rison — these problems are not related to the single currency, but the euro will at least have the merit of highlighting them and of acting as a reminder of the need to resolve them.


The President
of the Economic and Social Committee
Tom JENKINS

Opinion of the Economic and Social Committee on the ‘Draft Commission interpretative communication — Freedom to provide services and the general good in the insurance sector’

(98/C 407/08)

On 24 March 1998 the Economic and Social Committee, acting under the third paragraph of Rule 23 of its Rules of Procedure, decided to draw up an opinion on the above-mentioned draft interpretative communication.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 8 July 1998. The rapporteur was Mr Ataide Ferreira.

At its 357th plenary session (meeting of 9 September 1998), the Economic and Social Committee adopted the following opinion by 108 votes to one with five abstentions.

1. Introduction

1.1. In its own-initiative opinion on consumers in the insurance market (1), the Committee drew attention to a number of difficulties of interpretation which are an obstacle to the effective completion of a single insurance market, highlighting the imprecise ‘distinction between freedom of establishment and freedom to provide services, and the concepts of “temporality”, “regularity”, “periodicity”, “continuity” and “frequency” which are involved in defining them’ and to the ‘concept of the “general good”, and (…) the widely varying interpretations [of it] as a result of which each Member State has been able to justify a range of derogations from the right to provide services’.

1.1.1. The present opinion on the Draft Commission interpretative communication — Freedom to provide services and the general good in the insurance sector (2) sets out to supplement the earlier opinion.

1.2. The ‘general good’ precept is largely a result of Court of Justice case-law, as recognized by the Commission in its draft communication.

1.2.1. Nevertheless, the origins of the concept of the ‘general good’, identified as the ‘public good’ or the ‘public interest’ which it is the task of each country’s administration to further, lie in the fundamental principles of the constitutional and administrative law common to western nations.

1.2.2. This concept has given rise to the legal precept underpinning the imposition of restrictions or limitations on the free exercise of private initiative and interests, but the limits of which, clearly defined by law, are conditions for the legitimate exercise of the public authorities’ power to impose restrictions (with binding effect).

1.2.3. In other words, constitutional and administrative legal theory has clearly established that the law must provide the general interest not only with a typical definition of its purpose and prerequisites but also with proportionate means of enforcement.

1.3. At Community level, the main principles of constitutional law defining the ‘general good’ as a basis for restricting the freedoms enshrined in the Treaty of

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(1) OJ C 95, 30.3.1998, point 2.3.1.2.1.
Rome are to be found in Treaty Articles 36, 48, 56, 73d, 77, 90(2), 128, 129, 129a and 130r.


The so-called third directives on insurance are of special relevance to the issue under discussion in the present document, particularly Articles 28, 32(4) and 41 of Directives 92/49/EC and 92/96/EC of 18 June and 10 November 1992 respectively, and Article 54 of Directive 92/49/EC(1).

1.3.1. Analysis of the above precepts reveals that in both basic Community law and secondary legislation, the 'general good' at national level is placed in opposition to the 'European interest' or 'Community interest', with the former principally justifying derogations from certain Treaty provisions, while the latter places limits on national intervention and serves as a basis for the assignment of certain powers to the European Union (cf. Treaty Articles 126, 128, 129b, 130, 130a and 130f).

The 'general good' has a dual aspect: economic interest (particularly in Treaty Articles 77, 90 and 92 and in the secondary legislation provisions mentioned) and non-economic interest, including exceptions to the fundamental freedoms (Treaty Articles 36, 48, 56 and 73d), consumer protection (Treaty Article 129a), environmental protection (Treaty Article 130r), health protection (Treaty Article 129), and the promotion and protection of culture (Treaty Article 128).

1.3.2. The Community legal framework thus contains basic elements for establishing the scope within which the Member States may safeguard the national 'common good' or 'general good'; these laws are however few and have not been put on a systematic footing. For this reason, the interpretative case-law of the Court of Justice is essential in order to understand them and determine their scope.

On the other hand, the recent trend in secondary law has been to place ever greater restrictions on the ability of Member States’ to act, particularly in key areas of the economy and, increasingly, towards a uniform Community definition of the general good and the means to protect it, which may run counter to a certain interpretation of the principle of subsidiarity(2).

1.4. Concerning the insurance sector in particular and, to a certain extent, in tandem with developments in the banking sector (3), the differing ways in which the 'general good' is interpreted and applied within the Member States can hamper the freedom to provide services, by creating unjustifiable obstacles to the completion of the single insurance market where general non-economic interests, such as public health, public policy, road safety or even consumer protection are not in question, but only the specific economic interests of national companies or companies established and operating within national territory.

(1) Article 28: The Member State (in which a risk is situated/of the commitment) shall not prevent policyholder from concluding a contract with an insurance undertaking authorized under the conditions of Article 6 of Directive (73/239/EEC/79/267/EEC), as long as that does not conflict with legal provisions protecting the general good in the Member State (in which the risk is situated/of the commitment).

Article 32(4): Before the branch of an insurance undertaking starts business, the competent authorities of the Member State of the branch shall, within two months of receiving the information referred to in paragraph 3, inform the competent authority of the home Member State, if appropriate, of the conditions under which, in the interest of the general good, that business must be carried on in the Member State of the branch.

Article 41: Nothing in this Directive shall prevent insurance undertakings with head offices in Member States from advertising 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.

Article 41(1): Notwithstanding any provision to the contrary, a Member State in which contracts covering the risks in class 2 of point A of the Annex to Directive 73/239/EEC may serve as a partial or complete alternative to health cover provided by the statutory social security system may require that those contracts comply with the specific legal provisions adopted by that Member State to protect the general good in that class of insurance, and that the general and special conditions of that insurance be communicated to the competent authorities of that Member State before use.


2. Outline summary of the Commission’s approach in the draft communication

2.1. The Commission seeks to make transparent and to clarify the Community rules which it is its task to enforce. It acknowledges that the draft may be transformed into an ‘interpretative communication, which will enable economic agents and the Member States to determine the stance that the Commission would be likely to adopt in the event of a particular problem being brought to its attention’.

2.2. To this end, the Commission firstly attempts to clarify the distinction between the legal standing of the right of establishment and the freedom to provide services, in the insurance sector.

2.2.1. Basing its comments primarily on basic Community law (1), the Commission indicates the temporary or lasting character of the presence of the service provider in a Member State other than that of origin as the principal criterion of demarcation.

2.2.2. The Court of Justice’s most recent case-law, however, holds that whether a service provided is of a temporary character must be decided not only on the basis of duration, but also of frequency, periodicity and continuity. The purpose is to avoid circumvention of applicable provisions in the case of establishment in a Member State of a service provider whose activity is entirely or mainly directed towards the territory of another Member State. According to the Commission, this would only be applicable in the event of the service provider’s movement on a lasting basis from the Member State of origin to the host Member State, and not when the service provider is approached, in its country of origin, by nationals of the other Member State where the risk is located.

2.2.3. Again on the basis of Court of Justice case-law, the Commission argues that permanent presence in the host country is covered by the right of establishment.

2.2.3.1. According to this case-law, permanent presence is constituted by a branch or agency, an office managed by the undertaking’s staff, or even a person authorized to act on a permanent basis for the undertaking.

2.2.3.2. This approach is furthermore explicitly enshrined in Article 1(b) of Directives 92/49/EEC and 92/96/EEC, and in Article 3 of Directives 88/357/EEC and 90/619/EEC.

2.2.3.3. However, the most recent interpretation of Court of Justice case-law tends rather to the view that the material fact of an insurance undertaking having an office in the host country is not decisive in determining application of the right of establishment: it must be verified whether the provision of services is temporary or otherwise in the light of the criteria of duration, regularity, periodicity and continuity.

2.2.4. A number of the situations set out by the Commission, however, fall into a grey area. The Commission makes the following points in relation to them:

a) Recourse to independent intermediaries — right of establishment is applicable only if cumulatively, such intermediaries are shown (i) to be subject to the direction and control of the insurance undertaking on behalf of which they are operating (exclusive brief) (ii) they can commit the insurance undertaking, being able to conclude business on its behalf, and (iii) they have a permanent brief, not on an occasional or one-off basis for specific cases.

b) Permanent presence of the insurance undertaking’s staff in the host country — right of establishment is applicable only if the staff effectively engage in insurance activities, regularly and continuously concluding contracts, settling claims and paying indemnities. Simple reconnoitring, marketing and advertising and not covered by the right of establishment.

2.2.5. One of the main effects of this demarcation is that the arrangements concerning the content of the notification procedure for the right of establishment and for the freedom to provide services differ; the provisions of Article 10 of Directives 73/239/EEC and 79/267/EEC, as set out in Article 32 of Directives 92/49/EEC and 92/96/EEC, are only obligatory in cases where the right of establishment is applicable; in cases where freedom to provide services is involved, the provisions of Articles 11 and 14 of these directives, as set out in Articles 34 and 35 of Directives 92/49/EEC and 92/96/EEC, apply.

2.2.5.1. For the specific case of advertising, the Commission even considers that the prior information obligation under Articles 34 et seq. of Directives 92/49/EEC and 92/96/EEC, does not apply. Compliance with the general-good provisions of Article 41 of the same directives is sufficient.

2.2.6. The Commission further considers that the notification and prior information procedures under both right of establishment and freedom to provide

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(1) Third paragraph of Treaty Article 60: ‘without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals’. Cf. the Commission’s interpretative communication on the freedom of movement across borders of services in OJ C 334, 9.12.1993, p. 3.
services directives are not a consumer protection measure, but simply a process for exchanging information between Member State supervisory authorities and therefore cannot be considered an essential condition for the validity of insurance policies concluded by undertakings which have not fulfilled this condition, although it does not suggest any sanction for such failure.

2.3. In the second part of the draft communication, the Commission describes the scope of the concept of the general good as it applies to insurance, covering without distinction the right of establishment and freedom to provide services, and attempting to define the general good concept as it emerges from Court of Justice case-law.

2.3.1. With particular consideration of the application made by the Third Directives of the concept of the general good, the Commission highlights those fields in which, not having been harmonized at Community level, explicit mention is made of the national general good:

- setting up a branch (fourth paragraph of Article 10 of Directives 73/239/EC and 79/267/EC, as set out in Article 32 of Directives 92/49/EC and 92/96/EC)
- subscription of insurance policies (Article 28 of Directives 92/49/EC and 92/96/EC) under both right of establishment and freedom to provide services
- advertising (Article 41 of Directive 92/49/EC and 92/96/EC)
- health insurance as an alternative to a statutory system of social security (first paragraph of Article 54 of Directive 92/49/EC) (1).

2.3.2. With regard to these fields, and still on the basis of Court of Justice case-law, the Commission makes an essential distinction between discriminatory and non-discriminatory restrictions.

2.3.2.1. In the former case, the restriction is only justifiable under the terms of Treaty Article 56, i.e. on the grounds of the non-economic general good (public policy, public security or public health), as demonstrated by consistent Court of Justice case-law (5).

2.3.2.2. In the latter case, i.e. if restrictions are non-discriminatory, they may be justified on the grounds of the economic general good.

2.3.2.2.1. On the basis of Court of Justice case-law, the Commission then provides a non-exhaustive list of fields which may be covered by the general good [point IV.2(a)].

2.3.2.2.2. However, it is not, in abstract terms, sufficient for a measure to come under one of these fields. It must meet certain conditions:

(i) it must be necessary
(ii) it must be proportional, and
(iii) it must not overlap with country of origin rules (6).

2.3.2.2.3. Nevertheless, on account of its nature, which restricts fundamental rights, the general good must always be interpreted strictly and applied exceptionally. The Commission thus considers, for example, that the inclusion of whole areas of national law in the list of general-good provisions constitutes an abuse and is excessive.

2.3.2.2.4. On the other hand, although the concept of general good covers both the right of establishment and the freedom to provide services, the way in which its proportionality is judged in practical application may vary in line with the type of service provided (under right of establishment or freedom to provide services).

(1) It is arguable whether the Commission should take this matter any further within the framework of an interpretative communication, but it does represent a shortcoming pointed out in the Protocol of Cooperation between the supervisory authorities for the application of insurance directives, reviewed at the 109th conference of supervisory authorities, held in October 1997 (DT/119/93, Rev.4).

(2) Cf. recitals 19 and 20 of Directives 92/49/EC and 92/96/EC respectively, as follows: “whereas it is for the Member State in which the risk is situated to ensure that there is nothing to prevent the marketing within its territory of all 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 insofar 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”.

(3) It is important to bear in mind that the third directives on insurance only introduced partial harmonization of the conditions governing access to and exercise of the activity, essential elements such as contract law and taxation remaining outside their scope.

(4) Precepts referred to in footnote 1, p. 39.

(5) Cf. e.g. Svensson and Gustavsson/Ministry of Housing and Urbanism, case C-1184/93 ECR I, 3977; cf. also the conclusions of the Advocate-General in case C-17/92, Fedicine/Spain, ECRI, 2258, point 18.

(6) Cf. Union royale belge des sociétés de football ASBL/J.-M. Bosman (case C-415/93), where it is specifically stated that: the measures must be objectively necessary; it must not be possible to obtain the result by means of less restrictive rules; the interest must not already be protected by the rules of the country of origin (ECR. I, 4999). The Germany/Commission judgement of 4 December 1986 (case 205/84, ECR p. 3803, point 37) takes a similar view.
2.3.2.3. The Commission then provides a list of (nine) examples of national regulations with which the host country may require compliance, on grounds of the general good, and which the Commission considers unjustified, in the light either in the light of the principles contained in the third directives, or specifically on account of consumer protection, the guarantee of transparency, the reservation of banking operations, linguistic sovereignty, or market discipline. This applies to:

i) the requirement of prior notification or information of general policy conditions and other contractual documents;

ii) prohibition of capital redemption insurance in countries where such operations are reserved for credit institutions;

iii) compulsory no-claims bonus systems for motor insurance;

iv) compulsory use, without exception, of the language of the host country as a condition of policy validity;

v) indiscriminate imposition of codes of conduct of professional bodies to which country of origin undertakings do not belong;

vi) imposition by the host country of maximum technical interest rates for life assurance on companies from other Member States, operating under either right of establishment or freedom to provide services;

vii) indiscriminate imposition of standard clauses or minimum conditions in certain types of insurance, without establishing need, proportionality or discriminatory effect;

viii) compulsory excess;

ix) complete and absolute obligation to provide a surrender value or a bonus in all life assurance policies.

2.3.2.4. On the other hand, the Commission acknowledges the right to prohibit cold-calling sale of insurance.

2.3.3. The Commission also considers that national rules allegedly designed to protect consumers cannot automatically be considered to be covered by the concept of the general good; in practice, they must be analyzed in the light of the criteria laid down by the Court of Justice and special checks must be made to ensure that their application does not constitute discriminatory treatment favouring undertakings of the host country.

2.3.4. Lastly, with regard to both the application of the national law of the host country to those insurance policies which may compulsorily be subject to it (particularly those involving mass risks, life assurance and compulsory non-life insurance) and cases where the rules of conflict point to 'mandatory' or 'public order' provisions, the Commission nevertheless holds that such laws must be examined in the light of the criteria defining the legitimacy of the general good concept, and always subject to the principle that Community law has priority over national rules of private law.

3. Definition of the general good by the Court of Justice

3.1. The Commission carries out an in-depth analysis of the stance of the EC Court of Justice on both the concept of the general good, and the demarcation between the freedom to provide services and the right of establishment.

There are however a number of points, in particular concerning the concept of the general good, which need to be looked at in greater detail and clarified, on account of the direct bearing they have on the insurance sector.

3.2. The third directives require insurance companies operating in another Member State, under the terms of a single licence to comply with the general-good provisions adopted by the host country, with no distinction made at the outset of how they operate (right of establishment or freedom to provide services).

3.2.1. The Court of Justice has, however, indicated that a Member State may not subject service providers to all the conditions required of an establishment, since this could compromise the effects of the freedom to provide services.

(1) The Commission, while accepting the principle, sets out a list of exceptions, which should be carefully examined [Point IV. 2(c)].

(2) The Commission makes an exception for codes drawn up by the national authorities; these should be examined in the light of Treaty Articles 52 and 59.


(4) Sager judgement, op. cit.
3.2.2. In this area, the Court’s basic assumption is that Treaty Article 59 requires not only the elimination of all forms of discrimination, but also the abolition of any restriction, even if applied without discrimination to national and outside service providers, when such a restriction might hinder free exercise of a business (1).

3.2.3. The Court has even explicitly stated the need to codify the single insurance market, and particularly direct non-life insurance, under both freedom to provide services and right of establishment, in order to facilitate the cover of risks situated within the Community by Community insurance undertakings (2).

3.3. The Court has however recognized that, in addition to the requirement for the assessment in abstract terms of the interest invoked with regard to the general good, in concrete terms, the imposition of restrictive rules on the grounds of the general good must comply with certain conditions if it is not to restrict the freedom to provide services within the Community, thereby jeopardizing the operation of the single insurance market (3). These conditions, listed cumulatively by the Court (4), are as follows:

a) the rules invoked by the Member State must be justified by imperative reasons of the general good;

b) they must not touch upon areas already harmonized by Community legislation;

c) they must comply with the principle of non-discrimination on the grounds of nationality;

d) they must be objectively necessary given the interest to be protected;

e) their imposition must accord with the principle of proportionality to the objective sought, they must not exceed what it is necessary to achieve the objective, and it must not be possible to achieve the objective through less restrictive rules;

f) the interest invoked must not already be protected by rules to which the service provider is subject in the country of origin.

3.4. The Court has repeatedly expressed its concern regarding the need for the Member States to fulfil the conditions for invoking the general good, particularly the non-discriminatory application of rules (5), thereby avoiding double protection of the objective sought. With regard to the grounds cited, which may be linked to economic interests, and particularly tax-related grounds (6), or other interests, the Member States must show that the restriction is an appropriate and necessary means of protecting the interest invoked.

3.5. Furthermore, the Court has examined the scope for applying the concept of the general good to the right of establishment (7) concerning the conditions for access to and exercise of an activity (8); at the same time, it has come to consider that no hidden practices resulting in discriminatory treatment (9) can ever be justified on the grounds of the general good.

3.6. Where the imposition of discriminatory rules is concerned, the case-law of the Court of Justice (10) holds that invocation of the general good is not sufficient. The Court considers that the imposition of rules involving discriminatory treatment of operators from other Member States can only be based on the grounds set out in Treaty Article 56 (11). The interpretation in case-law of the concept of public policy is clearly restrictive, considering it to be exceptional in nature.

3.7. The reasons adduced under Treaty Article 56 cannot be used for questions of an economic character, nor in particular may they be used for tax purposes, since their effect is to protect national economic operators (12). The Court’s opinion is conclusive as to the manifest impossibility for a Member State to impose such measures when they imply discriminatory treatment of an economic agent operating within its territory under a single licence on the basis either of the freedom to provide services or the right of establishment. This impossibility arises either from a restrictive interpretation of Treaty Article 56, or from the conditions imposed on invocation of the national general good, and is grounded on its incompatibility with the fundamental Treaty principles.

(4) Säger judgement, op. cit.
(7) Gebhard judgement, op. cit.
(8) Case 19/92, Kraus judgement of 31 March 1993, ECR I, p. 1663.
(9) Case C-1/93, Halliburton judgement of 12 April 1994, ECR I, p. 1137.
(10) Case C-17/92, Federación de distribuidores cinematográficos judgement of 4 May 1993, ECR I, p. 2239.
3.8. With regard to areas covered by the concept of the general good, the Court has argued, particularly concerning consumer rights, that defence of such rights may justify certain restrictions to the freedom to provide services (1), provided the Member State shows that national law is effectively pursuing this objective in an appropriate, necessary and proportional manner. However, in the Court’s view, these rules must continue to be monitored, to ensure they are not used as a means of hindering free competition on the single European market (2).

3.9. The aim of invoking the general good cannot be to erect obstacles to the free exercise of insurance activity. It is consequently not enough for the field invoked to be covered by the general good (3): certain principles governing the application of the rules invoked must also be complied with.

3.9.1. Certain national rules in the tax field, which have the effect of erecting obstacles to the freedom to provide services, give rise to distortion of competition potentially affecting the business of operators from other Member States. The Court of Justice has accepted this, on the grounds of the general good involved in the cohesion of the tax system, provided these rules are not discriminatory (4). Fiscal control and consistency may indeed only be protected by invoking the general good in a way which does not lead to discriminatory measures and applies to economic fields (5).

3.9.2. In addition to justification by the Member State of general-good grounds and compliance with the conditions which must be fulfilled in order to permit the imposition of certain rules, the Court (6) has considered that application of such rules must accord with the principles of non-discrimination, non-duplication (7), necessity, appropriateness and proportionality, in that the general good represents an exception to the fundamental principles of the Treaty in the area of freedom of movement.

3.9.3. Community case-law has come to the view that compatibility with Community law is required of all national legislation (8): thus, invocation of the general good in order to impose imperative rules is of an exceptional character. A Member State may not impose an undifferentiated series of rules simply because they are considered imperative. Member States must attempt to bring their legal systems into line with Community law. Recourse to the general good concept serves as a safety valve for the system.

3.10. Within the same field, the Court has analyzed (9) the prohibition on cold-calling with regard to cross-border services, in its aspect as a restriction on the freedom to provide services. Analysis of the case-law established in the Alpine Investments judgement, concerning services offered by telephone to recipients in other Member States, is particularly interesting. In this judgement, the general good is invoked with regard to a national challenging the conditions for the application of this restriction.

3.10.1. The Court’s starting point is Treaty Article 59, to the effect that freedom to provide services does not necessarily imply movement on the part of the service provider to the Member State where the recipient is located.

3.10.2. It also confirms that the prohibition on placing restrictions on freedom to provide services is equally binding upon the host country and the country of origin with regard to restrictive rules imposed on cross-border commerce, even if applied without distinction to nationals and non-nationals.

3.10.3. The judgement relates to the use of cold-calling, which is not currently prohibited by Community law, but which could be prohibited by internal Member State legislation. The prohibition, however, extends beyond a purely national context, since it may also cover

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(1) Svensson judgement and case 205/84, op. cit.
(4) Commerzbank and Bachmann judgements, op. cit.
(5) Case C-49 of 13 December 1989, ECR 1 p. 4441; cf. also Jessica Safir judgement, Case C-118/96 of 28 April 1998, not yet published.
(6) Case 304/84.
(7) Reisbüro Broede judgement, op. cit.
(8) Case 827/71, Salt judgement of 21 March 1972, ECR 1, p. 119.
(9) Alpine Investments judgement, op. cit.
cross-border situations by preventing national operators from contacting potential clients situated in other Member States and thereby affecting intra-Community trade.

3.10.4. The Court of Justice’s position on this restriction by a Member State of its nationals’ freedom to provide services is that this freedom may be invoked by an undertaking to challenge the State in which is it established provided that the restriction affects services provided in another Member State.

3.10.5. The question is to determine whether a Member State can invoke the general good to justify a restriction of freedom to provide services imposed on its nationals. The case-law of the Court of Justice tends to hold that the freedom to provide services bars the application of any national legislation which, without objective justification, has the effect of making it more difficult to provide services within the Community.

4. Comments on the draft communication

4.1. The Committee believes that the draft communication meets the need for clarification of the interpretation of fundamental concepts, where uncertainty and differences may prejudice the completion of the single insurance market; it cannot be used to introduce legislative changes, although these may be necessary, as argued by the ESC in the opinion supplemented by the present document. Rather, it should contribute to legal certainty, both in pre-litigation assessment of cases within the Commission and in future cases which may be submitted to it.

4.2. The draft communication, however, give cause for comment on the way the Commission has dealt with the two issues raised in it:

4.3. The concept of the general good

4.3.1. The Commission bases its entire interpretation of the concept of the general good on Court of Justice case-law. However, as has already been stated, not only did the Commission omit a number of important judgements, such as Keck and Mithouard (November 1993), the French Federation of Insurance Companies (November 1995) and Jessica Safir (April 1998), from its list of relevant case-law, it also interprets this case-law in a way which fails to take full account of the particular nature of the sector in question, necessarily including the situation of public and private operators who proceed with a solidarity-based approach by virtue of the common interest they defend and thereby outside the scope of the rules of competition (1).

4.3.2. Thus the Commission appears not to have given sufficient weight to the opinion of the Court of Justice itself that service providers should be able to operate within a less restrictive legal framework under the freedom to provide services than under the right of establishment (2), particularly where service provision does not involve movement by the service provider to the country of the recipient (3), even though by virtue of the Third Directives, the general good applies without distinction to the right of establishment and the freedom to provide services.

4.3.2.1. On the contrary, the importance of the difference between would appear to be sufficient grounds for the Commission to have clearly indicated which elements should be used to make a proper distinction between right of establishment and freedom to provide services arrangements, in relation to the general good, in particular through a series of useful, positive examples drawn from the case-law and practice of the Member States. The Commission should also have drawn the appropriate conclusions, in particular from the Keck and Mithouard judgement, and included the interpretative guidelines for general good requirements in its communication, especially with regard to control of proportionality.

4.3.3. The Commission has also not taken a position on the question of the burden of proof in the event of disagreement over the general good, it being the Committee’s view that it will be up to supervisory bodies to demonstrate, in each case, that the rules they wish to impose on companies of other Member States satisfy the cumulative requirements established by the Court of Justice.

4.3.4. Although making reference to it, the Commission has not adopted a clear stance on the practice

(1) Case C-244/94 of 16 November 1995 Fédération française des sociétés d’assurance judgement, ECR p. 4013.

(2) Sager judgement op cit, which explicitly states 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’; cf. also the Commission/Italy Judgement of 26 February 1991, Case 180/89, point 15, and the Commission Interpretative Communication on the free movement across borders of services (93/C334/03) in OJ C 334, 9.12.1993.

(3) Alpine Investments judgement, op. cit.

of certain Member States of making en bloc notification of the legal instruments which they consider to constitute the general good, without specifying which rules within this legislative whole actually constitute the fundamental principles of the general good

4.3.4.1. This method of ‘informing’ country of origin insurance operators, together with the non-transparency of national legislation and the difficulty in interpreting it — as evidenced by contradictory rulings by national courts, particularly in relation to operators under the freedom to provide services — seriously jeopardizes the real completion of a single insurance market.

4.3.4.2. Furthermore, the Commission has not touched upon the question — omitted from the provisions of the Third Directives — of who is responsible for informing companies operating under the freedom to provide services (2) about the general good rules. This question is of particular importance if it is claimed that the content, or at least intensity, of these rules (proportionality) is not the same for the right of establishment and freedom to provide services. The Committee believes that the supervisory authorities’ duty of information should take the form of a legal obligation.

4.3.4.3. The Commission has not expressed a view on the obligation upon the host country authorities to supply detailed and precise lists of rules considered relevant to the general good to the insurance sector, together with their interpretation by both national courts and the public administration (3), which must explain clearly, explicitly and in detail how these are to be applied in practice (4).

4.3.4.4. Lastly, the Commission has not considered whether it would be advisable to make it compulsory for a Member State to inform the Commission and the other Member States of its intention prior to introducing new rules considered to be for the ‘general good’, giving proper and detailed grounds for its decision, thereby enabling the Commission to set the legal machinery into immediate motion if it should consider the measure unjustified (5).

4.3.5. The Commission also does not appear to deem the situation noted in some host Member States, whereby operators are obliged — albeit a posteriori — to inform the supervisory authorities on a systematic basis of the conditions of the policies they are marketing, to be an infringement of the Third Directives.

4.3.6. Neither does the Commission consider situations in which certain Member States limit insurance companies’ ability to buy shares in other companies, even beyond where technical reserves are concerned.

4.3.7. The Commission’s position on the question of the language of the insurance policy appears oversimplistic, overlooking the fact that there are countries in which, by virtue of general law, all contractual documents must be produced in the language of the country in order to have validity before the courts; furthermore, particularly in non-life insurance contracts, third parties are involved in the host country where the risk is situated, and this is the connecting element taken into consideration for the purposes of deciding on applicable law and competent courts (6).

4.3.8. The Commission has not expressed a view on the ban in some Member States on life assurance companies managing group pension funds, although this is specifically provided for in Class 7 of the appendix to the First Directive.

4.3.9. On the other hand, the Commission has taken surrender rights and bonuses together under the same heading, although they respond to different criteria. It does not seem acceptable to accord them uniform treatment, since there may be valid general good reasons, relating to the form of pricing, particularly during the initial years, to guarantee the right of surrender.

4.3.10. The Commission has made no comment on the compulsory appointment of a tax representative in the host Member State, even when taxable premiums are not payable.

4.3.11. The Commission raises the issue of conflict of laws defining the legislation applicable to insurance policies, but without making any practical proposals to

(1) This is the case, for example, of Portugal, which considers the rules governing advertising and taxation rules generally to be public policy provisions, or of Germany, which generally refers to the civil code!
(2) Point 2.3 of the protocol of cooperation between EU insurance supervisory bodies for the application of the Third Directives, revised at the 109th conference of supervisory authorities in October 1997.
(3) Cf. the Committee’s well-grounded view on this aspect, idem note 4, p. 45.
(5) This is felt to be a field which should be discussed under the cooperation protocol between supervisory authorities referred to above.
(6) On this matter, see the interesting pragmatic approach of the European Insurance Committee in its communication of 20 November 1995.
simplify or clarify the rules in such cases. The complex nature of these rules may be considered an obstacle to the completion of a single insurance market, particularly in view of the Commission proposal of 22 December 1997 to amend the Brussels Convention (COM(97) 609 final) (1).

4.3.12. Another question which the Commission could have raised in connection with restrictions on the freedom of movement of capital, which directly affects the insurance market under both the right of establishment and the freedom to provide services, is the need to prevent insurance policies being used as a means of laundering capital (2).

4. The distinction between the right of establishment and the freedom to provide services

4.4.1. The Commission’s interpretation of the distinction between these two concepts also gives rise to various doubts. Firstly, it must be made clear that the Commission’s analysis must cover the three configurations of freedom to provide services identified by the Court of Justice: (i) where the insurer moves to the Member State of the policy-holder (ii) where the insured party moves to the Member State of the insurer, and (iii) where neither the policy-holder nor the insurer moves.

4.4.2. With regard to the concept of temporary or occasional provision of services and the meaning of the criteria of ‘regularity’, ‘periodicity’, ‘continuity’ and ‘permanence’, although in the ultimate analysis, any decision must always depend on the appreciation in each case of the Court of Justice, the Commission document makes no headway with a classification of the content of these concepts which would help to clarify the distinction. Clarification could be provided in the form of significant examples drawn from case-law.

4.4.3. Given the explicit establishment of this distinction in the insurance directives, it might indeed be worth considering whether it would be more appropriate to consider the right of establishment to apply exclusively to cases where the original company sets up a branch or agency empowered to act as a representative and to conclude insurance policies, all other cases, in which there is no such physical presence (‘establishment’) with such powers, being deemed to come under the freedom to provide services (3).

4.4.3.1. Consequently, the distinction concerning who takes the initiative to establish contacts to conclude policies would, in this case, be superfluous.

4.4.3.2. However, if the continuous or frequent nature of the service provider’s activity is taken as the distinguishing criterion, then this criterion should be applied in order to determine right of establishment whether or not the service provider moves to the host state as long as, in either case, its activity focuses principally or exclusively on that market, and its aim is to avoid application of legislative, regulatory, tax or professional provisions applicable to insurers established in that Member State (fraud) (4). In the latter case, and with a view to preventing operations under the freedom to provide services being systematically reclassified under the right of establishment, it would be helpful for all the elements indicating intent to evade the applicable rules to be properly described.

4.4.4. In contrast, the Commission does not adopt a clear stance on the use of brokers in concluding insurance policies. In view of their independence (5), it would appear that brokers can only be considered to come under freedom to provide services. As a result, it would appear that instead of the term ‘independent intermediary’, the Commission should refer to the concept of ‘independent person’ in accordance with Article 3 of the second life and non-life insurance directives.

4.4.4.1. The principle of exclusiveness does not appear to be acceptable with relation to other insurance intermediaries, since this would exclude permanent


(3) Cf. R. Gebhard/Consiglio dell’Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) where, in connection with the right of establishment, and recalling the conclusions of the Advocate General in Case 81/87, Daily Mail judgement of 27 September 1988, it is stated that ‘establishment means integration into a national economy’, ‘where [an economic operator] is chiefly directed towards the market in that State, which is where he concentrates his activities’ (ECR I-4171 and 4173).


insurance establishments from coming under the right of establishment, simply because they work for more than one company (1). At most the existence of an exclusive mandate may indicate that an independent person should come under the right of establishment regime, but this must always be evaluated in accordance with the nature and extent of the functions assigned to the intermediary (2).

4.4.4.2. The Gebhard judgement in particular also appears to clearly show that the simple existence of a permanent structure is not a sufficient distinguishing criterion to determine the right of establishment. It is essential that the structure must at the same time be empowered to act as a representative and to commit the insurance company when concluding insurance policies.

4.4.4.3. It also emerges clearly from Court case-law and, more specifically, from the Shearson Lehman Hutton judgement, that neither exclusivity, if unaccompanied by the control and direction of the parent company, nor the link of dependence vis-à-vis the parent company situated in another Member States, are determining criteria in deciding between whether a branch, agency or establishment is involved (3).

4.4.4.4. Lastly, it would appear that in line with the exceptions which the Commission quite rightly established with regard to inclusion under the right of establishment, consideration should be given to the case of the use, in the host country, of a person responsible only for the management and settlement of claims (e.g. a lawyer), regardless of the temporary or permanent character of the mandate (legal in particular) (4).

4.4.5. The Commission’s view on advertising is that whatever form it takes, it can never be covered by the notification procedures under Article 34 of the third directives.

4.4.5.1. However, the situation requires close analysis, particularly in cases where ‘the advertisement constitutes commercial canvassing, ranking as an actual invitation, issued at a distance, to enter into a contract or where it precedes a physical journey by the supplier’ with a view to concluding a policy, as set out in the ESC’s opinion on banking (5). The Commission should however spell out the circumstances in which an advertisement takes on this character. The criteria which might indicate that an advertisement contains the intention to conclude a contract could therefore include reference to telephone numbers, postal and e-mail addresses etc., and reference to the markets on which the products are available.

4.4.6. The Committee also considers that in the interests of market transparency, the publication of, or free access to, lists of insurance companies which have notified their intention to operate under the freedom to provide services should be made compulsory.

4.4.7. The Commission mentions the ‘use [of] this new technology for carrying out insurance business in the single market’. However, the Commission then seems to forget this aspect throughout the rest of the document, although it is now of increasing importance, allowing for remote information and the negotiation and conclusion of insurance policies at a distance via Internet or interactive terminals, quite apart from the use of electronic equipment.

4.4.7.1. The Commission could have looked at these situations and have attempted to think about and analyze circumstances which are no longer in the future, but are already a reality.

4.4.8. The Commission rightly argues that the prior notification and information procedures under Articles 34 and 35 of the third directives cannot be considered as an essential condition for the validity of policies, but it would not seem advisable to claim that these procedures cannot constitute a consumer protection measure.

4.4.8.1. On the contrary, the need to protect consumers may be the cornerstone of a Member State’s opposition to activity under right of establishment or freedom to provide services arrangements, as in cases where a supervisory authority prevents an operator from (6).

(1) Contrary to the Commission’s argument, it cannot be concluded from the Bloos judgement of 6 October 1976 and the Blaukant and Willems judgement of 18 March 1981 (Cases 14/76 and 139/80, in ECR p. 1497 and 819) that an exclusive brief is a necessary condition for application of the right of establishment (cf. OJ C 204, 15.7.1996, p. 66).

(2) In this connection, it should be recalled that the Commission/Germany judgement of 4 December 1986 specifically stated that ‘the profession of intermediary in the insurance sector is not the subject of any Community legislation on the basis of which the Court could hold that an intermediary is acting on behalf of one or other of the parties to an insurance contract. In addition, the fact that an insurance contract has been negotiated through an intermediary who is not an authorized agent of the foreign insurance undertaking cannot change the nature of that contract as representing a service provided by that undertaking to the policy-holder’ (point 16) (in ECR 1986 page 3755-3815).

(3) Shearson Lehman Hutton/TUB mbH judgement, Case C-89/91 of 19 January 1993, Conclusions of the Advocate General in ECR I-170, points 42 and 45.

(4) Cf. in this regard Article 6 of the directive concerning freedom to provide services in the motor vehicle insurance sector (Directive 90/618/EEC), referring to Article 12a(4) of Directive 88/357/EEC, as well as the Article 2(4) of the draft 4th directive on motor vehicles of 15 October 1997.

(5) OJ C 204, 15.7.1996, p. 66. There is no apparent reason to make a distinction in relation to insurance, provided that the advertisement clearly indicates the insurer’s intention to cover risks in the host country, independently of any physical journey.
underwriting risks which are not usual in its country of origin, for which it is consequently technically or financially unequipped and which could, if underwritten, jeopardize its overall solvency (1). This impediment, which can always be appealed against, is embodied in non-notification to the Member State of establishment or provision of services.

4.4.8.2. It therefore seems necessary to establish that conducting business under the freedom to provide services or the right of establishment, without having fulfilled the requirements of notification of the Member State of origin and subsequent developments, may constitute grounds for initiating the procedures, including urgency procedures, under Article 40 of Directives 92/49/EEC and 92/96/EEC.

4.5. The Committee fully agrees with the Commission’s accurate analysis of all remaining points, considering the draft interpretative communication to be the starting-point for the necessary publication of an interpretative communication on this matter.

4.5.1. The Committee must, however, point out that other aspects, equally vital to the completion of a single insurance market, are omitted from the present draft communication, such as the harmonization of basic aspects of insurance policies and direct and indirect taxation arrangements. This was fully discussed in the opinion which the present document supplements.

(1) Cf. Svensson judgement, op. cit.


5. Conclusions

5.1. The Committee believes that the Commission should issue an interpretative communication on the general good and freedom to provide services and right of establishment arrangements with regard to insurance, as it has done in relation to the banking sector.

5.2. It considers the document submitted for public debate to be a good basis for work in this regard, provided due account is taken of the above comments. The Committee reserves the right to draw up an opinion on the final version of the communication, and emphasizes that the Commission’s work thus far is of great value in the context of the simplification initiatives under the SLIM programme.

5.3. When the basic structure of the single insurance market is sketched out by means of interpretation — a market in which the general good will have to take on a European dimension — no interruption in insurance contractual relationships — particularly in terms of consumer protection — must be allowed. To this end, the supervisory authorities must be provided with the necessary means to ensure strict compliance in the insurance sector.

5.4. It will not be possible to overcome many of the problems affecting the insurance market simply by means of an interpretative communication: legislation will be required, including international law. The ESC sought to draw the Commission’s attention to this need in its earlier own-initiative opinion on consumers in the insurance market (2), and would now repeat this call.

(2) OJ C 95, 30.3.1998, point 2.3.1.2.1.

Tom JENKINS

The President of the Economic and Social Committee