INSURANCE ACTIVITY AT THE EUROPEAN COURT OF JUSTICE

1. INTRODUCTION

The Commission of the European Communities is charged with representing the interests of those bodies and one of its main tasks is to enforce the application of Community Law. Should it consider that one of the Member States has not fulfilled one of its obligations under Community Law it has the right to request compliance and, if such compliance is not forthcoming, it may bring the matter before the European Court of Justice. On the other hand, an action may be brought *against* the Commission where one of its decisions is considered not to be in accordance with a provision of the EC Treaty.

This, then, is the background to two highly significant decisions of the European Court of Justice which were delivered on 4th December 1986 and 27th January 1987 respectively, decisions which are still being avidly and industriously studied, interpreted and written about.

2. THE SERVICES AND CO-INSURANCE CASE

i) The Services Issue

The German Insurance Supervision Law ("VAG") prohibits intermediaries established in the Federal Republic from arranging contracts of insurance for persons who are resident in that country with insurers established in another Member State, although any German has always been at liberty to negotiate directly a contract with an overseas insurer.

A German intermediary, Mr. Schleicher, had sold insurance policies underwritten by U.K. insurers to German insureds in Germany. The U.K. insurers had not been authorised by the German supervisory authorities nor were they established in Germany. As Mr. Schleicher failed to comply with a warning given by the Insurance Supervision Office in Berlin he was prosecuted and fined DM18,000.

Mr. Schleicher appealed, but the Berlin Appeals Court confirmed that the fine had been correctly imposed. It was following that confirmation of the original decision that the Commission became involved when it decided to bring an action against the Federal Republic for being in breach of Articles 59 and 60 of the Treaty of Rome.

In defence of its position the German Government argued that a German national who seeks insurance with an overseas insurer through a German agent is dealing with a local undertaking which is acting on behalf of another undertaking which is neither established nor authorised in the Federal Republic.

The Court held that Articles 59 and 60 of the Treaty require the removal of all restrictions with regard to the freedom of a person established in one Member State to provide services in another. That freedom, the court held, may only be restricted if there are imperative reasons of public interest which justify restrictions on the freedom to provide services, if it is established that the public interest is not already protected by the rules of the state of establishment and if it is further established that the same result cannot be obtained by less restrictive rules.

The German Government had argued that only the requirement of authorisation could provide an effective means of ensuring adequate protection of the consumer and that it was for the state in which the service was to be provided to grant and withdraw that authorisation.

The Court accepted this basic argument, but restricted its effect by stating that authorisation must be granted on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the state in which the service is provided. Furthermore, the supervisory authority in the state where the service is provided must take into account supervision and verifications which have already been carried out in the state of establishment.

The Commission's case against the Federal Republic thus failed on this authorisation point.

Having disposed of the authorisation question in favour of the Federal Republic the court went on to consider the German requirement that an insurer established in another Member State must be established in the Federal Republic if it wishes to transact business there. It held that it had not been established that considerations concerning the protection of policyholders and insured persons make the establishment of the insurer in the territory of the state in which the service is provided an indispensable requirement.

However, this decision was held not to apply to compulsory insurance nor to insurance for which the insurer either maintains a permanent presence equivalent to an agency or branch or directs his business entirely or principally towards the territory of the Federal Republic.

This last point might need some clarification before we are all clear as to exactly how far the principle is intended to go.

ii) **The Co-Insurance Issue**

According to the Commission the Federal Republic had failed to fulfil its obligations under the 1978 Co-Insurance Directive by continuing to require the leading insurer to be both authorised by its supervisory authorities and also to be established in its territory.

The court was quite emphatic in holding that a requirement of establishment in relation to the leading insurer could find no basis in the Directive.

Consideration of the first issue, it added, had shown that the requirement of authorisation in the state in which the service is provided is not justified where the undertaking providing the service already satisfies equivalent conditions in the Member State in which it is established.

A difference of treatment between the leading insurer and other Co-Insurers was held not to be objectively justified and the court concluded that not only the requirement that the leading insurer be established but also the requirement that he be authorised, as laid down in the VAG, are contrary to Articles 59 and 60 of the Treaty and therefore also to the Co-Insurance Directive.

3. THE GERMAN FIRE TARIFF CASE

In June 1980, in an attempt to do something about the very poor results being suffered by German Industrial Fire Insurers at the time, the German Associaton of Property Insurers ("VdS") recommended to its members that they introduce a general premium increase in the fields of Industrial Fire and Consequential Loss Insurance.

As a precautionary measure the VdS applied to the EC Commission in September 1982 for negative clearance in relation to this

recommendation, but by its decision of 5th December 1984 the Commission decided that the VdS's recommendations were in breach of Article 85 of the Treaty and so it refused to grant the negative clearance sought. (Article 85 provides that agreements between enterprises which may affect trade between Member States and which have as their object or effect the distortion of competition are prohibited and automatically void.)

The Vds now applied to the European Court of Justice for that decision to be annulled and it based its case on the following six points:-

i) **Article 85 and its Applicability to Insurance**

Although the VdS maintained that Article 85 did not apply to the field of insurance until such time as the Council of Ministers introduced special provisions extending it to that field, the Court held that Community competition rules as contained in Articles 85 et seq. did in fact apply to insurance.

ii) **Interference by the Commission in National Economic Policy**

The court upheld the Commission's submission to the effect that the latter's decision of December 1984 only affected a private cartel and thus did not hamper the effective carrying out of the Federal Republic's insurance supervisory activities.

iii) **The Recommendation was not Binding**

Although the recommendation was referred to by the VdS as being non-binding in character, nevertheless it represented an expression of the intention of the VdS to co-ordinate the activities of its members active in the German Market and so the court held that the recommendation fell within the ambit of Article 85.

iv) **Restriction of Competition**

The VdS had submitted that the recommendation had only been intended as a measure of co-operation and that in any event it had hardly been implemented.

Nevertheless the court found that the VdS had aimed to achieve a collective increase in the price of the services which its members offered and as such the recommendation was aimed at restricting competition.

v) **Effect on Inter-State Trade**

The general premium increase recommended affected the position of overseas insurers as well by preventing them, through their branches, from offering more competitive terms. It was therefore held by the court to make access to the German Market more difficult and thus *did* affect trade between Member States.

vi) **An Improvement in Services?**

The VdS had argued that the recommendation was justified because it was aimed at re-establishing the profitability of insurers. There had not, the VdS added, been any objection from the Federal Cartel Office.

The German Insurance Association, which was supporting the action, stated that an improvement in the profitability of Fire Insurance could have a positive effect on the performance of other branches as well.

Nevertheless the court held that the Commission had not exceeded its authority in refusing to grant negative clearance and so this sixth and final point of argument failed.

4. CONCLUSIONS

These cases represent real confrontations between various interests of no mean standing in the field of insurance within the European Community.

Just as the question of freedom of services has been demanding an airing before the European Court of Justice for some time, if only because so little tangible progress within the European Community has been made to date, so the question of the recommendation of a general premium increase applicable to certain types of insurance appeared to be calling for consideration by the court in the context of a possible breach of the sacred competition rules of the Treaty of Rome.

It behoves us all to pay careful attention to these decisions, although at this early stage it is not absolutely clear exactly what effect the Freedom of Services and Co-Insurance decision will have, nor is it clear how far-reaching the principle underlying the German Fire Tariff decision might eventually prove to be.

Will we have complete freedom of services very shortly? Will the various constituent parts of the London Insurance and Reinsurance Markets have to consider very carefully all their Market agreements, no matter of what standing and irrespective of whether or not these "agreements" are binding?

As always with the EC, issues seem to rumble on incessantly, only to erupt from time to time to shake us all into awareness and action. We have had the eruptions and now we must see how the land looks when the dust has settled. But one thing is to be expected: having pushed Freedom of Services and Competition right before our eyes the Commission will not let the issue simply go away. After all, it is only five years to 1992, by which time the Commission aims to have the Internal Market completed. There might be hectic times ahead.

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REVIEW OF PERSONAL INJURIES LITIGATION – Part 2
by Roger Doulton, Solicitor, Winward, Fearon & Co.

So far as the third proposition is concerned, I am also somewhat sceptical. When one is confronted by a Plaintiff with very serious injuries it is not always appropriate to issue proceedings within a short period of time after the first consultation. Even if it becomes appropriate to issue proceedings so that one can, for example, obtain an interim award it is not always then sensible to press on for a full hearing for some considerable period of time. Hopefully if proposition 2 were put into effect there would be no need for proposition 3!

Lastly and whilst on this subject of delay, very few of those surveyed cited the conduct of insurance companies as a cause of delay. Nonetheless this has not prevented the National Consumer Council from reasserting this proposition! Second, to Plaintiff's Solicitors the most important reasons for delay would appear to be:-

1. Plaintiff's own delay in seeking any expert advice;
2. Waiting for the Plaintiff's medical condition to stabilise;
3. Waiting to obtain medical report;
4. Waiting for trial.