Establishment and Services: An Analysis of the Insurance Cases

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Introduction

On December 4, 1986 the European Court delivered its long-awaited judgments in the cases brought by the Commission against France, Denmark, Germany and Ireland\(^1\) for failure properly to implement the Co-insurance Directive and, in the case of Germany, for imposing undue restrictions on the right of foreign insurers to insure risks situated in Germany. The result was a disappointment to those who hoped that these cases would do for services what Cassis de Dijon did for goods and that the Court would, at a stroke, open up the internal market in insurance and other financial services. This has not happened and, at least at first sight, the effect of the judgments is not clear.

Some assistance in interpretation can be gained from two other cases, the first of which\(^2\) was decided on January 28, 1986, the second\(^3\) exactly one year later on January 27, 1987. The first concerned the granting of shareholders’ tax credits to the branches and agencies in France of insurance companies whose registered offices were in other Member States. The second was an action brought by the German Association of Property Insurers for the annulment of a Commission Decision refusing negative clearance and exemption to a recommendation of the Association for increases in the premiums charged by its members for industrial fire insurance.

When all six cases are read together in the light of the arguments presented and the legislative history of the relevant directives, it is easier to understand the basis of the Court’s reasoning. Although complete liberalisation of the insurance market now depends on the willingness of the Council to legislate, there are hints that the Court would be prepared to go further than it was prepared to go on this occasion, if the issue it is asked to decide is defined with more precision.

Of wider significance, however, is the way in which the Court has approached the distinction between establishment and services. A broad definition is given to “establishment”; “services” is then confined strictly in accordance with the Treaty to services provided by persons “established in a State of the Community other than that of the person for whom the services are intended.”\(^4\) At first sight, this is a step back from the recognition in Klopp\(^5\) that we live in a world of

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1 Cases 220/83, 252/83, 205/84 and 206/84, Commission v. France, Denmark, Germany and Ireland, [1987] 2 C.M.L.R. 69 et seq.
3 Case 45/85, Verband der Sachversicherer (Vd.S) v. Commission, not yet reported at (1987) 12 E.L. Rev. 265. The policy implications of the Commission’s decision in this case are discussed in Competition Policy in the 80s by Stephen Hornsby, ante, p. 79.
4 Article 59 EEC, first paragraph.
modern means of transport and telecommunications where the physical location of the provider of services is less and less important. The problem of adapting the Treaty categories to the market for services in the world of Big Bang has not been helped by some obscure and unnecessary *obiter dicta*.

In this article, the four main cases are, for brevity, referred to as “the French/German/Danish/Irish co-insurance cases,” albeit the case against Germany had a wider scope. The other cases are referred to as “the French tax credits case” and “the German fire insurance case” respectively.

**Background**

(1) The Treaty

In the Chapters of the Treaty dealing with establishment and services, insurance is mentioned only in Article 61(2): “The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital.” This provision was relied on by some governments in the co-insurance cases to argue that freedom to provide insurance services must await the realisation of freedom of movement of capital. The Court disposed of this argument by pointing out that the First Capital Directive already requires Member States to grant all foreign exchange authorisations required for capital movements in respect of transfers in performance of insurance contracts.

The Court gave equally short shrift to an argument advanced in the German fire insurance case that Article 85 cannot be applied to the insurance sector until the Council has made special provision for its application to that sector. Insurance is not a special case and the normal Treaty rules apply.

There are however two provisions of the Treaty which should be kept particularly in view in interpreting the Court’s judgments. First, the second sentence of Article 52 includes amongst the restrictions on the right of establishment which are to be abolished, “restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.” Secondly, the first paragraph of Article 59 provides for the abolition of restrictions on freedom to provide services “in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the service are intended.”

It follows from these provisions that a person established in State A who sets up an agency, branch or subsidiary in State B becomes “established” in State B as well as in State A. It follows also that, where that person provides services (in the ordinary sense) through his agency, branch or subsidiary to another person in State B, the relationship between them falls under the Chapter on Establishment and not under the Chapter on Services. “Multiple establishment” with multiplicity of jurisdictional control is therefore, to that extent, contemplated by the Treaty itself.

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8 Case 45/85, (Vd.S) point 7 et seq. of the judgment.
(2) The Insurance Directives

Three Directives are relevant here: the First Co-ordinating Directive on Direct Non-Life Insurance (73/239), the First Co-ordinating Directive on Direct Life Assurance (79/267) and the Co-insurance Directive (78/473). In addition, reference was made in argument to the proposal for a second directive on direct non-life insurance.

(i) The First Non-Life Insurance Directive, adopted on the basis of Article 57(2) (but not Article 66), is designed to facilitate the setting-up of branches and agencies in other Member States of insurance undertakings whose head offices are situated within the Community. The directive also deals with agencies or branches established within the Community of undertakings whose head offices are outside the Community. Under the directive, the right to undertake 18 classes of direct insurance business within the territory of a Member State is subject to official authorisation by the competent authorities of that Member State.

The directive specifically provides, with respect to undertakings whose head offices are situated within the Community, that: "Each Member State shall make the taking-up of the business of direct insurance in its territory subject to an official authorisation." This follows the statement in the preamble that "... it is necessary to extend supervision in each Member State to all classes of insurance to which this directive applies; ... such supervision is not possible unless the undertaking of such classes of insurance is subject to an official authorisation."

The directive also regulates supervision by the Member States of insurers’ compliance with the conditions governing the business of direct insurance, especially those relating to their financial position. The supervisory authority of the Member State in whose territory the undertaking's head office is situated must verify its state of solvency with respect to its entire business, and rules are laid down as to the establishment of an adequate solvency margin corresponding to the assets of the undertaking. Technical reserves must be sufficient and represented by equivalent and matching assets localised in each state where business is carried on. Co-ordination of the national rules as to technical reserves and other matters is reserved for later directives.

These co-ordinating measures do not prevent Member States from enfor-
ing provisions requiring for all insurance undertakings approval of the general and special policy conditions, tariffs and any other documents necessary for the normal exercise of supervision.\textsuperscript{24}

The directive provides for the allocation of responsibility between the Member States for supervision of accounts and documentation:

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

2. Member States shall require \emph{undertakings operating in their territory} to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision. \emph{The competent supervisory authorities shall furnish each other with the documents and information necessary for exercising supervision.}\textsuperscript{25}

Finally, the directive provides that the Commission and the competent authorities of the Member States are to collaborate closely “for the purpose of facilitating the supervision of direct insurance within the Community and of examining any difficulties which may arise in the application of this directive.”\textsuperscript{26}

Three points stand out from a study of the directive. First, the setting up of any branch or agency in another Member State is treated as “establishment” in the full sense. Second, authorisation by each Member State where an insurer has a branch or agency is mandatory because authorisation is considered necessary for effective supervision. Third, the allocation of responsibility for supervision as between Member States is based on the idea that the state where the undertaking has its head office should be responsible for supervising what might be called the “group” aspects of the activities of the undertaking, while each state is entitled (and bound) to supervise and control the activities of subsidiary or branch operations within its own territory.

(ii) The provisions of the First Life Assurance Directive\textsuperscript{27} are for the most part identical to those of the First Non-Life Insurance Directive.

(iii) \emph{The Co-insurance Directive}\textsuperscript{28} was a harmonising directive adopted on the basis of Articles 57(2) and 66 of the Treaty. The following statement was recorded in the Minutes of the Council when the directive was adopted\textsuperscript{29}:

\begin{quote}
The Council emphasizes that the adoption of this Directive and in particular Article 2(1) thereof is entirely without prejudice to the resolving of the dispute between the Member States and the Commission on the interpretation to be placed on the rulings of the Court of Justice on freedom to provide services (No. 33/74 Van Binsbergen).

The text is without prejudice to national provisions relating to the establishment of the leading insurer, which are to be appraised on the basis of the Treaty, by the Court of Justice as a last resort if necessary.
\end{quote}

\textsuperscript{24} Article 10(3).
\textsuperscript{25} Article 19, emphasis added.
\textsuperscript{26} Article 33.
\textsuperscript{27} Note 10 \textit{supra}.
\textsuperscript{28} Note 11 \textit{supra}.
\textsuperscript{29} Meeting of May 23, 1978.
According to the preamble, the main reasons for adoption of the directive were that:

- the effective pursuit of Community co-insurance business should be facilitated by a minimum of co-ordination in order to prevent distortion of competition and inequality of treatment, without affecting the freedom existing in several Member States; such co-ordination covers only those co-insurance operations which are economically the most important, i.e. those which by reason of their nature or their size are liable to be covered by international co-insurance;
- this directive constitutes a first step towards the co-ordination of all operations which may be carried out by virtue of the freedom to provide services; this co-ordination, in fact, is the object of the proposal for a second Council directive on non-life insurance;
- the leading insurer is better placed than the other co-insurers to assess claims and to fix the minimum amount of reserves for outstanding claims.

So the directive applies only to “risks . . . which by reason of their nature or size call for the participation of several insurers for their coverage,” and in particular to those Community co-insurance operations which satisfy the following conditions:

1. The risk . . . is covered by a single contract at an overall premium and for the same period by two or more insurance undertakings . . . each for its own part; one of these undertakings shall be the leading insurer;
2. The risk is situated within the Community;
3. For the purposes of covering this risk the leading insurer is authorised in accordance with the conditions laid down in the First Co-ordination Directive, i.e. he is treated as if he were the insurer covering the whole risk;
4. At least one of the co-insurers participates in the contract by means of a head office, agency or branch established in a Member State other than that of the leading insurer;
5. The leading insurer fully assumes the leader’s role in co-insurance practice and in particular determines the terms and conditions of insurance and rating.

Other co-insurance operations “remain subject to the national laws operative at the time when this directive comes into force.” The right of Community insurers to participate in Community co-insurance may not be made subject to any provisions other than those of the Co-insurance Directive.

The conditions and procedures for Community co-insurance are dealt with as follows:

**Article 4**

1. The amount of the technical reserves shall be determined by the differ-

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30 First four Recitals, emphasis added.
31 Article 1(2), emphasis added.
32 Article 2(1), emphasis added.
33 Article 2(2).
34 Undertakings which have their head office in a Member State, and which are subject to and satisfy the requirements of the First Non-Life Directive.
35 Article 3.
36 Emphasis added.
ent co-insurers according to the rules fixed by the Member State where they are established or, in the absence of such rules, according to customary practice in that State. However, the reserve for outstanding claims shall be at least equal to that determined by the leading insurer according to the rules or practice of the State where such insurer is established.

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

Article 5

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

Article 6

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

The Co-insurance Directive also provides for close co-operation between the Commission and the supervisory authorities in the Member States:

The Commission and the competent authorities of the Member States shall co-operate closely for the purpose of examining any difficulties which might arise in implementing this directive. In the course of this co-operation it shall examine in particular any practices which might indicate that the purpose of the provisions of this directive and in particular Article 1(2) and Article 2 are being misused either in that the leading insurer does not assume the leader's role in co-insurance practices or that the risks clearly do not require the participation of two or more insurers for their coverage.

It will be noted that the terms of the directive are deliberately ambiguous. In particular, although there are several references to the state where the leading insurer is established, there is no reference to the situs of the risk other than that it must be within the Community.

Further, although the text of the directive contains several references to the nature or size of the risks to be covered, it contains no definition of the criteria by which these are to be determined. Again, it appears that this was a deliberate omission. A declaration recorded in the Council minutes when the directive was adopted reads:

The Council calls upon the supervisory authorities of the Member States to join with the Commission in taking all possible steps to establish by

37 Article 8, emphasis added.
common agreement within twelve months of the date of notification of the Directive the broad lines of what is meant by "nature" and "size" of the risks justifying recourse to the technique of co-insurance.

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

A working party on co-insurance was set up by the Conference of Supervisory Authorities. The Court was told that, without exception, the members of the working party considered it necessary for the implementation of the directive to fix not only a qualitative criterion concerning the professional activities of the policy-holder but also quantitative "thresholds" which would vary according to the class of insurance concerned. The Court was also told that the figures for thresholds subsequently adopted in the national legislation of Germany, France, Denmark and Ireland were those proposed by a majority of the working party.

(iv) The proposed Second Non-Life Directive which, as noted above, is specifically referred to in the preamble of the Co-insurance Directive, deals with the freedom to provide services in respect of the classes of insurance covered by the First Non-Life Directive, particularly as regards the method of calculating technical reserves, the rules governing insurance contracts and supervision of the undertakings concerned.

The Court was told that, in discussion of the proposal, significant progress had already been achieved on certain points: definition of major risks, choice of the applicable law, compulsory insurance and procedures in respect of major risks and mass risks. But other questions, such as the provisions dealing with transfers of portfolios or calculation of technical reserves, were still under consideration; and the discussions had so far failed to produce a unanimously acceptable solution regarding the application of the rules on matching assets, the treatment of certain types of insurance and some aspects of taxation. Differences of opinion were said to persist as to the demarcation line, in the field of direct insurance, between freedom to provide services and establishment.

(3) National legislation

(a) Germany

Three aspects of German insurance legislation were relevant to the European Court's decisions.

First, the Insurance Supervision Law (Versicherungsaufsichtsgesetz or VAG) made it impossible for any foreign insurer to conduct business in Germany without maintaining a permanent presence in Germany through an independent working unit with separate accounts. The law provided that the insurer must be authorised in order, not only to carry on business through a subsidiary, agency or branch, but also to do so through salesmen, representatives, agents or other

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38 Report for the Hearing in case 220/83 (France), para. III.2. (c)(bb).
39 Note 12 supra.
intermediaries.\textsuperscript{41} In order to be authorised the insurer must set up an “establishment” in Germany and “keep available there all the commercial documents relating to that establishment” including separate accounts.\textsuperscript{42} Any person including (or proposing to conclude) an insurance contract in Germany on behalf of an undertaking which did not possess the requisite authorisation was guilty of a criminal offence.\textsuperscript{43} Apart from Community co-insurance, only “transport insurance”\textsuperscript{44} was not subject to this restriction.\textsuperscript{45}

Secondly, the legislation implementing the Co-insurance Directive\textsuperscript{46} provided that the Insurance Supervision Law should not apply to co-insurance of German risks by Community insurers so long as (a) the leading insurer was authorised to cover the risks insured (and therefore necessarily established in Germany), and (b) the risk insured was not less than an amount to be fixed by the Federal Minister for Finance. Thresholds were in fact fixed by a circular issued by the Federal Insurance Supervision Office.\textsuperscript{47}

Thirdly, both the Federal Insurance Supervision Office and the Federal Cartel Office\textsuperscript{48} were required to, and did, approve the recommendation of the Association of Property Insurers for an increase in industrial fire insurance premiums.

(b) France

The Co-insurance Directive was implemented in France by a Law of 1981 on insurance contracts and capitalisation operations\textsuperscript{49} and a Decree amending the Insurance Code (Code des Assurances).\textsuperscript{50} The Law provided that “French or foreign insurance undertakings which act as the leading insurer in regard to a Community co-insurance contract must be authorised” in accordance with the Insurance Code.\textsuperscript{51} The Code provided that “undertakings subject to State supervision . . . may not begin trading until they have received official authorisation”\textsuperscript{52} and that an “application for official authorisation submitted by a foreign undertaking . . . must . . . include . . . proof that the undertaking has, in the territory of the French Republic, for its operations in that territory, a branch where it elects domicile.”\textsuperscript{53} The Decree amending the Insurance Code provided for the fixing of guarantee thresholds for Community co-insurance as in Germany.

In addition, the Tax Code\textsuperscript{54} provided that “foreign insurers must have a French representative who has been approved by the taxation authorities and will be personally liable for taxes and penalties.”\textsuperscript{55} Corporation tax was payable

\textsuperscript{41} VAG §105(1).
\textsuperscript{42} VAG §106(2).
\textsuperscript{43} VAG §144(1).
\textsuperscript{44} Insurance of railway rolling stock, aircraft, ships, goods in transit and liability for

\textsuperscript{45} ships.
\textsuperscript{46} VAG §111(1).
\textsuperscript{47} VAG §111(2) as amended.
\textsuperscript{48} Bundesaufsichtsamts für das Versicherungswesen.
\textsuperscript{49} Bundeskartellamt.
\textsuperscript{52} Article 36.
\textsuperscript{53} Article L.321-1.
\textsuperscript{54} Article R.321-7(1).
\textsuperscript{55} Code Général des Impôts.
\textsuperscript{56} Article 1004.
by companies and other legal persons in respect of profits made in France but a shareholders’ tax credit, known as avoir fiscal, was available in respect of dividends from profits which had already suffered corporation tax. In particular, insurance and reinsurance companies could set off against corporation tax the entire tax credit to which they were entitled in respect of dividends received. This advantage was, however, available only to “persons who have their habitual residence or registered office in France,” unless provision was made for its extension to foreign nationals under a double taxation agreement.

(c) Denmark

The Danish legislation implementing the Co-insurance Directive provided that the leading insurer must be established in Denmark for the purpose of covering risks to be regarded as Danish. A risk was to be regarded as Danish if it was situated in Denmark, although there were special rules for goods in transit and means of transport. In order to be established the leading insurer had to be authorised by the Danish supervisory authorities and Danish branches of insurers established elsewhere in the Community were prohibited from taking part in co-insurance transactions in relation to risks situated in other Member States unless they had been authorised to do so. An insurer could not seek business in Denmark or act through an agent or broker there unless he complied with the establishment and authorisation requirements. But it was perfectly lawful for a person resident in Denmark to go directly to an insurer in another Member State.

As in Germany and France, the Danish legislation laid down thresholds for Community co-insurance transactions based on the report of the majority of the working party.

(d) Ireland

In Ireland the first non-life insurance directive was implemented by the European Communities (Non-Life Insurance) Regulations 1976. The effect of these Regulations was to require that an insurer be both established in Ireland and authorised by the Irish authorities in order to carry on non-life insurance business in Ireland. The Co-insurance Directive was implemented by further regulations which exempted all co-insurers with the exception of the leading insurer from all requirements of the 1976 Regulation. Thus the leading insurer remained subject to the requirements of establishment and authorisation. The Regulations also, as in Germany, France and Denmark, set thresholds for Com-

56 Articles 205; 209.
57 Article 158 bis.
58 Loi de Finances no. 77-1467 of December 30, 1977 J.O.R.F. p. 6316, Article 15.
59 Code Article 158 ter.
60 Article 242 quater.
61 Decree No. 459 of September 10, 1981.
62 Article 7.
63 Article 5.
64 Decrees Nos. 455, 457 and 459 of September 10, 1981.
66 Article 4(1).
67 The European Communities (Co-insurance) Regulations 1983.
68 Article 4(1).
munity co-insurance which, broadly speaking, followed the recommendations of the majority of the working party.

The French Tax credits case

The French tax credits case arose out of the shareholders' tax credit system described above. As noted, the benefit of the system was accorded only to "persons who have their habitual residence or registered office in France" unless there was a double taxation agreement with their country of residence. Such agreements had been concluded between France and four other Member States (Germany, Luxembourg, the Netherlands and the United Kingdom), but the benefit was extended only to companies whose registered office was in one of those Member States and which held shares in French companies among the assets of its principal establishment. No benefit was granted in respect of shares forming part of the assets of secondary establishments, branches or agencies of companies whose registered office was not in France.

The case appears to have arisen because of complaints by insurers although, as the Commission pointed out, the discriminatory effect of the French legislation applied equally to other sectors. However, the effects of the legislation were particularly noticeable in the insurance sector, where branches or agencies of foreign insurance companies were required by the first non-life directive to establish technical reserves consisting of assets localised in the country where business is carried on.

The French government sought to justify the difference in treatment on various grounds, all of which were rejected by the Court. The significance of the case for present purposes lies in the Court's approach to the question of "establishment" through the setting up of a branch or agency.

The Court began by pointing out that freedom of establishment includes the right of "Community" companies or firms, as defined in Article 58, to pursue their activities in other Member States through branches or agencies.

With regard to companies, . . . it is their registered office in [this] sense that serves as the connecting factor with the legal system of a particular state, like nationality in the case of natural persons. Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would deprive [Article 52] of all meaning.

The Court went on to say that:

Since the rules at issue place companies whose registered office is in France and branches and agencies situated in France of companies whose registered office is abroad on the same footing for the purposes of taxing their profits, those rules cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits. By treating the two forms of establishment in

69 Note 2, supra.
70 Point 7 of judgment, [1987] 1 C.M.L.R. at p. 418.
72 i.e. as defined in Article 58.
the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.

. . . Article 52 prohibits all discrimination, even if only of a limited nature.

. . . The second sentence of Article 52(1) expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions. . . . Article 52 prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.73

Thus, the Court emphasised, as an essential element in the concept of freedom of establishment, the principle of equal treatment of nationals and non-nationals. The obvious corollary is that the principle itself must be applied equally whether the undertaking stands to gain or to lose from equality of treatment. Moreover, the fact that the case was concerned with non-incorporated branches and agencies of foreign insurers, which claimed the benefit of the tax credits precisely because they were “established” in France, shows that the provision of services (in the ordinary sense) through an agency or branch in another Member State must not be regarded as a form of “services” (in the Treaty sense).

The co-insurance cases 74

The co-insurance cases against France, Denmark and Ireland, and the wider case against Germany were concerned with the provision of “services” in the Treaty sense. The effect of the legislation by which those states had implemented the Co-Insurance Directive was to exclude any foreign insurer who was not established in, or at least authorised by, those states from acting as leading insurer in respect of risks situated there. The effect of the thresholds was further to exclude such insurers from participation in all co-insurance business of lower value.

The Commission argued that any requirement of establishment in, or authorisation by, the host Member State for the purpose of providing “services” (in the Treaty sense) was fundamentally inconsistent with the scheme of the Treaty. An insurer established and authorised to conduct insurance business in one Member State must be free to insure any type or value of risk situated in another Member State without going to the expense of maintaining a branch or agency in that State or submitting to its detailed regulatory system. For their part, the defendant states relied on the inferences to be drawn from the terms and legislative history of the Co-insurance Directive read in the light of the First Non-Life Directive, the accompanying Declarations of the Council and the reference in the preamble to the proposed Second Directive.

The case against Germany raised wider questions because the effect of the

74 Note 1, supra.
German legislation as a whole was to impose a requirement of establishment and authorisation for all classes of insurance business except "transport" insurance and co-insurance (other than as the leading insurer) above the threshold. The highly restrictive nature of the German legislation had recently been illustrated by a case involving a German insurance broker, Schleichcr, who had been convicted of offering to persons resident in Germany insurance cover by British companies not authorised by the German Supervisory Authority. The Kammergericht in Berlin (from whose judgment no appeal lay) had found that the German rule was compatible with Community law and had refused to make a reference for a preliminary ruling. The Commission again argued that any restriction on the provision of insurance services by foreign insurers was unlawful and did not, until the very end of the case, concede any exception to this principle. The German government argued that its legislation was compatible with the Co-ordinating Directives and that restrictions on the freedom to provide insurance services were in any event justified on grounds of consumer protection.

At the very end of the oral hearing, the Commission conceded that "compulsory insurance" should be excluded from the case. The Commission appears to have been persuaded that, where a Member State makes insurance compulsory (for example, third party motor insurance or employers' liability insurance), it is reasonable to require that the insurer be authorised by, if not established in, that state. The German government, for its part, accepted that the scope of the action extended to direct life assurance as well as direct non-life insurance.

Thus, this group of cases was concerned, on the one hand, with the limited and specialised category of co-insurance transactions relating to "risks which by reason of their nature or size call for the participation of several insurers" and, on the other hand, with all forms of direct life and non-life insurance except compulsory insurance and "transport" insurance. In his opinion in the case against Germany, the Advocate General (Sir Gordon Slynn) emphasised the distinction between them and defined the issue in the case:

There are differences between co-insurance and direct insurance with one insurer even though the latter may re-insure part of the risks. A greater range of risks is likely to be covered; the individual citizen as well as the large company with a legal or indeed an expert insurance department, may want, indeed, as with motor cars, may be obliged, to take out insurance. Medical and accident insurance may involve different legal and social considerations from the insurance of a house and its contents, or of employees, or of property at risk from the escape of gas or other substances, or of such items as valuable jewellery, a luxury yacht or antiques.

There can be no doubt that pening harmonisation at Community level national law may prescribe specific rules in relation to insurance generally or as to specific branches of insurance . . . Many of the arguments advanced, carefully and in depth, by the Federal Republic seem to me to provide cogent argument for the maintenance of at any rate some national

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75 Opinion of the Advocate General in Case 205/84 (Germany), [1987] 2 C.M.L.R. at p. 86.
76 Ibid., pp. 88–89.
rules in the general interest and, in particular, for the protection of the insured and third parties who may be affected if the risk materialises.

That, however, is not the central issue in this case. The issue is whether in addition to these rules a requirement of establishment and authorisation across the board can be justified consistent with the Treaty.

In the end, the Advocate General concluded that such a requirement “across the board” could not be justified, and in the course of his Opinion in the German fire insurance case,77 (delivered shortly before the decision of the European Court in the co-insurance cases) Advocate General Darmon said78 that he agreed with the opinion of Sir Gordon Slynn.

On the question of the arrangement of insurance through brokers, agents or representatives, Advocate General Slynn said79:

...I find it impossible to accept the argument that whilst a citizen of the Federal Republic can contract directly with an insurer in Paris or Rome or London, it is consistent with Articles 59 and 60 of the Treaty that he cannot do so through the intermediary of the German broker. Nothing that has been said on behalf of the Federal Republic or the Member States intervening on its behalf seems to me to justify such a restriction. Since it may be convenient for a citizen who understands only German to go through a broker who has a continuing business link with an insurer in another Member State, it seems to me if anything to take away one of the grounds of protection which is relied on. It deprives the insurer of the assistance of the German broker: it may deprive the assured of more favourable terms than he could get in the Federal Republic. Whether the insurer who wishes to undertake insurance in Germany needs in the general interest to be established and receive a prior authorisation there—so that he cannot provide his services through salesmen, representatives or agents or other intermediaries—raises a wider issue.

I do not accept the argument that if an insurer from another Member State provides insurance regularly in Germany he must have such necessary accommodation and equipment there that in effect he becomes established and that no question as to the provision of services arises. I am not persuaded that insurance is so different that there cannot be both establishment and the provision of services as separate activities, or that even if the precise distinction between establishment and services has not yet been fully defined, there is no difference between the two. In other words, in my opinion, the appointment of an agent or representative in Germany does not per se necessarily constitute establishment. Nor can I see in principle why insurance services by an insurer from another Member State who visits Germany for that purpose on an occasional basis should not be permitted per se to do so.

In relation to co-insurance, Advocate General Slynn dealt in detail with the arguments in his Opinion in the French case and concluded that neither the requirement of establishment nor the requirement of authorisation for the lead-
ing insurer could be justified. He also held that the fixing of thresholds for co
insurance could not be justified. In his Opinion in the German case he said\textsuperscript{80}:

\ldots Whether the Member States are entitled independently, or whether a few of them in agreement are entitled, to fix the thresholds under the Directive is not immediately clear. I read Article 1(2) of the 1978 Directive, however, as leaving it to market forces to decide what risks by reason of their nature and size call for co-insurance. It is only if it is found that the provisions of the Directive are being misused, in that the Co-insurance Directive is being used for insurance which does not call for co-insurance or if difficulties in the application of the Directive arise, that Member States and the Commission are to consider those practices. It may be that, if such difficulties were shown to exist it would be reasonable for the Community to adopt amongst other measures, the fixing of thresholds. I do not consider however, that the Council’s Declaration empowered the Member States to set thresholds under the Directive. \ldots If thresholds are needed they must be fixed by the Community.

\textit{The Court’s judgment}

The Court took the German case as the leading case, and like the Advocate
General, addressed the general question whether a blanket requirement of
establishment or authorisation could be imposed for all forms of insurance busi
ness, including life assurance. However, the Court made a different distinction
between establishment and services.

The Court said that it was necessary “to determine the scope of [Articles 59
and 60] in relation to the provisions of the Treaty on the right of establishment”
and continued:

\begin{quote}
In that respect, it must be acknowledged that an insurance undertaking of
another Member State which maintains a permanent presence in the Mem
ber 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 would be the case with an
agency. In the light of the aforementioned definition contained in the first
paragraph of Article 60, such an insurance undertaking cannot therefore
avail itself of Articles 59 and 60 with regard to its activities in the Member
State in question.\textsuperscript{81}
\end{quote}

The structure of the second half of the first sentence is not clear in the English

text. But the French text shows that the sense is “\ldots even if that presence does
not take the form of a branch or agency, but is exercised through the medium
(a) of a mere office managed by the undertaking’s own staff or (b) of a person
who is independent but authorised to act on a permanent basis for the undertak
ing as an agency would do.”

This appears to mean that, if an insurance broker in another state is author-
\textsuperscript{80} \textit{Ibid.}, p. 93.
\textsuperscript{81} \textit{Case 205/84, Points 20–21 of judgment, ibid.}, pp. 99–100.
ised "to act on a permanent basis" for an insurer, then that insurer is "established" in that state and subject to all its rules of supervision and control. If that is the correct interpretation, then the Court differed fundamentally from the Advocate General (quoted above). The Court did not, apparently, consider the situation where a local office or independent agent is authorised only to act for the insurer in some classes of business, leaving other classes to be dealt with from head office, or the situation where a quotation is sought direct from head office bypassing the local office even if the business could have been undertaken by the local office.

The next paragraph of the judgment goes even further in extending the scope of "establishment":

Similarly, as the Court held in [Van Binsbergen] a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

The expression "subject to judicial control" is a translation of the single French word justiciable. A better translation might, perhaps, be: "Such a situation may be treated in law as falling within the provisions of the chapter relating to the right of establishment and not of that on the provision of services."

Finally, by way of preliminary points, the Court emphasised that it was concerned only with the insurance of risks situated in the Member State of the policyholder. It declined to consider the situation where the insurer is in one state, the prospective policyholder in another, and the risk in a third.

On that basis the Court defined the scope of the question before it as being limited to:

— contracts of insurance against risks in one Member State
— concluded by a policyholder established or resident in that state
— with an insurer who
  (a) is established in another Member State, and
  (b) does not
    (i) maintain any permanent presence in the Member State of the risk and the policyholder, or
    (ii) direct his business activities entirely or principally towards the territory of that state.

On that limited basis the Court began by restating the principle that restrictions on the right to provide "services" in another Member State can only be maintained if "there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services [objectively justified

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82 Point 22 ibid., p. 100.
83 Point 23 ibid., p. 100.
84 Point 24 ibid., p. 100.
mandatory requirements’), the public interest is not already protected by the rules of the state of establishment ['equivalence'] and the same result cannot be obtained by less restrictive means ['proportionality'].” Each component of the principle was then considered in turn.

**Objective justification**

The Court held that there are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide “services” in the field of insurance. The reasons specifically mentioned were, first, that insurance necessarily relates to a future, and usually uncertain, event and, second, that in certain fields insurance has become a mass phenomenon. The state is entitled to take steps to ensure that the insurer will be in a position to pay when the risk insured against occurs, and to take other steps for the protection of the population as a whole almost all of whom are, as policyholders or as injured third parties, covered by certain types of insurance. Implicitly, therefore, the Court confirmed that compulsory insurance calls for special treatment.

**Equivalent protection**

The Court next considered whether the consumer (the policyholder) is sufficiently protected by the rules for supervision laid down in the First Co-ordinating Directives on non-life and life insurance, which impose duties of supervision and control on the authorities of the state where an insurer is established. The Court concluded that this is not necessarily so because, in spite of these directives, the laws of the Member States may still differ, and do in fact differ, (a) as to the technical reserves which an authorised insurer must maintain, and (b) as to the conditions which may and may not be included in a policy of insurance.

**Proportionality**

That took the Court to the final question: whether a requirement of (i) authorisation and/or (ii) establishment is more restrictive than is necessary to protect the public interest. It considered the two requirements separately, beginning with authorisation.

**Authorisation**

The Court started from the position, accepted by the Commission, that the host state is entitled to exercise some degree of control over insurers providing “services” within its territory. Next, the Court observed that the First Co-ordinating Directives presuppose the existence of an authorisation system in each Member State but do not provide for an integrated system of co-operation between supervising authorities. On the other hand, the proposal for a second
directive on non-life direct insurance not only provides for such a system but also requires an insurer wishing to conduct business in another Member State to obtain an authorisation to do so from the supervising authority of that state. The Court said that no less restrictive but equally effective system of supervision and control had been suggested.

The Court therefore concluded that a requirement of authorisation by the supervising authorities of the host state could not, in itself, be held to be disproportionate and unlawful. However, this conclusion was subject to two important provisos.

The first proviso involves three elements:

1. “Authorisation must be granted on request to any undertaking established in another Member State which meets the conditions laid down in the legislation of the state in which the service is provided.” This appears to mean that, in applying its legislation, a Member State cannot refuse authorisation to an insurer who in fact meets the requirements of that legislation, even if its own Member State imposes less exacting conditions. Thus, suppose that Member State A requires an insurer writing a particular class of business to maintain minimum reserves of £x and Member State B requires minimum reserves of £2x. State B must grant authorisation to an insurer established in State A who in fact maintains minimum reserves of £2x, although State A does not require him to do so.

2. “Those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the state in which the undertaking is established.” This appears to presuppose a situation in which two Member States impose statutory requirements which are identical or, if not identical, are for practical purposes the same. If an insurer has satisfied the requirements of the state where he is established, he cannot be required to do the same all over again in the other state where he wishes to provide services. So, modifying the previous example, suppose that Member States A and B both require minimum reserves of £x. State B cannot require an insurer “established” in State A to maintain minimum reserves of £2x (£x for State A and £x for State B) in order to provide services in State B. On the other hand (and the Court makes this clear), State B can require him to maintain in State B sufficient reserves to cover such business as he actually writes in State B. The example presupposes, of course, that reserves are to be dominated in the national currencies of the Member States. Were they to be uniformly denominated in ECU, the artificiality of the problem would be apparent.

3. “The supervisory authority of the state in which the service is provided must take into account the supervision and verifications which have already been carried out in the member state of establishment.” So it appears that,

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89 Point 55 ibid., p. 108. Given the protection afforded to policy-holders by Title II, Section 3 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments, it is not clear why it should still be justifiable to insist on “localisation” of reserves. Nor is it clear that, in the event of the insurer’s insolvency, a policyholder would have a preferential claim against reserves which happened to be “localised” in his particular member state. These questions do not appear to have been argued or considered by the European Court.
where State A has already verified that the insurer is maintaining the required minimum reserve of £x, State B cannot insist on going through the whole process of verification again.

The second proviso is that authorisation cannot be required at all unless such a requirement is objectively justified for reasons of consumer protection. The Court refrained from specifying the circumstances in which this proviso might apply, but it referred with apparent approval to a submission of the United Kingdom that "the free movement of services is of importance principally for commercial insurance" to which considerations of consumer protection do not apply. The Court also referred to the proposed second directive which specifies in detail the classes of insurance to which a requirement of local authorisation would not apply. In the absence of such legislation, the Court felt unable to draw a clear line of demarcation between classes for which authorisation would be objectively justified and those for which it would not. This would depend on "the nature of the risk and of the party seeking insurance."

The effect of the second proviso appears to be that, unless and until there is Community legislation, Member States will have to make their own judgment as to whether they are objectively justified in imposing a requirement of authorisation. Correspondingly, insurers who consider that such a requirement is not objectively justified for the class of business they intend to write can challenge such a requirement before the national courts. The Commission could also be asked to institute proceedings and might be prepared to do so in order to clarify the issues left open by the Court on this occasion.

In the result, the Court went along with the Advocate General in holding that a blanket requirement of prior authorisation for all classes of insurance business could not be justified, but was rather more specific (though not entirely so) in laying down the criteria by reference to which the need for such authorisation can be justified.

Establishment

As regards establishment, the Court was faced with an argument that it would not be possible for the supervising authorities of a Member State properly and effectively to supervise the activities of an insurer carrying on business in its territory unless the insurer were established in the territory with a place of business at which the process of inspecting books, etc., could be carried out. In reply to this argument, the Court said that administrative considerations could not be allowed to override the freedoms guaranteed by the Treaty. Supervision can be carried out by obtaining certified copies of balance sheets, accounts, conditions of insurance, schemes of operation, etc., certified by the supervising authorities of the state where the insurer is established. If the insurer fails to comply with these and other supervisory requirements of a state where he seeks to do business, his certificate of authorisation can be withdrawn.

The Court therefore held that a requirement of establishment as such cannot be imposed, thus again agreeing with the Advocate General.

Having held that a blanket requirement of establishment cannot be justified for
the insurance sector in general, the Court had no hesitation in holding that such
a requirement cannot be justified in relation to the leading insurer in co-insurance.

As regards prior authorisation of the leading insurer, the Court pointed out
that the Co-insurance Directive applies only to “insurance against risks which by
reason of their nature or size call for the participation of several insurers for
their coverage,” and that it excludes life assurance, accident and sickness assurance
and third party motor insurance. Further, the Co-insurance Directive puts
in place a special system of co-operation between the supervisory authorities of
the Member States—an element missing from the First Co-ordinating Directives.
In these circumstances the Court held that a requirement of prior authorisation of the lead insurer could not be justified either.

As regards “thresholds” for Community co-insurance, the Court held that
thresholds are justified because they provide a criterion for distinguishing
between Community co-insurance and other insurance business. The Court’s
reasoning is, to say the least, telegraphic. There is no reference to the point
made by the Advocate General that the setting of thresholds is a matter for the
Community rather than unilateral action on the part of Member States. The
Court was, admittedly, placed in some difficulty because the Commission relied
upon the bald proposition that all thresholds were unlawful and suggested no
other basis for defining the scope of Community co-insurance. Nevertheless, it is
regrettable that the Court was prepared, in effect, to authorise the unilateral
limitation of a Community right on the basis of the majority opinion of a Council
working party.

The German fire insurance case

The German fire insurance case arose out of a Recommendation by the German Association of Property Insurers for specific percentage increases in fire premiums. The case is relevant here because the applicants argued, before both the Commission and the Court, that the recommendation could not “affect trade between Member States” because it was addressed only to insurers established in Germany; this was necessarily so because only an insurer established in Germany could, under the Insurance Supervision Law, offer to insure the risks in question.

In its Decision, the Commission held that, even if a branch office of a foreign insurer is “established” in Germany, “from the point of view of competition a branch office is merely an extended arm of the foreign insurer.”

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93 Note 3 supra. The text of the European Court’s judgment was not available in English at the time of writing.
94 Verband der Sachversicherer.
96 Para. 31 of decision; [1985] 3 C.M.L.R. at page 256.
the Court, the applicants argued97 that this could not be so since branch offices are autonomous economic units and therefore independent undertakings from the point of view of competition. It appears that this gave rise to a débat circonstancié about the juridical character of a "branch."98 The Court decided the point on other grounds:

Firstly, the fact that an insurance company which has its head office in another Member State but which proposes to do business in Germany is obliged to create an establishment in Germany does not mean that trade between Member States is excluded in relation to insurance services. Even if it is only the branch that is affected by the recommendation, the financial relationship between the branch and the parent company may still be affected; and that is so whatever may be, in law, the degree of independence of the branch.

In that connection, it has to be recognised that, at the time when the Commission took its decision, the German legislation was99 very restrictive as to the carrying on of insurance business in Germany by insurance companies whose head office was in another Member State. Nevertheless, such companies could take part in such business there by establishing a branch in Germany, or by participating in co-insurance contracts covering a risk situated in Germany. . . .

Secondly, the overall increase in premiums not justified by the individual circumstances of the undertakings concerned is such as to affect the position of foreign insurers who would be able to offer a more competitive service, albeit indirectly through their branches.1

The significance of this judgment lies in the fact that it is an indication, less than two months after the judgment in the co-insurance cases, of what the Court believed it had decided in those cases. The risks in question were industrial fire risks with consequential loss due to disruption of business. It is a reasonable inference that such risks were considered by the Court to fall into the category of "commercial insurance" for which prior authorisation would not be necessary.2 The use of the word "was" in the passage quoted is highly significant, showing that the Court regarded its previous judgment as having required a change in the German legislation.

Further, it will be remembered that both the Federal Insurance Supervision Office and the Federal Cartel Office had approved the recommendation in question. So, the judgment reaffirms the Court's position in Nouvelles Frontières3 that "the Treaty imposes a duty on member states not to adopt or maintain in force any measure which could deprive [Articles 85 and 86] of their effectiveness."4 Competition law must be taken into account in determining the true significance of the Court's judgments in the co-insurance cases. They do not stand on their own.

97 Judgment, point 46.
98 Judgment, point 47.
99 Emphasis added.
1 Judgment, points 48–50.
Discussion

Insurance

So far as insurance is concerned, two points seem clear. At one extreme, it is not permissible for a Member State to impose a requirement of establishment or prior authorisation upon an insurer from other Member States who wishes to act as the leading insurer in Community co-insurance contracts. At the other extreme, a requirement of prior authorisation, and possibly also of establishment, is permissible where an insurer seeks to offer cover for compulsory insurance.

Between these two extremes, a requirement of prior authorisation may be permissible where the nature of the risk or of the person seeking insurance are such that, for reasons of consumer protection, local control through a system of prior authorisation is objectively justified in the public interest. This will not apply to "commercial insurance" where the risks insured are of substantial value and the person seeking insurance can reasonably be expected to be capable of assessing for himself the reasonableness of the insurer's terms.

However, this will be so only where the insurer is not established in the Member State where he seeks to do business and the Court has given a wide meaning to the concept of "establishment." An insurer can be established in more than one Member State at the same time, and he will be deemed to be established in a Member State if—

(a) he has his head office or principal place of business there;
(b) he has a branch or subsidiary there;
(c) he has an office there staffed by his own employees;
(d) he conducts business there through an independent person who is authorised to act on his behalf on a permanent basis; or
(e) he directs his activities entirely or principally towards that state.5

If any of these situations exist, then an insurer will be subject to the same conditions as insurers of the host state.

As the French tax credits case shows, insurers cannot claim the benefits of establishment without submitting to the corresponding burdens. It is not clear to what extent, if at all, an insurer who is established through a branch or agency can claim exemption from restrictive rules of the host state on the ground that he is already subject to "equivalent" rules in his state of origin. A better basis on which to attack restrictive national legislation or administrative practices seems to be that they "deprive Articles 85 and 86 of their effectiveness."

An insurer wishing to do business in other Member States without being established there must, it is thought, first define the classes of business he intends to undertake. If he wishes to operate without prior authorisation, he must confine his activities to those classes where a requirement of prior authorisation would not be justified for reasons of consumer protection.

If an insurer is prepared to submit to prior authorisation, he must ensure that, de facto, he meets the requirements of the host state and is in a position to provide copies of all relevant documentation certified by his own supervising authorities. He will then, it appears, be in a position to require the host state to grant authorisation without further formalities.

5 The proper interpretation of point (e) is discussed below.
It is not clear what is the position if an insurer wishes to conduct some classes of business through a local office or representative, while conducting other classes from Head Office. It is suggested that he should seek authorisation for the first category and ask the supervising authority to confirm that authorisation is not required for the second.

If authorisation is sought and refused, the insurer should insist on receiving a statement of the reasons for refusal. He may then raise an action challenging the decision or try to persuade the Commission to take action. Short of further Community legislation, such actions, directed towards specific restrictions on specific classes of insurance business and clearly related to an objectively defined factual situation, seem to be the only way in which remaining uncertainties can be cleared up. The Court has not closed the door.

Establishment and services generally

Contrary to the impression given by comment in the press, the Court did not differ fundamentally from the Advocate General on the question of regulation of the insurance sector. They differed in the way in which they defined the issue. The Advocate General asked whether a requirement of authorisation was justified “across the board” and concluded that it was not, while conceding that different considerations might apply in relation to some classes of insurance. Starting, as it were, from the opposite end, the Court asked whether such a requirement could ever be justified and concluded that it could, while allowing an exception in the field of commercial insurance.

The most significant, and in some respects most worrying, point of difference between the Court and the Advocate General lies in their approach to the line of demarcation between establishment and services. The Advocate General suggested that “the precise distinction between establishment and services has not yet been fully defined” and did not attempt to provide a comprehensive definition. But he clearly envisaged that a “broker who has a continuing business link with an insurer in another Member State” could be the medium through which such an insurer could provide “services” (in the Treaty sense).6

The Court, on the other hand, went out of its way to offer, if not a definition, at least a catalogue of situations which would constitute “establishment.”7 The Court’s willingness to do so is surprising when compared with its determination to limit the scope of its decision in other respects.8

Before considering the implications of the Court’s judgment, it is worth remembering that, at the time when the Treaty was drafted, it was easy, conceptually, to distinguish between establishment and services. Except in frontier areas, the slowness of travel and communication made it difficult for a person to carry on economic activities in more than one state at a time. Even for companies and firms, the setting up of a branch or agency in another country was, relatively speaking, a major step to take: apart from the legal problems, there were administrative difficulties in controlling the activities of a branch or agency in another country. Indeed, precisely because of these difficulties it was probably reasonable to regard branches or agencies as autonomous economic units.

6 See passage quoted at Note 79 supra.
8 For example, at points 23 and 50 of judgment, ibid, at pp. 100 and 107.
Today a professional consultant can conduct a multinational practice from his own home and from hotel rooms round the world. But he may find it convenient, when he has a long job in another country, to take a short lease of office space and install a secretary there with a telephone, a word-processor and telecopier. In the case of a company, the best way of breaking into a new market, before deciding whether the market justifies a permanent establishment, may be to open a small office to which enquiries can be directed, or to strike up a relationship with a local intermediary who can prospect for, and develop, local opportunities. The speed of modern communications makes it possible for all decisions of any importance to be referred to head office rather than be taken locally. (This is common experience in British banking where the three-cornered relationship between client, bank manager and head office is now quite different from what it was in the 1950s.) A local office or a link with a local intermediary may be a useful channel for what is, in its essentials, a cross-frontier relationship.

But physical propinquity or access to the provider of services is becoming increasingly unimportant. Documents can be prepared and revised many times within a space of a few hours without the drafters ever meeting each other or the client. Televisual conference facilities are already possible and will become as much a part of business life as the telecopier. At least one Court, the Supreme Court of Canada, is already prepared to make use of them. If a meeting is necessary, it is possible, in spite of the time difference, to have breakfast in New York and dinner in Edinburgh or Geneva, so that a meeting can be arranged at the drop of a hat.

In such a world, regulation of professional and corporate activity calls for the development of new concepts and new methods. The idea that there can be effective control by a proliferation of national agencies based on a criterion of territorial location flies in the face of the facts.

It may be true that, within the Community system, it is only the Council that can adapt the Treaty categories to the new environment and set up a workable system of multijurisdictional regulation. But it is, nevertheless, regrettable that the European Court should have felt it necessary, in a series of opaque obiter dicta, to encourage the idea that the Member States are, in any meaningful sense, free to adopt detailed and sometimes incompatible systems of local control without obstructing the process of transnational competition. One can understand the Court’s concern to ensure that legislation designed for consumer protection is not evaded, and to assert the principle of equality of treatment. But it is well known that obstacles to unwelcome foreign competition can be erected by the opportune rediscovery or creation of local rules, or by the enforcement or introduction of bureaucratic practices and procedures, all of which are cheerfully ignored by the local operators in the relevant market.

Such devices can, no doubt, be challenged in the national courts and struck down by the European Court in Article 177 references. But the experience of Mr. Schleicher9 and the growing caseload of the Court do nothing to encourage the belief that this is an effective remedy. Indeed, the prospect of protracted litigation can, in itself, be a deterrent to the businessman or professional consultant who sees a gap in the market for services in another country and seeks to fill it. If

9 Note 75 above.
anything, the complexities of litigation are made worse by the possible availability of new defences under Articles 8A, 8C, 100A and 100B of the Single Act.

Nevertheless, on the face of the Court's judgment in the German co-insurance case, any provider of services (in the ordinary sense) will find himself subject to detailed local regulation as soon as he installs a secretary in a local office or authorises a local intermediary to act on his behalf "on a permanent basis" (in contra-distinction, presumably, to a "temporary" or "occasional" basis). This constitutes "establishment" and, apparently, excludes all reliance upon the doctrines of equivalent protection or proportionality. Only by dealing with the client at long range and avoiding any local presence (except on a purely temporary basis) can the provider of services be immune from complete submission to local restrictions. But if both he and his client are equipped with the most modern telecommunication systems and never meet, local restrictions can be avoided unless the provider of services directs his activities "entirely or principally" towards the territory where the client is established.

The European Court repeated its dictum in Van Binsbergen that a person may be deemed to be established in a state if his activities are "entirely or principally directed towards its territory." In the context of the Van Binsbergen case itself, the dictum is understandable. In the German co-insurance case the European Court restated it as if it were a rule of law of wider application.

In Van Binsbergen both the provider of services (Kortmann) and his client (Van Binsbergen) were Dutch nationals. Van Binsbergen had lost a case before the local social security court in Roermond (near the Belgian frontier) and had authorised Kortmann to represent him in appeal proceedings before the higher court in Utrecht. Kortmann's habitual residence was in Zeist (near Utrecht) but in the course of the proceedings he went to live in Neeroeteren (just over the Belgian frontier a short distance from Roermond). It is thought that he did so in order to benefit from more favourable tax treatment in Belgium. Dutch law provided, in relation to representation before the court in question, that "Only persons established in the Netherlands may act as legal representatives or advisers." No other qualification was necessary for a person to represent a party before that court. Accordingly, the only question in the case was whether a requirement of establishment could be insisted upon.

In its judgment the European Court distinguished between, on the one hand, a general requirement of establishment which, as it pointed out, would have the result of depriving Article 59 of all useful effect, and, on the other, "specific requirements where they have as their purpose the application of professional rules justified by the general good which are binding on any person established in the state where the service is provided, where the person providing the service would escape from the ambit of those rules by being established in another Member State." In that context (deliberate evasion of professional rules) the Court said that a Member State would be entitled to prevent a person taking

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10 Case 205/84, point 21, quoted at Note 81 supra.
11 Cp. Article 60, third paragraph.
12 Case 33/74, Van Binsbergen, 1974 E.C.R. 1229; 1975 1 C.M.L.R. 298, point 13 of judgment.
13 Case 205/84, point 22 and, more particularly, point 24, quoted at notes 82 and 84 above.
14 Points 11 and 12 of judgment.
advantage of the freedom to provide services if (but only if) his activities were "entirely or principally directed towards its territory."

The Court made the same point in a different context in *Knoors*¹⁵:

... it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting wrongly to evade the application of their national legislation ... 

In the proper context, the reason for the rule is clear: a person cannot plead the rule against reverse discrimination against his own state in order to avoid complying with that state's legitimate rules. It is a quite different matter to propound as a general rule of law that a state is entitled to deem someone to be established in its territory simply because his economic activities are entirely or principally directed towards that territory. Such a doctrine sounds uncomfortably like the "effects doctrine" in competition law and it is to be hoped that the Court did not intend to lead the Community towards further ventures into the field of extraterritoriality.

It is suggested that the repetition of the *Van Binsbergen dictum* in the German co-insurance case should be read in the context of the *Van Binsbergen* judgment and that, for practical purposes, it can be disregarded as being applicable only to a tiny category of cases.

**Conclusion**

On a close reading the result of the insurance cases is not surprising and is, in many respects, encouraging to those who look for an enlargement of the internal market in services. Restrictions on the freedom to provide "services" (in the Treaty sense) will be struck down if they are not objectively justifiable, or they duplicate equivalent measures of protection, or they are disproportionate. But the approach of the Court shows that, where a legitimate consumer interest is involved, suitable and sufficient evidence will have to be produced to demonstrate that that interest could be sufficiently protected in other and less burdensome ways. The quality of the evidence in support of a complaint of discrimination is likely to be crucial, and something like the "Brandeis Brief," dealing with the economic effects of national legislation, may have to be developed. Particular attention should be given to the effect on competition as well as the immediate effect on the freedom to provide services.

As soon as one enters the field of establishment, however, it must be recognised that equal access to the market in another Member State involves equal acceptance of the disadvantages experienced by those who are already established in that market. One cannot rely on the Chapter on Services to escape the limitations imposed by the Chapter on Establishment. But here, once again, a careful analysis of the way in which local rules are applied, with particular reference to their anticompetitive effect, may offer a more profitable approach to the problem of opening up the market.

Monnet is said to have remarked that “The whole Treaty is about competition.” The rules on competition are “common rules.” They are not a specialist chapter on their own but an essential complement to the effective protection of the four fundamental freedoms.\textsuperscript{17}

\textsuperscript{16} See the title of Part Three, Title I of the Treaty.
\textsuperscript{17} The writer would like to acknowledge the help of Nicholas Forwood and Liliana Archibald in preparing this article.