4* (see footnote 16). See also the Opinion of Mr Advocate-General Lenz in Case C-212/97 *Centros* [1999] ECR I-1459, a case concerning alleged misuse of the 'secondary' right of establishment. The Court applied its case law on circumvention developed in the context of the freedom to provide services.

⁽¹⁹⁾ Case 205/84 *Commission v Germany* [1986] ECR 3755 paragraph 22; Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 13.

⁽²⁰⁾ Case 55/94 *Gebhard* [1995] ECR I-4165; Case C-221/89 *Factortame* [1991] ECR I-3905.

⁽²¹⁾ Case 205/84 *Commission v Germany* [1986] ECR 3755.

⁽²²⁾ Case 205/84, (see footnote 11, paragraphs 21 and 22; Case C-148/91 *Veronica* (see footnote 18); Case C-56/96 *VT4* (see footnote 16) (see Opinion of Mr Advocate-General Lenz).

⁽²³⁾ Case C-55/94, *Gebhard* (see footnote 15). It should be pointed out that, in his Opinion on Case 205/84 *Commission v Germany* (see footnote 6), the Advocate-General stated that the appointment of an agent or representative (in the host Member State) did not in itself necessarily constitute establishment.

⁽²⁴⁾ Case C-55/94 *Gebhard* (see footnote 15).

In the light of the case law of the Court of Justice⁽²⁵⁾, The Commission considers that the Member State of the provision of services may not treat any permanent presence of the provider of services on its territory as an establishment and subject it in any event to the rules relating to the right of establishment.

3. Grey area

It is, however, not always easy to draw the line between the two concepts of provision of services and establishment. Some situations are difficult to classify, in particular where the insurer, in order to carry on its insurance business, uses a permanent infrastructure in the Member State of provision. This arises in particular in the following cases:

(a) **recourse to independent persons established in the host Member State;**

(b) **electronic machines carrying on insurance business.**

On the strength of the Court's case law, the Commission departments propose the following interpretations:

(a) **Recourse to independent persons established in the host Member State**

The problem is to determine to what extent an insurance undertaking established in Member State A which has recourse to an independent person⁽²⁶⁾ established in Member State B in order to do insurance business there could be regarded as itself carrying on an insurance activity on a permanent basis in Member State B and hence be treated as an establishment of the insurance undertaking in the host Member State, instead of being regarded as carrying on an insurance activity under the rules on the freedom to provide services.

In *De Bloos*⁽²⁷⁾ the Court held that:

⁽²⁵⁾ See, in particular, Gebhard, and VT4, (see footnote 16).

⁽²⁶⁾ It should be pointed out straightaway that the notion of 'independent person' refers to structures (natural or legal persons) that are legally separate from the insurance undertaking they call on, irrespective of their form or designation. It is not used therefore in the more restrictive sense of Council Directive 77/92/EEC (OJ L 26, 31.1.1977) to distinguish between insurance agents (who act on behalf and for the account of, or solely on behalf of, one or more insurance undertakings) and insurance brokers (whose professional activity consists in particular in bringing together persons seeking insurance and insurance undertakings without being bound in the choice of the latter, with a view to covering risks to be insured, and who carry out work preparatory to the conclusion of policies of insurance and assist in the administration and performance of such policies, in particular in the event of a claim).

⁽²⁷⁾ Case 14/76 [1976] ECR 1497. It should be noted that this judgment and those cited in footnotes 27, 28 and 29 were delivered in cases concerning the interpretation of the concept of a branch in accordance with the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

'One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body.'

In even more precise terms, in *Somafer*⁽²⁸⁾ the Court held that:

'The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties, so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such a parent body but may transact business at the place of business constituting the extension.'

It concluded that a sole concessionaire not subject to the control and direction of a company could not be regarded as a branch, agency or establishment.

In *Blanckart & Willems*⁽²⁹⁾, the Court held that:

'An independent commercial agent who merely negotiates business, inasmuch as his legal status leaves him basically free to arrange his own work and decide what proportion of his time to devote to the interest of the undertaking which he agrees to represent and whom that undertaking may not prevent from representing at the same time several firms competing in the same manufacturing or marketing sector, and who, moreover, merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch, agency or other establishment ...'

Moreover, in his Opinion in *Shearson Lehman Hutton*⁽³⁰⁾ Mr Advocate-General Darmon stated that:

'The link of dependence vis-à-vis the company established in another signatory State⁽³¹⁾ is not the determining criterion here. In our opinion, that criterion resides in the fact the secondary establishment has the power to enter into contracts with third parties.'

⁽²⁸⁾ Case 33/78 [1978] ECR 2183. See also Case C-439/93, *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] ECR I-961.

⁽²⁹⁾ Case 139/80 [1981] ECR 819.

⁽³⁰⁾ Case C-89/91 [1992] ECR I-165.

⁽³¹⁾ The term 'signatory State' is used here because the case concerned the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

Lastly, in his report on the Brussels Convention, Mr Jenard notes that there is an agency or branch only 'where the foreign company is represented by a person capable of acting in a manner that is binding on its vis-à-vis third parties' ⁽³²⁾.

On the basis of these precedents, the Commission considers that, for the links between an independent person — such as, for example, an independent intermediary — and an insurance undertaking to be regarded as meaning that the insurance undertaking falls within the scope of the rules governing the right of establishment rather than those applicable to the freedom to provide services, the independent person must meet the following three cumulative conditions:

- (i) *he must be subject to the direction and control of the insurance undertaking he represents;*
- (ii) *he must be able to commit the insurance undertaking, and*
- (iii) *he must have received a permanent brief.*

It is, therefore, only where the independent person acts as a genuine extension of the insurance undertaking that the insurance undertaking falls within the scope of the rules applicable to the establishment of a branch.

- (i) *The independent person must be subject to the direction and control of the insurance undertaking he represents*

To verify if this criterion is met, a check should be made in particular to see whether, in the light of the links establishment between the insurance undertaking and the independent person, the latter has sufficient freedom to organise his activities, to decide how much time he will devote to the insurance undertaking and in particular, to represent competitors at the same time.

An exclusive brief received by an independent intermediary from a single insurer is an indication that the intermediary is subject to the direction and control of that insurer. It is nevertheless not uncommon in the insurance sector for intermediaries to represent several competing insurers at the same time. In most cases, such representation concerns different classes of insurance for different insurers.

Thus, in such cases, an intermediary who works for several insurers, only one of which has given him an

exclusive brief, would be treated as a branch of that insurance undertaking to the extent that the brief places intermediary under the direction and control of that insurer. The other insurers would, on the other hand, be subject to the rules governing the freedom to provide services.

In any event, the remaining two conditions mentioned should also be satisfied in order for the intermediary to be treated as a branch of an insurance undertaking in the host Member State and for the activities of that insurer to be covered by the rules on establishment rather than the rules on the provision of services. The above considerations apply irrespective of whether the intermediary is a natural person or a legal person.

- (ii) *The independent person must commit the insurance undertaking*

To determine whether this condition is satisfied, it has to be examined, in accordance with the Court's case law, whether the acts or decisions of the independent person can commit the insurance undertaking vis-à-vis third parties, who therefore do not need to deal with the insurance undertaking itself and may conclude business with the independent person.

The commitment of the insurance undertaking vis-à-vis the insured results primarily from the brief given to the independent person to conclude insurance policies with those seeking insurance on behalf and for the account of the insurance undertaking not established in the host Member State. The specific purpose of an agency or a branch is to conclude policies with third parties on behalf and for the account of the head office, which is thus directly committed, since the agency is an extension of the head office. If the independent person can, for instance, make on behalf of the insurance undertaking an offer containing all the essential of the proposed policy, but the insurance undertaking can still refuse the proposal submitted by the independent person and signed by the client, the condition of the ability to commit will not be met.

In some cases, other elements of the brief given by the insurance undertaking to an independent person may also show the intention of the insurance undertaking to be directly committed to the policyholder. For example, where the insurer has granted the intermediary the power to decide to accept and settle a claim submitted to it and the decisions taken by the intermediary bind the insurer vis-à-vis third parties. This function must, however, be distinguished from the brief given to the intermediary simple to manage files relating to claims; this may include, where appropriate, the payment of indemnities pursuant to the instructions given by the insurer himself.

⁽³²⁾ OJ C 59, 5.3.1979, p. 1.

(iii) *The independent person must have received a permanent brief*

The capacity of an independent person (e.g. an intermediary) established in the host Member State to commit an insurance undertaking must be based on a long-term, continuous brief and not a brief that is limited in time or a one-off instruction. This stable and continuous quality of the brief shows that the insurance undertaking intends to integrate into the economy of the host Member State the insurance activities which it carries on there.

In the Commission's opinion, where an insurance undertaking has recourse, in order temporarily and occasionally to carry on insurance business in another Member State, to an intermediary established in that other Member State, it falls within the scope of the rules governing the freedom to provide services⁽³³⁾.

The Commission considers that an insurance undertaking that decides to transact insurance business under the freedom to provide services must be able to use certain services either upstream or downstream of the transaction in the Member State of provision. For example, an insurance undertaking should be able to use for its business under the freedom to provide services:

- a local expert to assess the risks to be covered under the freedom to provide services,
- a local expert to assess damage caused under risks covered by insurance policies negotiated under the freedom to provide services,
- canvassers who do not conclude insurance policies and whose activity is limited to sending insurance proposals received from potential policyholders to the insurance undertaking for acceptance,
- local legal services, medical or actuarial services established in the Member State of provision,
- a permanent structure for collecting the premiums for insurance policies entered into under the freedom to provide services (e.g. a credit institution or a factoring company),
- a permanent structure for receiving notices of claims relating to policies concluded under the freedom to provide services for transmission to

the insurance undertaking for a decision to accept or refuse each claim,

- a permanent structure for managing files relating to claims (this may include, where appropriate, the payment of indemnities pursuant to the instructions given by the insurer himself).

It should be made clear that the only brief which results in treating a permanent presence in the same way as a branch of the insurance undertaking in the Member State of provision is one which concerns the activities that are part of the undertaking's objects, i.e. the business of insurance. A brief given to persons established in another Member State to carry out activities other than insurance cannot be taken into account when assessing the arrangements for carrying on the insurance activity in the host Member State. This could be the case with a brief given to an investment company to manage the insurance undertaking's securities portfolio or with a company instructed to manage real estate which the undertaking owns in a Member State and which it uses as cover for technical provisions.

Conclusion:

The Commission takes the view that it is only where the above three conditions are met (i.e. where the independent person to the direction and control of the insurance undertaking, is able to commit the insurance undertaking and has received a permanent brief) that an insurance undertaking, using independent persons — e.g. intermediaries — permanently established in the host Member State, must be treated as if it had a branch in the host Member State, with all that this implies from the legal point of view. Accordingly, the insurance undertaking will have to follow the procedure for opening a branch laid down by Article 10 of the First Insurance Directives 73/329/EEC and 79/267/EEC, as amended by Article 32 of the Third Insurance Directives 92/49/EEC and 92/96/EEC (specifying that the activities envisaged will be carried on through an independent intermediary). In addition, the independent person's activities must be carried on with due regard for the rules on branches adopted in the interest of the general good by the host State.

The fact that these conditions may involve making the insurance undertaking subject to the right of establishment does not mean that the independent person himself constitutes a branch of the insurer. A branch is 'a place of business which forms a legally dependent part of an insurance undertaking'⁽³⁴⁾. Since the person is assumed to be independent, he cannot be a 'part' of an insurance undertaking. This is without prejudice to compliance, where appropriate, by that independent person with the conditions governing the taking up and exercise of his professional activity in the Member State in which he is established.

⁽³³⁾ See Articles 14, 16 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/49/EEC (non-life insurance), and Articles 11, 14 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/96/EEC (life assurance), for the procedure relating to activities under the freedom to provide services falling within the scope of these Directives.

⁽³⁴⁾ See in this respect the concept of a branch given in Article 1(3) of Second Banking Directive 89/646/EEC (OJ L 386, 30.12.1989) and Article 1(8) of Directive 93/22/EEC on investment services in the securities field (OJ L 141, 11.6.1993).

(b) Electronic machines

This means fixed, ATM-type electronic machines capable of performing the insurance activities listed in the Annex to the First Directives ⁽³⁵⁾.

Such machines may be covered by the right of establishment if they fulfil the criteria laid down by the Court of Justice (see (a)).

For such a machine to be capable of being treated as an establishment, therefore, it would have to have a management, which is by definition impossible unless the Court acknowledges that the concept can encompass not only human management but also electronic management.

However, such a machine is unlikely to be the only place of business of an insurance undertaking in a Member State. It is likely to be attached in the same country to a branch or an agency. In that event, the machine is not an entity in its own right as it is covered by the rules governing the establishment to which it is attached.

If the machine does, however, constitute the only presence of an insurance undertaking in a Member State for the type of insurance transaction in question, the Commission takes the view that it may be possible to treat it as a provision of services in the territory of that Member State. The presence in the host country of a person or company responsible simply for maintaining the machine, equipping it and dealing with any technical problems encountered by users cannot rank as an establishment of the insurance undertaking and does not prevent the activity being deemed to be carried on under the freedom to provide services.

The Commission cannot rule out the possibility that technological developments might, in the future, induce it to review its position. If such developments were to make it possible for an insurance undertaking to have only a machine in a given country which could 'act' as a branch, taking actual decisions which would completely obviate the need for the customer to have contact with the parent company, the Commission would be forced to consider an appropriate Community legal framework. The present legal framework in fact rests on mechanisms which are still based on a 'human' concept of a branch (for example, the programme of operations must contain the names of those responsible for the management of the branch). It is therefore not possible, under the existing rules, to consider machines as constituting a branch.

⁽³⁵⁾ It does not mean individual, mobile data-processing equipment which can provide or receive distance insurance services, e.g. through the Internet. Equipment of this kind is discussed in point 6.

4. Simultaneous exercise of the freedom to provide services and the right of establishment

Since 1 July 1994, when the Third Directives 92/49/EEC and 92/96/EEC entered into force, an insurance undertaking can simultaneously carry on business in the same country under the freedom to provide services and through a form of establishment (branch), even if it is the same activity. Those Directives repealed the provisions of the Second Directives which allowed Member States to prohibit in certain cases simultaneous exercise of the freedom to provide services and the right of establishment ⁽³⁶⁾.

For the purpose of carrying on its insurance business under the freedom to provide services, the insurance undertaking can have recourse to an establishment opened in the Member State of the provision of services for support activities either upstream or downstream of the conclusion of the insurance policy (e.g. use the risk assessment services or of local legal or medical services, receipt of notices of claims relating to policies entered into under the freedom to provide services, evaluation by local services of damage caused under risks covered by such policies, information service for policyholders). The insurance undertaking must, however, be able clearly to relate the activity concerned to one of the methods of carrying on business: either the right of establishment or the freedom to provide services.

5. Monitoring by the host Member State of the conditions for granting the single licence

In the Commission's view, the Insurance Directives ⁽³⁷⁾ do not allow the host Member State to carry out checks to determine whether an insurance undertaking intending to operate in its territory under the freedom to provide services or through a branch meets the standard conditions under which it was granted the single licence in its home Member State. Such checks may be carried out by the home Member State alone. It is on the responsibility of the home Member State that the single licence is granted, and the host Member State cannot question the granting of such a licence ⁽³⁸⁾.

If the host Member State has reason to doubt compliance with the standard conditions, it may recourse to Article 227

⁽³⁶⁾ Directives 92/49/EEC (Article 37 and recital 28) and 92/96/EEC (Article 17 and recital 25).

⁽³⁷⁾ Non-life insurance: Articles 6, 7, 8 and 9 of the First Directive 73/239/EEC, as amended by Articles 4, 5, 6, 7 and 8 of Directive 92/49/EEC and Article 3 of Directive 95/26/EEC. Life assurance: Articles 6, 7, 8 and 9 of the First Directive 79/267/EEC, as amended by Articles 3, 4, 5, 6 and 7 of Directive 92/96/EEC and Article 3 of Directive 95/26/EEC.

⁽³⁸⁾ See the judgment delivered by the Court on 10 September 1996 on a similar issue in Case C-11/95 Commission v Belgium [1996] ECR I-4115. The Court ruled that the receiving Member State was not authorised to monitor the application of the law of the originating Member State applying to television broadcasts and to ensure compliance with Council Directive 89/552/EEC (known as the 'Television without Frontiers' Directive (OJ L 298, 17.10.1989, p. 23)).

of the Treaty or request the Commission to take action against the home Member State for failing to meet its obligations pursuant to Article 226 of the Treaty.

6. Insurance business carried on using remote means of communication, and in particular via electronic commerce

- (a) The use of remote means of communication (telephone, fax, the press, etc.) and in particular electronic commerce (e.g. via the Internet) to conclude insurance policies covering a risk (or communication) situated in a Member State other than the Member State of establishment of the insurer should be regarded as insurance business carried on under the freedom to provide services with no movement on the part of the contracting parties⁽³⁹⁾. In addition, most of the cases involve services provided on a listing basis⁽⁴⁰⁾. The Member State of establishment of the insurance undertaking with which a policy is concluded in this way is the Member State of establishment of the insurer that effectively comes on the insurance activity (head office or branch) and not the place where the technological means used for providing the service are located (e.g. the place where the Internet server is installed)⁽⁴¹⁾.

In most cases, the initiative for the conclusion of such insurance policies via the Internet comes from the prospective policyholder, who decides to use his own equipment in order to contact, and to seek to conclude an insurance policy electronically with, an insurance undertaking willing to do business in this way.

Under the Insurance Directives, the location of the risk (or commitment) covered by the insurance policy is the key factor for determining the rules applicable to an insurance transaction. The location of the risk or commitment is furthermore itself determined according to precise criteria laid down by the Insurance Directives themselves⁽⁴²⁾. Consequently, if an insurance transaction is to be carried out under the freedom to provide services, the risk or commitment covered by the insurance policy must be situated in a Member State other than the Member State

⁽³⁹⁾ Joined Cases 286/82 and 26/83 *Luisi and Carbone* (see footnote 13); Case C-23/93 *TV10* (see footnote 18).

⁽⁴⁰⁾ See Part I.1 and footnote 17.

⁽⁴¹⁾ See in this connection Article 1(c) of the amended proposal for a directive on certain legal aspects of electronic commerce in the internal market, *supra*; Case C-221/89 *Factortame* (see footnote 20).

⁽⁴²⁾ Non-life insurance: Article 2(d) of the Second Directive 88/357/EEC; life assurance: Article 2(e) of Directive 90/619/EEC. This is unlike the banking sector, for which the Second Banking Directive 89/646/EEC does not lay any criteria for locating banking activities carried on in the single market (see communication on the banking sector (SEC(97) 1193 final, 20.6.1997), which provides criteria for locating banking activities carried on under the freedom to provide services with a view to determining the rules applicable).

of establishment of the insurance undertaking covering that risk or commitment.

The Commission takes the view that, in accordance with the rules as they stand, insurance activities carried on via electronic commerce (e.g. the Internet) and covering a risk located in a Member State other than that in which the insurer covering the risk is established are subject to the provisions of the Insurance Directives relating to the freedom to provide services. An insurance undertaking operating from one Member State which is prepared to conclude via the Internet insurance policies covering risks or commitments situated in other Member States should therefore follow the notification procedure for activities carried on under the freedom to provide services⁽⁴³⁾.

The existing legal framework governing the single insurance market rests on mechanisms which did not envisage the use of information technology for carrying on insurance business in the single market. For this reason, the Commission already stated in its communication to the Council on the Financial Services Action Plan⁽⁴⁴⁾ that it intended to bring out a Green Paper to examine whether the existing provisions of the directives in the field of financial services provided a regulatory framework that is propitious to the development of electronic commerce in financial services while ensuring that the interests of consumers are fully protected.

- (b) On the other hand, the use of electronic commerce methods for the sole purposes of advertising, providing commercial information or enhancing awareness of the insurance undertaking cannot be regarded as an insurance activity. As stated in Section III below, the Insurance Directives do not make advertising activities in the host Member State subject to their notification procedure, only the intention to carry on an insurance activity in another Member State under the freedom to provide services⁽⁴⁵⁾.

The Commission considers that it is out of the question to make such advertising and information activities subject to the notification procedure laid down by the Third

⁽⁴³⁾ See Articles 14, 16 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/49/EEC (non-life insurance), and Articles 11, 14 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/96/EEC (life assurance), for the procedure relating to activities under the freedom to provide services falling within the scope of these Directives.

⁽⁴⁴⁾ COM(1999) 232, 11.5.1999.

⁽⁴⁵⁾ See Commission communication 'A European initiative in electronic commerce' (COM(97) 15 final), proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM(98) 586 final, 18.11.1998) and amended proposal (COM(1999) 427 final, 17.8.1999).

Directives (Article 34 et seq.), which was designed for actual insurance activities carried on under the freedom to provide services.

7. Miscellaneous

In the Commission's opinion, it would very likely be contrary to Community law for an insurance undertaking which has carried on its business under freedom to provide services within the territory of a Member State for a given length of time to be forced by that Member State to become established as a prerequisite for the continued pursuit of its activities.

B. NATURE OF THE PROCEDURE FOR NOTIFYING THE OPENING OF A BRANCH OR THE INTENTION TO CARRY ON BUSINESS UNDER THE FREEDOM TO PROVIDE SERVICES

The Commission considers that the notification procedure laid down in the Third Insurance Directives (both for branches and for provision of services) ⁽⁴⁶⁾ pursues a simple objective of exchange of information between supervisory authorities and is not a consumer protection measure. It should not, in the Commission's view, be considered a condition affecting the validity of any insurance policies concluded without the procedure having previously been followed.

It should be pointed out here that the expert group responsible for studying, as part of the third phase of the SLIM project, possible ways of simplifying Community legislation on insurance has recommended that the notification procedure for carrying on business under the freedom to provide services be retained with certain adjustments so as to enable Community insurers to respond with the necessary speed to requests they receive for insurance cover under the freedom to provide services, without any intention to evade the notification obligation ⁽⁴⁷⁾.

The Commission welcomes this recommendation and has undertaken to examine the rules in force with a view to making the adjustments deemed necessary in order to enable any insurance undertaking in the Community to respond rapidly to requests for insurance cover under the freedom to provide services, particularly in cases where, not having given prior notification, it is requested on its own territory to conclude an insurance policy under the freedom to provide services ⁽⁴⁸⁾. The Commission will put forward the necessary proposals to that end.

⁽⁴⁶⁾ See Article 10 of First Directive 73/239/EEC, as amended by Article 32 of Directive 92/49/EEC, as regards non-life insurance and Article 10 of First Directive 79/267/EEC, as amended by Article 32 of Directive 92/96/EEC, as regards life assurance for the procedure to be followed for opening a branch. See Articles 14, 16 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/49/EEC, as regards non-life insurance and Articles 11, 14 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/96/EEC as regards life assurance for the procedure relating to activities under the freedom to provide services falling within the scope of these Directives.

⁽⁴⁷⁾ COM(1999) 88 final, 25.2.1999.

⁽⁴⁸⁾ COM(1999) 88 final, 25.2.1999.

C. ADVERTISING INSURANCE SERVICES

The Third Insurance Directives lay down that insurance undertakings with head offices in Member States may advertise their services, through all available means of communication, in the Member State of the branch or the Member State of the provision of services, subject to any rules governing the form and content of such advertising adopted in the interest of the general good ⁽⁴⁹⁾.

The Commission believes it is out of the question to make the right to advertise ⁽⁵⁰⁾ conditional on compliance with the notification procedure laid down in Article 34 et seq. of the Third Directives for carrying on insurance business under the freedom to provide services.

Such a link would be artificial since it is not explicitly provided for by the Third Directives. Article 34 et seq. of the Third Insurance Directives make subject to the notification procedure not advertising activities in the host Member State but the intention to pursue an insurance activity under the freedom to provide services.

Similarly, to link advertising and the notification procedure for carrying on activities under the freedom to provide services could lead to anomalous situations where an insurance undertaking could find itself invited to notify the authorities of all the Member States in which its advertising could in theory be received, although the undertaking may not be planning to pursue its activities in all the Member States where such advertising is received.

The Commission believes, therefore, that, in accordance with the Third Directives, all forms of advertising by whatever means (mail, fax, electronic mail, etc.) should not be subject to the notification procedure referred to in Article 34 et seq. of the Third Directives. It is only if the insurance undertaking plans to carry on insurance activities under the freedom to provide services and only if it offers insurance products to potential clients established in another Member State that it must only comply with the notification procedure.

The above considerations concern only the problem of advertising seen from the formal angle and do not affect the right of Member States to enforce, on their territory and subject to current Community law, their general-good rules on the content of advertising, pursuant to Article 41 of the Third Directives.

⁽⁴⁹⁾ Article 41 of the Third Non-life Directive (92/49/EEC) and Article 41 of the Third Life Directive (92/96/EEC).

⁽⁵⁰⁾ By advertising is meant 'the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations' (Directive 84/450/EEC of 10 September 1984 on misleading advertising (OJ L 250, 19.9.1984, p. 17)). See also Article 2(e) ('commercial communications') of the amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, *supra*.

II. THE GENERAL GOOD IN THE THIRD INSURANCE DIRECTIVES; APPLICABILITY OF RULES PROMOTING THE GENERAL GOOD

The Third Insurance Directives reflect the case law of the Court of Justice and contain several references to the concept of the general good, providing in particular that an insurance undertaking operating under a single licence must comply with host-country rules adopted in the interest of the general good.

Such compliance is required either in the specific context of freedom of establishment (Article 32(4) of Directives 92/49/EEC and 92/96/EEC) or indiscriminately in connection with freedom of establishment and freedom to provide services (Articles 28 and 41 of Directives 92/49/EEC and 92/96/EEC).

1. The concept of the general good in the Third Insurance Directives

The Third Insurance Directives refer to the general good in several places:

- (a) Under the procedure for setting up a branch establishment, the host Member State two months from the receipt of the file sent by the host Member State to indicate to the insurance undertaking the conditions in which, for reasons of the general good, such activities must be carried on in the Member State of the branch (Article 10 of Directives 73/239/EEC and 79/267/EEC, as amended by Article 32 of Directives 92/49/EEC and 92/96/EEC).
- (b) As regards the marketing of insurance policies, the Member State of the commitment or that in which the risk is situated must allow insurance policies (non-life or life) to be concluded with insurance undertakings authorised in other Member States, whether under the rules on branches or under the freedom to provide services, on condition that such insurance policies do not conflict with the statutory provisions protecting the general good in force in the Member State of the commitment or that in which the risk is situated (Article 28 of Directives 92/49/EEC and 92/96/EEC).
- (c) In the case of health insurance taken out as an alternative to the cover provided by a statutory system of social security Article 54 of the Third Non-life Directive (92/49/EEC) states that each Member State in which health insurance policies can be substituted either wholly or in part for the sickness cover provided by a statutory system of social security may require such policies to

comply with the statutory provisions protecting the general good in that Member State for that class of insurance. The Member State may also require prior notification of policy conditions before such policies are marketed ⁽⁵¹⁾.

- (d) Lastly, an insurance undertaking authorised in its home Member State may advertise its services by any means of communication available in the Member State of the branch or the provision of services, on condition that it complies with any general-good rules on the form and content of the advertisement (Article 41 of Directives 92/49/EEC and 92/96/EEC).

The main objective of the Insurance Directives is to allow any insurance undertaking authorised in a Member State to carry on its insurance activities throughout the European Union, whether under the rules on branches or under the freedom to provide services. Their provisions apply to any insurance undertaking operating in Member States other than the home Member State under a single licence issued in the home Member State. This is because the Community legislator did not intend to differentiate between setting up a branch and provision of services ⁽⁵²⁾. The only differences introduced concern the notification procedure, which is more detailed for the establishment of a branch (Article 32 of Directives 92/49/EEC and 92/96/EEC) than for the conduct of insurance business under the freedom to provide services (Articles 34 *et seq.* of Directives 92/49/EEC and 92/96/EEC ⁽⁵³⁾). The 19th recital of Directive 92/49/EEC and the 20th recital of Directive 92/96/EEC state that the host Member State must:

- ⁽⁵¹⁾ It should be noted here that, where the technique of health insurance is similar to that in the field of life assurance, Article 54(2) of Directive 92/49/EEC has already established the conditions that can be applied to insurers exercising such activities. As regards compulsory insurance for accidents at work, the Member States concerned may require every insurance undertaking to respect the specific provisions in their national law for such insurance, with the exception of provisions concerning financial supervision, which are the exclusive responsibility of the home Member State (Article 55 of Directive 92/49/EEC).
- ⁽⁵²⁾ It should be pointed out that the uniform application of the mutual recognition principle to both branches and service providers was not introduced for the first time by the Third Insurance Directives but appears also in the other directives relating to financial services: the Second Banking Directive 89/646/EEC (OJ L 386, 30.12.1989), as last amended by Directive 92/30/EEC (OJ L 110, 28.4.1992, p. 52) and Directive 93/22/EEC on investment services in the securities field (OJ L 141, 11.6.1993, p. 27).
- ⁽⁵³⁾ It should be pointed out that the principle of single authorisation and supervision by the home Member State does not obstruct the application of other areas of the national law of the host Member State, e.g. tax law, social security law or labour law, which may accord differentiated treatment to Community firms depending on the way in which they choose to conduct their business, i.e. by way of freedom to provide services or by way of freedom of movement. In any event, the compatibility of such provisions with Community law will always be assessed on the basis of established case law criteria, especially where the general good is concerned, i.e. non-discrimination, non-duplication, necessity, proportionality, etc.

'... ensure that there is nothing to prevent the marketing within its territory of the insurance products offered for sale in the Community as long as they do not conflict with the legal provisions protecting the general good in force in the Member State in which the risk is situated, and in so far as the general good is not safeguarded by the rules of the home Member State, provided that such provisions must be applied without discrimination to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued'.

Since the recitals of a directive have legal force as an aid to interpretation, they shed light for the reader on the intentions of the Community legislator⁽⁵⁴⁾.

The Commission takes the view that an insurance undertaking operating under the arrangements laid down by the Insurance Directives could, therefore, be obliged to adapt its services to the host-country rules only if the measures enforced against it serve the general good, irrespective of whether it carries on its activities through a branch or under the freedom to provide services.

This approach is borne out by recent decisions of the Court of Justice, which held that only general-good rules can restrict or impede exercise of the two basic freedoms, namely the freedom to provide services⁽⁵⁵⁾ and the right of establishment⁽⁵⁶⁾. However, the Insurance Directives do not contain any definition of 'the general good'. They simply recall in their recitals the requirements imposed by the Court of Justice's case law on the concept of the general good. The reason for this is that is a judicial construction of an evolutive and open nature devised by the Court of Justice. It makes it possible to assess the conformity with Community law of a national measure that is taken in a non-harmonised area at Community level and hinders freedom of establishment and freedom to provide services. In non-harmonised areas, the level of what is regarded as the general good depends first on the assessment made by the Member States and can vary substantially from one country to another according to national traditions and the objectives of the Member States. It is necessary, therefore, to refer to the relevant case law of the Court of Justice.

⁽⁵⁴⁾ See in particular Case 76/72 Michel [1973] ECR 457 and Case C-238/94 Garcia [1996] ECR I-1673.

⁽⁵⁵⁾ Case C-76/90 Säger [1991] ECR I-4221. See the analysis set out in the Commission interpretative communications concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3) and concerning freedom to provide services and the interest of the general good in the Second Banking Directive (SEC(97) 1193, 26.6.1997).

⁽⁵⁶⁾ Gebhard, footnote 15. See also Cases C-19/92 Kraus [1993] ECR I-1663 and C-212/97 Centros (see footnote 18).

2. The concept of the general good

(a) *Case-law principles*⁽⁵⁷⁾

The concept of the general good is based in the Court's case law. It was developed first in the context of the free movement of services and goods and was subsequently applied to the right of establishment⁽⁵⁸⁾.

However, the Court has never given a definition of 'the general good', preferring to maintain its evolving nature. It has expressed its opinion in individual cases on the possibility of deeming a given national measure to be aimed at achieving an imperative objective serving the general good and has specified the line of reasoning to be followed in determining whether such a measure may be enforced by one Member State against a trader from another Member State who is operating within the territory of the former. The Court has though spelt out the strict conditions to be met by national measures which are aimed at achieving an imperative objective serving the general good if they are to be validly enforced against that trader⁽⁵⁹⁾.

The Court requires that a national provision must satisfy the following requirements if it is validly to obstruct or limit exercise of the right of establishment and the freedom to provide services:

- it must come within a field which has not been harmonised,
- it must pursue an objective of the general good,

⁽⁵⁷⁾ The Commission's analysis may, of course, be modified to reflect changes in the Court's case law.

⁽⁵⁸⁾ Case-55/94 Gebhard (see footnote 15). It is interesting to note that the judgment in Gebhard relates to an area (access to the profession of lawyer) in which harmonisation of the conditions for taking up and carrying on the activity is very limited in comparison with insurance. In the insurance sector, these conditions have been very extensively harmonised and the possibilities for relying on general-good rules are hence much more limited.

On the other hand, with regard to the law of insurance policies, which is a field that has not been harmonised by secondary Community legislation, the discretion of the Member States is much wider. It is above all in this field that the test of the general good is likely to be applied.

⁽⁵⁹⁾ See Gebhard (see footnote 15), where the Court held that '... national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'

This was subsequently confirmed by the Court in its judgments in Cases C-415/93 Bosman [1995] I-4921 and C-250/95 Futura [1997] I-2471.

- it must be non-discriminatory,
- it must be objectively necessary,
- it must be proportionate to the objective pursued,
- it is also necessary for the general-good objective not to be safeguarded by rules to which the provider of services is already subject in the Member State where he is established.

These conditions are cumulative. A national measure which is claimed to be compatible with the principle of the freedom of movement must satisfy all the conditions. If a national measure does not meet one or other condition, it is not compatible with Community law.

The concept of general good is an exception to the fundamental principles of the Treaty with regard to free movement and must, therefore, be interpreted in a restrictive fashion so as to ensure that recourse is not had to it in an excessive or abusive manner. In the event of a dispute, the Member State imposing the restriction has anyway to show that the measure meets the aforementioned conditions.

(b) Analysis of the requirements of the concept of the general good

(a) The measure must come within a field which has not been harmonised

The harmonisation directives define the minimum level of the general good within the Community. Measures relating, for example, to the calculation of technical provisions and the solvency margin, the conditions for taking up insurance business, and financial and prudential supervision may no longer be covered by the general good of a Member State.

Where these harmonised rules constitute minimum provisions, a Member State is free to impose on its own insurance undertakings stricter rules than those laid down in the Directives⁽⁶⁰⁾. As regards the Insurance Directives, this is the case with the provisions relating to investment rules and to the rules on the diversification of assets representing technical provisions. For this reason, the Third Insurance Directives stipulate that, in so far as certain of their provisions define minimum standards, 'a home Member State may lay down stricter rules for insurance undertakings authorised by its own competent authorities.'⁽⁶¹⁾

⁽⁶⁰⁾ The RTI judgment of 12 December 1996 in Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 [1996] ECR I-6471, making the use of minimum provisions conditional upon compliance with the Treaty.

⁽⁶¹⁾ Third Directive 92/49/EEC, recital 8, and Third Directive 92/96/EEC, recital 9.

Should a Member State impose, for reasons which it deems to be in the interest of the general good, a level of consumer protection stricter than the one set by a minimal Community provision on a Community insurance undertaking carrying on insurance business on its territory, the proportionality test would have to be satisfied for it to comply with Community law.

(b) The measure must pursue an objective of the general good

The Court has so far acknowledged that, in the absence of harmonisation, the following areas could fall within the scope of the interest of the general good⁽⁶²⁾:

- the professional rules designed to protect the recipient of services⁽⁶³⁾,
- protection of workers⁽⁶⁴⁾, including social protection⁽⁶⁵⁾,
- consumer protection⁽⁶⁶⁾,
- preservation of the good reputation of the national financial sector⁽⁶⁷⁾,
- prevention of fraud⁽⁶⁸⁾,
- social order⁽⁶⁹⁾,
- protection of intellectual property⁽⁷⁰⁾,
- preservation of the national historical and artistic heritage⁽⁷¹⁾,
- cultural policy and protection of cultural diversity in the audiovisual sector⁽⁷²⁾,
- cohesion of the tax system⁽⁷³⁾,

⁽⁶²⁾ To this list must be added *a fortiori* the provisions of Article 46, namely public policy, public security and public health.

⁽⁶³⁾ Joined Cases 110/78 and 111/78 Van Wesemael [1979] ECR 35.

⁽⁶⁴⁾ Case 279/80 Webb [1981] ECR 3305.

⁽⁶⁵⁾ Case 272/94 Guiot [1996] ECR I-1905.

⁽⁶⁶⁾ Case 205/84 Commission v Germany (see footnote 6).

⁽⁶⁷⁾ Case C-384/93 Alpine Investments BV (see footnote 13).

⁽⁶⁸⁾ Case C-275/92 Schindler [1994] ECR I-1039.

⁽⁶⁹⁾ *Ibid.*

⁽⁷⁰⁾ Case 62/79 Coditel [1980] ECR 881.

⁽⁷¹⁾ Case C-180/89 Commission v Italy [1991] ECR 709.

⁽⁷²⁾ Cases C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, C-353/89 Commission v Netherlands [1991] ECR I-4069 and C-148/91 Veronica Omroep Organisatie [1993] ECR I-487.

⁽⁷³⁾ Case C-204/90 Bachmann [1992] ECR 249.

- road safety ⁽⁷⁴⁾,
- protection of creditors ⁽⁷⁵⁾,
- fairness of commercial transactions ⁽⁷⁶⁾,
- protection of the proper administration of justice ⁽⁷⁷⁾.

This list is not definitive and the Court reserves the right to add to it at any time.

(c) *The measure must be non-discriminatory*

Where the restriction in question is discriminatory, i.e. a Member State imposes on a Community insurance undertaking measures which it does not impose or imposes more advantageously on its own insurance undertakings, it can be justified only on the grounds set out in Article 46 of the Treaty (public policy, public security and public health ⁽⁷⁸⁾, economic grounds not forming part of the latter ⁽⁷⁹⁾). Furthermore, this concept must be interpreted in a very strict fashion.

In that case there is no reason to invoke the general good as justification that this national measure is compatible with the Community legal order.

It is difficult to see what measures in the field of insurance could satisfy this condition of a serious threat to society. It is reasonable to believe, therefore, that discriminatory measures are unlikely to be justified in the insurance sector.

⁽⁷⁴⁾ Case C-55/93 van Schaik [1994] ECR I-4837.

⁽⁷⁵⁾ Judgment of 12 December 1996 in Case C-3/95 Reisebüro Broede [1996] ECR I-6511.

⁽⁷⁶⁾ Alpine Investments BV (see footnote 13); Case C-288/89 Collectieve Antennevoorziening Gouda, *supra*.

⁽⁷⁷⁾ *Ibid*.

⁽⁷⁸⁾ See Case C-17/92 Federación de Distribuidores Cinematográficos [1993] ECR I-2239, in which the Court indicated that the protection of cultural policy is not a justification featuring among those provided for in Article 46 of the Treaty. See Case C-224/97 Ciola (see footnote 11), paragraphs 16 and 17.

⁽⁷⁹⁾ Case 352/85 [1988] ECR 2085; Case C-17/92 [1993] ECR I-2239; Case C-484/93 Svesson [1995] ECR I-3955. For the Court, this concept presupposes the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (Case 30/77 Bouchereau [1977] ECR 1999); Case C-114/97 Commission v Spain [1998] ECR I-6717.

(d) *The measure must be objectively necessary*

Even if a measure is presented by a host Member State as defending an objective conducive to the general good, one may ask whether it is really necessary in order to protect that interest.

The Court of Justice has held in a number of judgments that a given national rule that was justified by the host country as pursuing an objective conducive to the general good, in the event consumer protection, went beyond what was necessary to protect that interest ⁽⁸⁰⁾. It checks whether certain measures, under cover of pursuit of an objective concerned with the protection of the recipient of the service, e.g. consumers, are not actually aimed at other objectives connected with the protection of the national market.

(e) *The measure must be proportionate to the objective pursued*

Finally, it is necessary to ask whether there are not less restrictive means of achieving the general-good objective pursued. The Court systematically examines whether the Member State did not have at its disposal measures with a less restrictive effect on trade ⁽⁸¹⁾. In the context of such an examination, it may deduce from a comparative analysis of the legislation of the other Member States that less restrictive consumer protection measures exist ⁽⁸²⁾. However, the Court has also ruled that 'the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law' ⁽⁸³⁾.

Where a host Member State invokes the need to protect the recipient of the service as justification for a national measure constituting a restriction on an insurance undertaking benefiting from mutual recognition, the actual need to protect the recipient should be questioned. In *Commission v Germany* (insurance), the Court held on 4 December 1986 that 'there may be cases where, because of the nature of the risk insured and of the party seeking insurance, there is no need to protect the latter by the application of the mandatory rules of his national law.' ⁽⁸⁴⁾

⁽⁸⁰⁾ Case C-410/96 Ambry [1998] ECR I-7875; Case C-76/90 Denemeyer (see footnote 13); Case 205/84 Commission v Germany [1986] ECR 3755.

⁽⁸¹⁾ See most recently Case C-101/94 Commission v Italy ('SIM') [1996] ECR I-2691. See also Case C-384/93 Alpine Investments (see footnote 13).

⁽⁸²⁾ Case C-129/91 Yves Rocher [1993] ECR I-2361.

⁽⁸³⁾ Case C-384/93 Alpine Investments (see footnote 13).

⁽⁸⁴⁾ Case 205/84 Commission v Germany (see footnote 6).

The Insurance Directives follow this case law and already take account of the nature and specific circumstances of the party seeking insurance in order to impose certain provisions designed to ensure his protection. Take, for instance, the distinction made in non-life insurance between 'large risks' and 'mass risks' ⁽⁸⁵⁾ or the scope of the provisions relating to the information requirements incumbent on policyholders ⁽⁸⁶⁾ or of the right to cancel a life assurance policy ⁽⁸⁷⁾.

The Commission considers, therefore, that Member States should, in imposing their general-good rules, make a distinction according to whether or not services are supplied to circumspect recipients and take account of the degree of vulnerability of the persons they are setting out to protect.

For example, insurance services involving 'large risks' or sophisticated or professional policyholders (e.g. professionals in the financial sector) should not be the subject of particular general-good rules imposed by the host Member State, at least where the protection of policyholders is concerned. The proportionality test would be especially difficult to satisfy in such cases.

- (f) *It is also necessary for the general-good objective not to be safeguarded by rules to which the provider of services is already subject in the Member State where he is established*

It is necessary to examine in this connection whether the insurance undertaking is not already subject to similar or comparable provisions aimed at safeguarding the same interest under the legislation of its Member State of origin ⁽⁸⁸⁾.

Under the Insurance Directives, this criterion could be important, particularly for the purpose of assessing the compatibility of the measures imposed by the host Member State in exercising its residual powers.

⁽⁸⁵⁾ Article 5(d) of Directive 73/239/EEC, as amended by Directives 88/357/EEC and 90/618/EEC.

⁽⁸⁶⁾ Non-life insurance: see Directive 92/49/EEC: Articles 31 (the precontractual information required must be supplied to policyholders who are natural persons) and 43 (restriction of such information to 'mass risks.').

⁽⁸⁷⁾ Only a person taking out an individual life assurance policy has the right to cancel that policy; Member States may not grant this right to policyholders not requiring such special protection on account of their status or of the circumstances in which the contract was concluded (see Article 15 of Directive 90/619/EEC, as amended by Article 30 of Directive 92/96/EEC).

⁽⁸⁸⁾ Case 205/84 Commission v Germany (see footnote 6); Case C-76/90 Denemeyer (see footnote 13).

For example, it is necessary to examine in the context of this test the extent to which certain controls required by the host Member State might already be carried out in the country of origin, the extent to which accounting, supervisory, statistical or financial information might already be communicated to the competent authority of the country of origin, etc.

(c) *Other considerations*

The inclusion by some Member States of whole areas of their national legislation in the list of provisions adopted in the interest of the general good could prove to constitute a misuse of the concept of general good. Several of them are tending to treat as rules adopted in the interest of the general good all their legislation on consumer protection, their tax or commercial law or their competition law. The Commission takes the view that the principles of necessity, non-duplication and proportionality mean that Member States should indicate, when new legislation is adopted or, where appropriate, when the conditions laid down in Article 32(4) of Directives 92/49/EEC and 92/96/EEC are notified, the specific provisions which could be in the interest of the general good.

Lastly, although the reasoning is identical and the questions are the same whether the insurance undertaking operates through a branch or under the freedom to provide services, the assessment of the proportionality of a restriction may, in certain cases, differ depending on the mode of operation. Since there are differences of kind between the provision of services and establishment, a restriction could more readily be considered to be proportionate in the case of an operator working permanently within a territory than in the case of the same operator working only temporarily.

The Court recognised this difference by imposing a less restrictive and more 'lightweight' legal framework for provision of services than for establishment ⁽⁸⁹⁾. It has likewise consistently held that it does not follow from Article 50(3) of the EC Treaty that: 'all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.' ⁽⁹⁰⁾

⁽⁸⁹⁾ The Court has consistently made the point that a Member State 'may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.' Case C-76/90 Säger (see footnote 13). See also Case C-198/89 Commission v Greece [1991] ECR I-735.

⁽⁹⁰⁾ Case 205/84 Commission v Germany (see footnote 6) and Case C-76/90 Denemeyer (see footnote 13).

Thus, depending on the circumstances, the same restriction applied in the interest of the general good could be judged proportionate in respect of a branch but disproportionate in respect of a provider of services. The Commission considers, for example, that a Member State which imposes certain formalities on insurance undertakings (controls, registration, costs, communication of information, etc.) for reasons that purport to be in the general good should take account of the mode of operation chosen by the insurance undertaking carrying on activities within its territory under mutual-recognition arrangements.

However, this distinction cannot be applied to consumer-protection rules (provided, of course, that they have satisfied the other tests). The level of consumer protection required must be identical, whether the service is supplied under the freedom to provide services or by way of establishment.

3. Application of these principles to the insurance sector

Having identified the main characteristics of the general good, the Commission regards it as appropriate to state its interpretation of the concept as it applies to insurance, giving a few examples of measures that a trader might encounter in exercising his right of establishment or his right to provide services. Once again it should be explained that this interpretation does not prejudge that which the Court of Justice, competent in the final analysis for interpreting the Treaty and secondary legislation, could be asked to give of the questions raised. Such measures may concern, for instance:

- (a) **prior notification of policy conditions;**
- (b) **capital redemption operations of insurance undertakings;**
- (c) **uniform no-claims bonus systems;**
- (d) **language of the insurance policy;**
- (e) **professional codes of conduct;**
- (f) **maximum technical interest rates for life assurance;**
- (g) **imposition of standard clauses or minimum insurance conditions;**
- (h) **clauses imposing mandatory levels of excess in insurance policies;**
- (i) **compulsory stipulation of a surrender value in life assurance policies;**
- (j) **prohibition of cold calling;**

- (k) **arrangements introduced by the host Member State for charging indirect taxes on insurance premiums for policies concluded under the freedom to provide services: appointment of a tax representative of the insurer.**

(a) **Prior notification of policy conditions**

The Third Directives expressly forbid any prior or systematic substantive control of insurance policies and policy documents⁽⁹¹⁾, irrespective of the name given by the national authorities to the system used, whether it involves the prior approval of policies and scales of premiums or their simple, systematic notification with tacit approval or with the deposit of documents before they can be used. Prior or systematic approval is henceforward authorised only in those cases explicitly provided for in the Community directives. Such is the case with compulsory insurance (e.g. compulsory third-party motor insurance⁽⁹²⁾ or health insurance which is a substitute for a statutory system of social security⁽⁹³⁾), where Member States may require that the general conditions of that insurance be communicated before use but, under no circumstances, approved. As for life assurance, the Member State of origin may require systematic notification of the technical bases used for calculating scales of premiums and technical provisions⁽⁹⁴⁾.

These specific cases apart, the Member States may use only systems of *ex post*, non-systematic control of insurance conditions — without, in any event, such a requirement constituting a condition which an insurance undertaking must satisfy before carrying on its business — in order to ensure that their general-good provisions concerning insurance conditions are complied with by policies marketed on their territory. Since the Community legislator has already determined the systems of substantive control that may be applied by the Member States and their conditions of application, this is an area which is already the subject of harmonisation at Community level.

Nevertheless, certain Member States continue to require prior notification of these particulars. In most cases, a sheet describing the insurance policy conditions has to be submitted. They argue that this is necessary to protect their consumers, to guarantee transparency of the products available on their national markets and to facilitate substantive control of insurance products by the supervisory authorities.

⁽⁹¹⁾ Articles 6(3), 29 and 39 of Directive 92/49/EEC and Articles 5(3), 29 and 39 of Directive 92/96/EEC.

⁽⁹²⁾ Article 30(2) of Directive 92/49/EEC.

⁽⁹³⁾ Article 54(1) of Directive 92/49/EEC.

⁽⁹⁴⁾ Article 29 of Directive 92/96/EEC and Article 5(3) of Directive 79/267/EEC.

The Commission takes the view that, leaving aside the cases expressly provided for by the Third Directives, maintaining such systems of prior or systematic control of insurance policies is not consistent with the relevant provisions of the Third Insurance Directives. It also considers that Member States may not justify such requirements on grounds of the general good since the conditions set by the Court of Justice have not been met, in as much as this is an area which is already the subject of harmonisation at Community level.

(b) *Capital redemption operations of insurance undertakings*

'Capital redemption operations based on actuarial calculations, whereby, in return for single or periodic payments agreed in advance, commitments of specified duration and amount are undertaken' figure among the activities covered by the insurance undertaking's single licence where such operations are the result of a contract and are subject to supervision by the insurance monitoring authority in the home Member State. Such activities, like any other activity falling within the scope of the Life Directives, may be carried on anywhere in the Community, including in a Member State in which they are not authorised for local life assurance undertakings on the grounds, for instance, that in the host Member State such operations are regarded as banking operations and are therefore reserved for credit institutions.

The Commission considers, therefore, that there is no reason to prohibit the marketing of capital redemption products which fulfil the conditions of the First Life Directive 79/267/EEC, as amended by Directive 92/96/EEC, and which are marketed in a Member State by an insurer authorised in its home Member State to pursue such activities. The fact that in the host Member State such activities are not regarded as insurance activities and are not therefore permitted for insurers which have their head office there does not prevent insurers from other Member States from pursuing those activities which, having been the subject of mutual recognition between the Member States, benefit from the single licence system introduced by the Third Life Directive 92/96/EEC⁽⁹⁵⁾.

In this connection, capital redemption products proposed in the host Member State by a life assurance undertaking will, as in any other life assurance activity, have to comply with the provisions in force in that Member State which are justified by reasons of the general good and relate in particular to the tax arrangements applicable to this type of product or the conditions governing advertising.

(c) *Uniform no-claims bonus systems*

In some Member States detailed national legislative instruments establish the criteria to be taken into account

⁽⁹⁵⁾ The same conclusion applies *mutatis mutandis* to the other operations referred to in Article 1(2) of the First Life Directive 79/267/EEC and contained in points V (tontines) and VII (management of group pension funds) of the Annex to the First Directive.

when calculating the premiums for third-party motor insurance. The instruments prescribe, *inter alia*, coefficients for the reduction/increase of premiums (no-claims bonus system). The method laid down consists in determining a compulsory scale for calculating the annual premium. The scale applies at the time the third-party motor insurance policy is concluded and/or when subsequent movements up or down the scale occur, depending on the frequency with which the insured submits a claim. As a result, the increase or reduction of the premium is not liberalised; on the contrary, it must comply with specific criteria laid down in the Member State's legislation. From the technical insurance perspective, such systems are tariff measures.

The main argument advanced in favour of such mandatory systems is that they contribute to preventing road accidents. Drivers who face an increased premium in the event of an accident will drive more carefully. It should also be pointed out that such mandatory systems foster transparency in that they allow those seeking insurance to compare and choose between different insurance products, thereby facilitating the mobility of such persons.

It should, however, be pointed out that the Third Non-life Directive 92/49/EEC introduced not only freedom as regards scales of premiums and the abolition of prior or systematic approval of scales and policies; it also introduced the concept of home-country control in the field of financial supervision of insurance undertakings⁽⁹⁶⁾. The maintenance of a mandatory tariff measure is, therefore, contrary to the letter and spirit of the Third Directives. Under the circumstances, it is expedient to ask whether other less restrictive means could not achieve the same result while complying with the principle of tariff freedom for insurance undertakings laid down in the Third Non-life Directive. The same applies to market transparency. The Commission also takes the view that this objective can be met without the principle of tariff freedom being jeopardised, by providing for systems that do not include any tariff elements. For instance, no-claims bonus scales which dispense with coefficients for the reduction/increase of premiums and for which insurers are free to determine premium levels make it possible to guarantee market transparency and the mobility of those seeking insurance.

Nevertheless, if a Member State were to take the view that such mandatory systems were to be regarded as contractual clauses governing an insurance policy, it would in any event have to ask whether, with a view to achieving the possible objectives pursued by such a clause, there were not other less restrictive and less binding means of achieving the desired result.

⁽⁹⁶⁾ Articles 6(3), 29 and 39 of Directive 92/49/EEC and Articles 5(3), 29 and 39 of Directive 92/96/EEC.

The Commission considers that, in so far as mandatory no-claims bonus systems were tariff provisions, they would be contrary to the Third Directive. In the circumstances, it takes the view that the Member States cannot therefore invoke the general good in order to preserve the mandatory character of these systems since they concern rules which have already been coordinated at Community level.

If a mechanism for reducing/increasing premiums is not a State measure but an agreement between professionals, its conformity with Community law would have to be assessed in particular in the light of Article 81 of the EC Treaty. In this connection, the Commission would point out that Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) (now Article 81(3)) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector⁽⁹⁷⁾ authorises agreements which have as their object the establishment and distribution of standard policy conditions for direct insurance only if certain requirements are met (Title III of the Regulation). The exemption thus applies, *inter alia*, only if the standard conditions are established and distributed with an explicit statement that they are purely illustrative and if they mention the possibility that different conditions may be agreed. It does not apply to undertakings or associations of undertakings which concert or agree among themselves, or oblige other undertakings, not to apply different conditions. Moreover, the Title of the Regulation relating to cooperation in calculating the premium (Title II) may not constitute a legal basis for a mechanism for reducing/increasing premiums.

(d) *Language of the insurance policy*

Some Member States require insurance policies taken out or performed on their territory to be drafted exclusively in their official language(s). Other languages, Community or otherwise, may be used only for simple translations, even if the contracting parties would have liked to use such languages for the original policy.

This absolute and unconditional requirement is justified by the linguistic sovereignty of the Member States, by a desire to protect consumers and by the need for any proceedings brought before local courts to be properly conducted.

⁽⁹⁷⁾ OJ L 398, 31.12.1992, p. 7.

It should be pointed out that the Commission is not calling into question the linguistic sovereignty of each Member State⁽⁹⁸⁾.

The Commission considers in this respect that a distinction should be drawn between large industrial and commercial risks and mass risks. In the former case, consumer protection is not a valid concern. As regards mass risks and individual life assurance, provisions governing the language of an insurance policy should also take account of certain circumstances. Thus, the first thing to take into consideration is policies with an international dimension, i.e. those where the law applicable to the insurance policy is not the law of the Member State where the risk/commitment is situated. For instance, exemptions from the principle that a policy must be drawn up in the official language(s) of the Member State where the risk/commitment is situated should be provided for in those cases where the insured person is of foreign origin. In all, five million citizens of the European Union live in a Member State which is not their own. Such persons would probably be better protected if they could take out policies in their own language instead of that of the Member State of residence or location of the risk they seek to cover.

(e) *Professional codes of conduct*

Professional codes of conduct valid on the territory of a Member State of the European Union are, in principle, also valid with regard to foreign insurers; failure to observe them often incurs a penalty, especially of a commercial nature. Compliance with codes of conduct is justified by the signatory parties on grounds of consumer protection or contribution to market discipline.

In any event, where such codes of conduct result from agreements between undertakings or from decisions by associations of undertakings, they must comply with the competition rules laid down in Article 81 et seq. In this respect, the Commission clearly could not authorise under the competition rules agreements or decisions by associations of undertakings that would have the same effects as state measures contravening the basic freedoms spelt out in Articles 39, 43 and 49 of the Treaty.

(f) *Maximum technical interest rates for life assurance*

The Third Life Directive 92/96/EEC coordinated the actuarial principles governing the calculation of mathematical provisions.

⁽⁹⁸⁾ See point 2 of the Commission communication to the Council and the European Parliament concerning language use in the information of consumers in the Community (COM(93) 456 final, 10.11.1993).

As regards the definition of technical interest rates, it provides⁽⁹⁹⁾, firstly, that the home Member State may set a maximum technical interest rate which the insurance undertakings it supervises must apply in order to calculate the bases for their technical provisions and, secondly, that the home Member State may require insurance undertakings with their head office on its territory to notify systematically the technical bases used to calculate scales of premiums and technical provisions.

The Commission would point out that, in view of the provisions of the Third Directive and the rules on supervision, which give exclusive competence for financial supervision to the insurance undertaking's home Member State, the branches of insurance undertakings and the insurers operating under the freedom to provide services are not bound by the provisions of the host Member State on maximum technical interest rates. Since the host Member State has no competence as regards financial supervision of an insurance undertaking duly authorised in its home Member State, it follows that it cannot impose compliance with its own prudential principles or check such compliance through substantive control of premium scales.

(g) Imposition of standard clauses or minimum insurance conditions

Member States which have rules laying down compulsory clauses for insurance policies give as justification the concern to protect the weaker party in the contractual relationship and to preserve the balance in the latter by imposing a given content for the rights and obligations of the parties and by a desire to protect third-party victims in the event of an accident.

As mentioned above, standard clauses may also result not from State measures but from agreements between professionals. The Commission would refer here to the observations in point (iii) above concerning application of exemption Regulation (EEC) No 3932/92⁽¹⁰⁰⁾.

The Commission believes that, in any event, protection of the weaker party should be imposed only in those cases where it is objectively necessary, e.g. in insurance policies where the policyholder, by virtue of his nature or size, has a particular need of protection, in order to preserve the contractual balance. It will also be necessary to consider the

proportionality of such measures and to analyse whether the inclusion in insurance policies of standard clauses laid down by the rules of a host Member State is a more difficult condition in practice for insurance undertakings from other Member States to fulfil than for insurance undertakings from the host Member State. This would be the case in particular if those insurance undertakings were deterred from prospecting a new market because they would be forced to create an entirely new insurance product in order to sell it on the market concerned instead of using an insurance product already used in their home Member State.

Similarly, the obligation to comply with standard clauses or minimum insurance conditions should not mean either that insurance policies cannot be worded differently.

(h) Clauses imposing mandatory levels of excess in insurance policies

One argument advanced in favour of retaining compulsory excesses is that they are supposed to protect the interest of the consumer, enabling him to take out insurance at a reasonable price. It is also argued that, without this mechanism, which obliges the insured to bear part of the cost of the claim, premiums would increase in a completely unreasonable manner because the insurer would have to act in the case of claims with a low economic cost. Yet another argument put forward is that the compulsory excess makes it possible to combat insurance fraud, which would otherwise be very frequent in the case of small claims. In such cases, the mandatory rule is designed to safeguard the profits of the insurer faced with a multitude of small claims.

These arguments show that the introduction of a compulsory excess meets a need to discipline the market so as to avoid undue competition over premiums charged by insurance undertakings. It may also be asked whether the aim of a compulsory excess is not to preserve the profits of the insurer faced with a multitude of small claims rather than to safeguard the interests of the policyholder or uphold public morality. It should be pointed out, however, that Community law excludes from reasons of the general good any consideration based on strictly economic grounds.

In addition, as with the imposition of standard clauses or minimum conditions in insurance policies, the rigid application of such rules by the host Member State may have a restrictive effect on insurance undertakings operating under the rules on establishment or under the freedom to provide services since they would be prevented from marketing insurance policies already correctly used in their home Member State without such excesses.

⁽⁹⁹⁾ See Article 17(1)(B) of the First Directive 79/267/EEC, as amended by Article 18 of the Third Directive 92/96/EEC.

⁽¹⁰⁰⁾ OJ L 398, 31.12.1992, p. 7.

Lastly, while it could be admitted that the introduction of excesses reflects the choice of management method by the insurance undertaking, it still has to be examined whether the imposition of compulsory excesses through binding rules is consistent with the objectives of the Third Insurance Directives as regards policies and scales of premiums.

If the introduction of an excess or a level of excess was covered by an agreement between professionals, it could not benefit from an exemption under Regulation (EEC) No 3932/92 ⁽¹⁰¹⁾, which explicitly excludes any exemption for standard insurance conditions containing clauses that specify amounts of guarantee or excess.

Insurance undertakings should therefore be free to assess the advisability of including an excess in the policies which they market. Where an insurance undertaking satisfies the solvency requirements laid down by its home Member State, which has given its approval and is responsible for its financial supervision, it should be free to decide to market insurance policies, with or without excesses, in the host Member State, clearly indicating to customers that it is doing so, without being forced into this by binding national rules.

(i) ***Compulsory stipulation of a surrender value in life assurance policies***

The main argument for justifying the compatibility of this requirement with the concept of the general good is that the obligation to fix a surrender value in a life assurance policy meets the interests of consumers, who would thus have the flexibility and liberty necessary in such policies, which are more often than not long-term policies, and would be able to mobilise their savings. As for the rules making it compulsory to provide in life assurance policies for the insured to receive a bonus, these are also justified by a desire to protect the economic interests of the insured.

A distinction should be made here between two main categories of life assurance. First, there are life assurance policies that contain a savings element (e.g. endowment assurance, assurance on survival to a stipulated age and annuity assurance). This element is taken into consideration in calculating the amount of the mathematical provisions which the insurer must establish. The person insured under such policies has the right to surrender the mathematical provision established. Second, there are life assurance policies that do not comprise any savings element since they are designed to cover only the risk associated with

human life (e.g. assurance on death and insurance on the amount outstanding). Such insurance policies do not take account of the savings element in calculating the mathematical provision. In such cases, the insured person does not have the right to surrender the mathematical provision established. Each of these categories of life assurance corresponds to the differing objective needs of insured persons as to cover. In addition, the cost of each category reflects the different types of risk assumed by the insurer in the insurance policy.

The requirement to provide for a surrender value in any life assurance policy designed solely to cover the risk of death would necessitate inclusion in the policy of a savings element and payment of a higher insurance premium for acceptance of the risk. It could be asked whether this meets the needs of insured persons, many of whom are interested only in products covering the risk of death alone.

Although the situation in each Member State must be assessed separately, it should be pointed out that the Third Life Directive 92/96/EEC lays down, as part of the actuarial principles which the home Member State imposes on insurance undertakings for the establishment of their mathematical provisions, specific rules for policies with a guaranteed surrender value and rules for policies with bonuses. Annex II to the Third Life Directive specifies among the information to be provided in a clear and accurate manner and in writing to policyholders before the contract is concluded or during the term of the contract 'the indication of surrender and paid-up values and the extent to which they are guaranteed, and the means of calculation and distribution of bonuses'. This information is designed to allow policyholders to become aware of, and to understand, the essential characteristics of insurance products in order that they can select the product best suited to their specific needs.

There are grounds for wondering, therefore, whether a national rule of the host Member State which imposes in a general and absolute manner the obligation to provide for a surrender value or a bonus in life assurance policies marketed on its territory is objectively necessary and proportionate to the objective of protecting the economic interests of policyholders or, on the contrary, whether this objective cannot be achieved by other less restrictive means, e.g. the obligation to give detailed information to the policyholder prior to the conclusion of a policy.

(j) ***Prohibition of cold calling***

The Court has already recognised the right to prohibit this marketing practice in the case of other financial products after examining a provision of Dutch law which was designed to protect the good reputation and reliability of the financial market in the Netherlands ⁽¹⁰²⁾. Consumer protection is also an argument that is often put forward

⁽¹⁰¹⁾ OJ L 398, 31.12.1992, p. 7.

⁽¹⁰²⁾ Case C-384/93 Alpine Investment (see footnote 13).

in support of banning this marketing method. The reasoning followed by the Court in the Dutch case can also be applied to insurance products. Nevertheless, pending harmonisation in this area, one should avoid trying to establish a general rule for the compatibility of this marketing method as far as insurance products are concerned, and each case should be assessed individually⁽¹⁰³⁾.

(k) Arrangements introduced by the host Member State for charging indirect taxes on insurance premiums for policies concluded under the freedom to provide services: appointment of a tax representative of the insurer

Under the Insurance Directives, policies concluded under the freedom to provide services are subject to indirect taxes and parafiscal charges on insurance premiums in the host Member State⁽¹⁰⁴⁾. To this end, the host Member State applies to undertakings doing business under the freedom to provide services within its territory the national provisions for ensuring the charging of such taxes and charges. In this connection, it may require, for example, submission of an exhaustive list of policies concluded under the freedom to provide services or the appointment of a tax representative of the insurance undertaking domiciled within its territory⁽¹⁰⁵⁾.

The requirement to appoint a tax representative of the insurer doing business under the freedom to provide services pursues an objective that is justified in the light of Community law, namely to guarantee the home Member State that its own legislation will be complied with and that the above taxes and charges will be charged. This measure might, however, impede the way in which freedom to provide services is exercised. An insurer wishing to avail himself of the right to provide services faces substantial administrative and financial costs in connection with the appointment of a tax representative established in the host Member State. Nevertheless, the practical arrangements whereby the host Member State implements this measure must comply with the criteria laid down by the Court, and in particular the requirements of necessity and proportionality.

Secondly, in the light of the foregoing considerations, the Commission takes the view that, where the host Member State does not charge any indirect taxes or parafiscal charges on insurance policies⁽¹⁰⁶⁾, it may not legitimately require insurers wishing to operate under the freedom to

provide services in areas of insurance not subject to indirect taxation to appoint a tax representative.

Thirdly, the requirement to appoint a tax representative is not one of the particulars that must be notified under the procedure laid down by the Insurance Directives in order to exercise freedom to provide services⁽¹⁰⁷⁾. Accordingly, the Commission takes the view that the host Member State may not reject any notification made by the home Member State under the procedure for freedom to provide services on the grounds that no tax representative has been appointed in the host Member State and, in so doing, prevent access to freedom to provide services and the commencement of that activity. The tax representative should be appointed only once the activities carried on under the freedom to provide services have effectively begun, i.e. at the time the insurer writes his first insurance policy under the freedom to provide services and charging the insurance premium corresponding to that activity⁽¹⁰⁸⁾.

The Commission takes the view that, where the host Member State, with a view to ensuring compliance with its rules governing indirect taxation in respect of insurance policies and the charging of such taxes, requires any insurer wishing to do business under the freedom to provide services to appoint a tax representative established on its territory, the practical arrangements for applying this measure must comply with the requirements laid down in the case law of the Court of Justice, and in particular the requirements of proportionality and necessity, in order that such measures do not constitute a restriction that is incompatible with the conduct of insurance business under the freedom to provide services within its territory.

4. Rules relating to the law applicable to insurance contracts and the concept of the general good

The Insurance Directives⁽¹⁰⁹⁾ lay down specific rules for determining the law applicable to insurance contract covering risks situated within the European Economic

⁽¹⁰³⁾ See amended proposal for a Directive concerning the distance marketing of consumer financial services (COM(1999) 375 final, 23.7.1999). Article 10(2) of the amended proposal provides for special arrangements concerning communications not solicited by consumers.

⁽¹⁰⁴⁾ Article 46 of the Third Non-life Directive 92/49/EEC and Article 44 of the Third Life Directive 92/96/EEC.

⁽¹⁰⁵⁾ Statements entered in the record of the Council meeting at which the Third Directives were approved.

⁽¹⁰⁶⁾ This reasoning is also valid where insurance policies are zero-rated.

⁽¹⁰⁷⁾ See Articles 14, 16 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/49/EEC, as regards non-life assurance and Articles 11, 14 and 17 of Directive 88/357/EEC, as amended by Articles 34, 35 and 36 of Directive 92/96/EEC, as regards life assurance.

⁽¹⁰⁸⁾ Frequently, a considerable amount of time, sometimes running into years, elapses between notification of the intention to do business under the freedom to provide services and the conclusion of the first insurance policy under that freedom. The requirement to appoint a tax representative before business has effectively begun appears disproportionate in that it obliges an insurer wishing to do business under the freedom to provide services to set up such a structure and thereby to incur such large costs that it might be deterred from availing itself of that freedom.

⁽¹⁰⁹⁾ As regards non-life assurance, see Articles 7 and 8 of the Second Directive 88/357/EEC, as amended by the Third Directive 92/49/EEC; as regards life assurance, see Article 4 of the Second Directive 90/619/EEC.

Area ⁽¹¹⁰⁾. They make it possible to define what substantive law will govern the contract. The rules apply both to insurance activities carried on under the rules on establishment and to those carried on under the freedom to provide services. The Directives also lay down provisions relating to application of the mandatory rules of the forum and of the Member State of the risk/commitment and to the public policy rules ⁽¹¹¹⁾.

The application, under the rules on the conflict of laws laid down by the Insurance Directives, by a Member State of its own mandatory substantive provisions and its public policy rules to insurance policies is likely, if it results in a restriction, to be examined from the viewpoint of the general good. The concept of the general good acts as a filter of national legislation. It obliges the authorities of the Member States to analyse their legislation for compliance with the Treaty's principles of free movement.

It is essential that any rule of national law, whatever the field it relates to, should be compatible with Community law. Thus, in a judgment dated 21 March 1972, the Court held that: 'The effectiveness of Community law cannot vary according to the various spheres of national law which it may affect.' ⁽¹¹²⁾

Community law takes precedence therefore, if necessary, over national rules in the sphere of private law.

In particular, it has fallen to the Court to verify the compatibility with Community law of national rules of civil law ⁽¹¹³⁾, civil procedure ⁽¹¹⁴⁾ and even of criminal law ⁽¹¹⁵⁾.

⁽¹¹⁰⁾ It should be pointed out that the Rome Convention on the law applicable to contractual obligations (OJ L 266, 9.10.1980, p. 1) excludes from its scope insurance contracts covering risks situated in the territories of the Member States (Article 1(3)).

⁽¹¹¹⁾ Non-life insurance: Article 7(1)(h) of Second Directive 88/35/EEC; life assurance: Article 4(4) of Second Directive 90/619/EEC.

⁽¹¹²⁾ Case C-82/71 SAIL [1972] ECR 119. See also Case C-20/92 Hubbard [1993] ECR I-3777.

⁽¹¹³⁾ Case C-168/91 Konstantinidis [1993] ECR I-1191; Case C-399/89 Alsthom Atlantique [1991] ECR I-107; Case C-93/92 Motorrad-center [1993] ECR I-5009.

⁽¹¹⁴⁾ See in this respect Case C-398/92 Mund & Fester [1994] ECR I-467; Case C-43/95 Data Delecta [1996] ECR I-4661; Case C-177/94 Perfili [1996] ECR I-161. See also Hubbard (footnote 112).

⁽¹¹⁵⁾ Case C-348/96 [1999] ECR I-11.

Consequently, as has already been stated above, it is not sufficient that the host Member State's entire legislation on insurance contracts be immediately declared mandatory for the authorities to think that it must be observed in full ⁽¹¹⁶⁾. Such provisions must also satisfy the requirements of the general good if the host Member State is to be able to require compliance with them by insurers operating through a branch or by way of freedom to provide services.

Since these are rules which were adopted in order to protect the consumer, there is a strong possibility that such rules of substantive law will pass the general-good test. The Court has recognised that consumer protection is an objective of the general good which justifies restrictions of fundamental freedoms. It cannot be presumed, however, that the test will be passed. It was seen above that national laws adopted with the declared aim of protecting the consumer can be subjected to the control of the Court and, where appropriate, 'disqualified', e.g. if they are not necessary or are disproportionate.

This additional level of reasoning is therefore essential, in the context of a single market, in order to verify whether, in the absence of harmonisation, national measures are not, under the pretext of consumer protection, being maintained simply to restrict or prevent the entry of insurance services which are different or unknown on the national territory.

If a Member State could invoke non-conformity with its own legislation in the case of an insurance product marketed in another Member State in order to restrict the marketing thereof on its territory, it would be hindering competition between insurance undertakings.

5. What action is to be taken when faced with national rules regarded as being in the general good by the host Member State?

When faced with a national rule which, in his view, is an unjustified restriction of the freedom of establishment or the freedom to provide services, an economic agent (insurance undertaking, intermediary or policyholder) must normally resort to the courts or inform the Commission, e.g. by lodging a complaint.

In practice, if, for instance, an insurance undertaking believes that the rules of a Member State where it proposes to carry on business contains restrictions that cannot satisfy the tests of the general good (e.g. binding

⁽¹¹⁶⁾ See point IV(3).

provisions which are to be included in any policy and which are unknown, or different to those, in its home Member State), various possibilities are open to it:

To avoid any potential conflict, it may of course adapt its services in all respects to the rules of the host country;

If, all the same, it offers insurance products that do not comply exactly with the binding provisions of the host country, it may well be prosecuted by the national authorities or by one of its clients. The insurance undertaking will have to assert its Community-law arguments before a national court or authority in order to establish that the rule which the Member State intends to invoke against it

does not satisfy the conditions identified by the Court. It is the national court which will assess the validity of the parties' arguments, having possibly referred the matter to the Court of Justice for a preliminary ruling pursuant to Article 234 of the Treaty;

It may, at any moment, inform the Commission, which, if it thinks the restrictions are unjustified and hence contrary to Community law, could institute proceedings under Article 226 of the Treaty against the Member State concerned for failure to fulfil its obligations. In this context, it will be for the Commission to provide evidence of the alleged failure to fulfil obligations⁽¹¹⁷⁾. Where appropriate, it is the Court of Justice which will decide in the last instance whether the disputed national measure satisfies the tests of the general good or not.

⁽¹¹⁷⁾ Case C-157/91 Commission v Netherlands [1992] ECR I-5899.

List of organisations having received Community funding for environmental purposes

(2000/C 43/04)

In implementation of the provisions set out in the remarks on budget heading B4-3060/1999, the Commission hereby publishes in the *Official Journal of the European Communities* the amounts involved and a list of the organisations having received Community funding.

Results of the call for the submission of proposals under a Community Action Programme promoting non-governmental organisations primarily active in the field of environmental protection (OJ C 319, 6.11.1999, p. 14).

Organisation	Amounts granted in euro	Aim of work programme
1. Seas at Risk (Netherlands)	107 410	Coordination of activities and exchange of information on marine environmental issues
2. World Wide Fund European Policy Office (Belgium)	350 000	Conservation of nature and ecological processes
3. Coalition Clean Baltic (Sweden)	112 075	Promotes the protection of the environment and natural resources of the Baltic Sea area
4. Climate Network Europe (Belgium)	138 437	Capacity-building, through the NGO network, on the problems of and the solutions to climate change and the coordination of European NGO policy on climate change
5. European Forum on Nature Conservation and Pastoralism (United Kingdom)	109 690	Promoting regional farming systems which work in harmony with local environmental conditions
6. Taiga Rescue Network (Sweden)	55 229	Raising awareness on the importance of the boreal forest ecosystem