

OPINION OF ADVOCATE GENERAL

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delivered on 17 December 1998 *

1. The Regeringsrätten (Supreme Administrative Court), Sweden, has asked the Court for a preliminary ruling on two questions concerning the interpretation of an article in Directives 73/239/EEC and 79/267/EEC¹ under which Member States may not prescribe rules as to the choice by insurance companies of the assets in which they invest their free resources.

2. The interpretation of the Community rules is required to enable the referring court to determine whether a national law prohibiting insurance companies from holding, without special administrative authorisation, more shares in other joint-stock companies than corresponds to 5% of the votes attached to all the shares (hereinafter 'the 5% rule') is applicable in the case at issue.

The facts and procedure in the main proceedings (according to the order for reference)

3. Försäkringsaktiebolaget Skandia (hereinafter 'Skandia') is a non-life insurance

company. Livförsäkringsaktiebolaget Skandia is a life insurance company wholly owned by Skandia. Together they own Skandia Investment AB, a company which invests in small and medium-sized companies.

4. In a letter of 29 December 1995, Skandia informed the Finansinspektionen (Financial Supervisory Authority) that Skandia Investment intended to increase its shareholding in Kungsdialysen AB, a company carrying on dialysis activity, an intention which it carried out.

5. After the additional share acquisition Skandia Investment owned shares in Kungsdialysen carrying 9.2% of the votes and representing 33.9% of the share capital (the previous figures were 5.0% and 30.8%). After the acquisition, the shareholding was within the company's free assets, that is to say within the assets not used as cover for the technical provisions.

6. By decision of 21 March 1996, the Finansinspektionen found that Skandia had to observe the 5% rule and ordered it to ensure that by 1 September 1996 Skandia Investment

* Original language: Spanish.

¹ — First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3) and First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance (OJ 1979 L 63, p. 1).

reduced its holding in Kungsdialysen to no more than 5% of the votes attached to all shares in the company.

to 5% of the votes attached to all the shares?

If Question 1 is answered in the negative:

7. Skandia appealed against the decision to the Government, which rejected the appeal by decision of 15 August 1996. Skandia appealed against that decision to the Regeringsrätten, seeking a judicial review to determine the legality of the Government's final decision. In the context of that procedure, the national court considered it necessary to refer the following questions to the Court for a preliminary ruling:

2. Are the aforementioned directive articles of such a character, as regards clarity and so forth, that they have the consequence that a national court must disregard a national provision having the tenor described above when called upon to examine the permissibility of an insurance company's investments of its free assets?

1. Is it compatible with Article 18(1) of Directive 73/239/EEC, as amended by Article 26 of Directive 92/49/EEC,² and with Article 21(1) of Directive 79/267/EEC, as amended by Article 27 of Directive 92/96/EEC,³ for national legislation to prescribe that, so far as an insurance company's free assets (i.e. those assets not used to cover the technical provisions) are concerned, the insurance company may not, without special administrative authorisation, own more shares in a domestic or foreign joint-stock company than corresponds

The relevant national provisions

8. The Försäkringsrörelselagen (Swedish Insurance Business Law) of 1982 contains provisions concerning the pursuit of business of life insurance companies and non-life insurance companies.

2 — Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive) (OJ 1992 L 228, p. 1).

3 — Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third Life Assurance Directive) (OJ 1992 L 360, p. 1).

9. The first paragraph of Article 3 of Chapter 1 provides that an insurance company may not pursue any business other than insurance business if there are no special reasons for such activity.

10. The first paragraph of Article 17 sets out the 5% rule in the following terms:

'An insurance company may not, without the approval of the Finansinspektionen, own a greater proportion of the shares in a Swedish or foreign joint-stock company than corresponds to the number of votes not exceeding 5% of the votes attached to all the shares. If the insurance company belongs to a group, this provision shall be applicable to the group. In the calculation of the group's holding, no regard shall be had to shares owned by banks belonging to the group or by subsidiaries of such banks unless they represent more than 5% of the votes in the joint-stock company.

The first paragraph shall not be applicable to shares or holdings in insurance companies or in legal persons whose business consists exclusively in owning shares in insurance companies, to provide guarantee capital for mutual insurance companies, to administer insurance companies' property or to assist insurance companies in the conduct of their business. The first paragraph shall, however, be applicable to shares or holdings in legal persons whose object is to own, directly or indirectly, assets referred to in the first paragraph of Article 10 if those assets do not consist of shares or holdings in public insurance companies or foreign companies of the same type.

Article 17(a) shall apply as regards the right of insurance companies to own shares or have

holdings in companies which pursue some form of financial activity.'

11. Rules similar to those contained in the first and second sentences of the first paragraph of Article 17 of Chapter 7 of the 1982 Law were also contained in the 1948 Insurance Business Law. The reason stated for those rules upon the enactment of that Law was to prevent insurance companies from acquiring too much influence in companies outside the insurance sector.

The relevant Community provisions

12. Community insurance law has developed in three stages:

- A first 'generation' of directives (Directive 79/267 on life insurance and Directive 73/239 on non-life insurance, both cited above) was designed to facilitate the effective exercise of insurance companies' right of establishment.
- A second 'generation' of directives (Directive 90/619/EEC⁴ on life assurance and

⁴ — Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (OJ 1990 L 330, p. 50).

Directive 88/357/EEC⁵ on non-life insurance) facilitated the effective pursuit of such insurance business under the rules on freedom to provide services.

- Lastly, a third 'generation' of directives (Directive 92/96 on life assurance and Directive 92/49 on non-life insurance, both cited above) was intended to complete the internal market in insurance on the principle of a single official authorisation and financial supervision by the competent authorities of the State in which the insurance company has its head office.

13. Thus the Community legislation sought to ensure, on the one hand, that insurance undertakings were free to pursue their business and, on the other, that Community citizens were free to avail themselves of the widest possible insurance market, while guaranteeing them adequate legal and economic protection.

14. To achieve the first objective, insurance undertakings authorised in a Member State

had to be able to carry on business throughout the Community under the right of establishment or the freedom to provide services. To that end, the third generation directives adopted the approach of '... bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State'.⁶

15. That principle meant that Member States would be responsible for monitoring the financial health of insurance undertakings, including their state of solvency, the establishment of adequate technical provisions and the covering of those provisions by matching assets. The coordination of national rules on the subject was particularly necessary in a system where there was mutual recognition of authorisations and prudential control systems.

16. The necessary harmonisation of the Member States' rules on the technical provisions which insurers are required to establish to cover their commitments had already been effected. The third generation of insurance directives took a further step in the same direction, stating that 'the rules governing the spread, localisation and matching of the assets

⁵ — Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 72/239/EEC (OJ 1988 L 172, p. 1).

⁶ — Fifth recital in the preamble to Directives 92/49 and 92/96.

used to cover technical provisions must be coordinated in order to facilitate the mutual recognition of Member States' rules'.⁷

17. To that end, the articles on technical reserves in the first generation directives (Article 15 of Directive 73/239 and Article 17 of Directive 79/267) were amended. As amended, they provide that the home Member State shall require every insurance undertaking to establish adequate technical provisions in respect of its entire business. The amount of such technical provisions must be determined in accordance with the rules laid down in Directive 91/674/EEC⁸ or Directive 92/96. The technical provisions in respect of the undertaking's entire business must be covered by matching assets.

18. The directives lay down the legal rules governing the spread, localisation and matching of those assets. In fact, only certain categories of assets (investments, debts and claims, and others) may be used to cover the technical provisions. In addition, Member States must require every insurance undertaking to invest no more than a certain percentage of its total gross technical provisions in certain categories of assets.

19. The assets not used to cover the technical provisions constitute what might be described as the insurance undertaking's 'free assets' or 'available or disposable assets'. The questions referred by the national court seek an interpretation of the rule, relating to those assets, contained in the two directives.

20. As amended, that rule is set out in the following terms:

(a) with respect to life assurance, Article 18(1) of Directive 73/239 provides that 'Member States shall not prescribe any rules as to the choice of the assets that need not be used as cover for the technical provisions referred to in Article 15';

(b) with respect to non-life insurance, Article 21(1) of Directive 79/267 provides that 'Member States shall not prescribe any rules as to the choice of the assets that need not be used as cover for the technical provisions referred to in Article 17'.

21. Lastly, the Community rules prohibit insurance undertakings from extending their objects to other types of commercial business. Thus, Article 8(1)(b) of Directive 73/239 and the similarly worded Article 8(1)(b) of Directive 79/267, as amended, provide that

7 — Thirteenth recital in the preamble to Directive 92/49 and fifteenth recital in the preamble to Directive 92/96.

8 — Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ 1991 L 374, p. 7).

the home Member State shall require every assurance (or insurance) undertaking to 'limit its objects to the business provided for in this Directive and operations directly arising therefrom, to the exclusion of all other commercial business'.

may impose 'quantitative' restrictions (such as the 5% rule) that do not require specific investment in any category of assets.

The first question

22. The first question referred by the national court seeks to ascertain whether the Community rule can be interpreted as meaning that the freedom in the 'choice of assets', accorded to insurance companies under the two directives, may be limited by a national rule imposing restrictions on that choice, as in the case of the aforementioned Swedish 5% rule.⁹

23. The Swedish Government (supported by the Norwegian Government and, in part, by the Finnish Government) contends that the directives only prohibit the imposition of 'qualitative' limits on insurance undertakings' choice of assets, that is to say, Member States may not require those undertakings to invest in certain 'categories' of assets. Conversely, so long as that condition is met, Member States

24. The Commission and the appellants in the main proceedings take the opposite view, maintaining that the rules contained in the two directives do not allow Member States to impose restrictions of any kind, qualitative or quantitative, on the choice by insurance companies of the assets in which they invest their free resources.

25. For my own part, I incline to the latter view. In giving my reasons, I shall first explain why I disagree with the proposition that the 5% rule is necessarily connected with the limitation on insurance companies' business outside the insurance sector; I shall then try to show why that rule is contrary to the provisions on freedom of choice in the matter of disposable assets contained in the two directives.

(i) The proposition that the 5% rule is based on the prohibition of pursuit by insurance companies of business other than insurance business

⁹ — The fact that the law allows the national authorities to authorise this type of investment in certain cases does not alter the fact that the rule is in the nature of a prohibition. The Court has consistently held that, when a national rule that is in the nature of a prohibition is contrary to Community law, the mere fact that the national authorities have discretion to grant authorisations that are contrary to the general rule is not sufficient to prevent that rule from being declared incompatible with Community law.

26. The Swedish and Norwegian Governments state that the 'aim and purpose' of the

5% rule is necessarily connected with the prohibition on insurance companies pursuing business outside the insurance sector. That prohibition is contained not only in their national legislation but also in the Community provisions.¹⁰

27. In their view, a legitimate way of ensuring compliance with that prohibition is to prevent insurance undertakings from owning significant shareholdings in companies outside the insurance sector. Holdings exceeding 5% of the votes in such companies would enable insurance undertakings to exercise a 'dominant influence' on the companies in question. According to the Swedish and Norwegian Governments, insurance undertakings could then easily evade the prohibition on pursuing business other than insurance business.

28. The Swedish Government emphasises that the limit of 5% of the vote-carrying capital was considered appropriate for the purpose of defining the point at which a holding with votes attached enabled the shareholder to exert a 'significant influence' on the management of a company. It referred in this connection to the opinions expressed by certain Member States in the context of the preparatory work for Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective invest-

ment in transferable securities (UCITS).¹¹ That directive did not, in the end, set any figure in this connection.

29. I do not agree with that line of argument for various reasons. Before going into them, I must confess that the Swedish Government's explanation seems to me to have been thought up after the event to justify a restriction imposed on other grounds. In fact, as the appellant in the main proceedings has shown, the original purpose of the 5% rule, in 1948, was not to ensure that insurance companies complied with the prohibition on pursuing business other than insurance business, but simply to limit their influence on the economic life of the country as an alternative to nationalisation of the insurance sector, which was advocated in certain political circles at that time.

30. Moreover, as the appellant rightly points out, if the real purpose of the 5% rule was to prevent insurance companies from pursuing business other than insurance business, it is difficult to see why the rule relates only to holdings in joint-stock companies and not to shares in other types of commercial company or legal person.

31. Even if it were to be admitted, for the sake of argument, that the purpose of the 5%

10 — See point 21 above.

11 — OJ 1985 L 375, p. 3.

rule is the one at present proposed by the Swedish Government, I consider that the prohibition on insurance companies pursuing business other than insurance business in no way requires them to limit their holdings in other companies to that extent. There is no direct and necessary connection between acquiring a 5% shareholding and pursuing the particular business of the company in which those shares are owned.

32. In short, I cannot see why a modest holding, albeit exceeding 5% of the vote-carrying shares, should be regarded as tantamount to the shareholders 'pursuing' the particular business of the company in which they own shares. It could be argued, by the same token, that any individual shareholder who owns 6% of the vote-carrying shares in a number of different joint-stock companies is pursuing the particular business of all those companies at the same time.

33. Such a conclusion is not defensible in law. A portfolio of vote-carrying shares may be part of the assets of a natural or legal person but owning such a portfolio does not necessarily presuppose or imply that the person concerned is in every case pursuing the commercial business of the company. In other words, for legal purposes, the fact that a shareholder owns shares in a company is not to be confused with the business of that company.

34. The difference between the two hypothetical cases is quite clear. On the one hand, we have the movable assets of a particular person (natural or legal, it does not matter here) and, on the other, the entirely separate issue of the pursuit of commercial business by that person. Owning shares in a company amounting to 6% of all vote-carrying shares does not turn the shareholder into a businessman, that is to say a person pursuing a certain business.

35. It could be argued that this is a somewhat formalistic line to take and that, in the business life of undertakings, shareholders who have a relatively modest holding may sometimes have a decisive influence on a company's management decisions. In my view, that does not alter the fact that there is a difference between owning shares, on the one hand, and pursuing a commercial business, on the other.

36. The power, by means of vote-carrying shares, to *influence* the decisions of the bodies (shareholders' meetings, boards of directors, etc.) that determine the business policy of a joint-stock company is not tantamount to *pursuing* the business of that company. It follows that a shareholder cannot, merely because he exercises his right to vote, be held to be pursuing the particular commercial business of the joint-stock company in which he owns shares.

37. I must emphasise that the two situations are quite distinct, from a legal point of view. Also, shareholders who own 6% of the vote-carrying shares in a company usually play only a very small part in the decisions taken by the company's governing bodies and they cannot therefore determine its conduct. Even less can they be said to 'carry on' or 'pursue' the business of the company, since its day-to-day management is in the hands of bodies in which they may not even be represented.

38. The requirement that insurance undertakings limit their business to business in the insurance sector is stated in very clear terms in the directives, which refer to the 'objects' of the undertaking. Those objects must be limited to insurance business (and operations directly arising therefrom). So long as that rule is observed, there is nothing to prevent an insurance undertaking's investment in shares in companies outside the insurance sector from exceeding 5%, or even a little more, of the share capital of those companies.

39. The problem that may arise in this connection is far wider and is not confined merely to shareholdings. It is the problem of avoiding a surreptitious but significant modification in the objects of the undertaking as a result of the establishment, acquisition or control of dummy companies, whether or not they are subsidiaries in the strict sense of the term, through which the insurance company effec-

tively 'pursues' business outside the insurance sector.¹²

40. An insurance company could, in fact, seek to extend its business activities by acquiring shares in a company or other similar instruments with a view to gaining control of the company in question.¹³ Such acquisitions would no longer be merely a financial investment but controlling shares enabling the company effectively to take over the management of the companies concerned.

41. However, such conduct goes far beyond mere financial investment. The investment of free resources in shares, even vote-carrying shares, ought not to be regarded as 'business other than insurance business', which

12 — The prohibition on modifying the objects of the undertaking by participating in other undertakings is absolute in some national legal systems. For example, Article 2361 of the Italian Civil Code prohibits joint-stock companies from acquiring shares in other undertakings, even in cases where the company's articles of association allow it, if the objects of the company as defined in its articles of association would be significantly modified as a result of the size and purpose of the holding. On the application of this principle to the problems arising from one company controlling others, see Schiuma, L., *Controllo, governo e partecipazione al capitale*, Padua, 1997. Italian writers have studied in detail the problems caused by insurance undertakings participating in companies outside the insurance sector. See, in particular, Fanelli, G., 'Sulla legittimità dell'acquisto da parte di imprese di assicurazione della partecipazione in imprese con diverso oggetto sociale', *Gior. Comm.*, 1987, I, pp. 817-826.

13 — Under the Danish law on insurance business, an insurance company is considered to be pursuing business other than insurance if it has a decisive influence on a commercial company whose business is outside the insurance sector or connected with business outside the insurance sector. The Finnish law on insurance undertakings contains similar provisions, prohibiting them from holding more than 50% of the shares in companies outside the insurance sector. The Italian law prohibits insurance undertakings from acquiring holdings in undertakings outside the insurance sector that would give them control of those undertakings.

insurance companies may not pursue, if it does not modify the objects of the insurance company investing its free resources in this way. In fact, a financial investment of this kind is not even a 'business activity' in the strict sense of the term¹⁴ but merely a case of a company investing part of its assets in securities.

distinction to all types of shareholding, far exceeds what is admissible for the purpose of limiting the objects of insurance companies, as prescribed in the abovementioned directives.

(ii) The interpretation of the Community provisions on choice in the matter of disposable assets

42. Only if an insurance company's acquisition of shares is intended to circumvent the limitation on its objects by establishing dummy companies, which it controls and which enable it to pursue business other than insurance business, only then, in my view, may the national authorities act, in a particular case, to forestall the possibility of a significant modification in the insurance company's objects.

43. In my opinion, it is clear that the 5% rule contained in the Swedish legislation, in view of its abstract and rigid character, taking no account of the facts and applying without

44. The freedom of choice in the matter of disposable assets guaranteed by the two rules in the directives, to which I have already referred, takes the form of forbidding Member States to prescribe 'any rules' on the subject. In my view, the negative form of words used is a sufficiently clear indication that Member States may not act in this area, as there are clear and exhaustive Community rules on the subject. To be more specific, they may not impose limits, either qualitative or quantitative, on the choice of these assets.

45. The first argument in favour of that interpretation, even if it does not carry great weight as a criterion for interpretation in Community law, is purely literal: the wording of the rule is mandatory, leaving no room for State action to limit the freedom of choice. The prohibition is expressed literally in terms that allow no exceptions, either quantitative or

14 — For tax purposes, in particular for the purposes of value added tax, such investment is not even regarded as an 'economic activity'. Indeed, the Court has held that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person (Case C-60/90 *Polystar Investments Netherlands* [1991] ECR I-3111, paragraph 13). The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis, because any dividend yielded by that holding is merely the result of ownership of the property (see also, to this effect, Case C-333/91 *Softiam* [1993] ECR I-3513, paragraph 12, and Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraphs 14 to 18).

qualitative. Moreover, the provision is not designed simply to guarantee freedom of choice with respect to 'certain categories of assets' but to prevent Member States from prescribing any rule restraining insurance companies from investing their disposable resources in whatever assets they consider appropriate.

46. A second and more important point is that an examination of the meaning of the rule within the system of both directives leads to the same conclusion. The establishment of a harmonised framework for competition between insurance undertakings that will be to the advantage of the policy-holder without jeopardising the financial health of the undertakings demands sufficiently clear rules on their assets. While the directives laid down rules on the obligation to establish technical provisions, which Member States were required to enforce, they also intended to leave to individual undertakings decisions as to the investment of part of their assets, decisions that are not and cannot be regulated by national provisions or national authorities.

47. The distinction between one part of an undertaking's assets (the assets used as cover for the technical provisions), which are subject to various restrictions, on the one hand, and another part, the free assets which are not subject to restrictions of any kind, on the

other, would be meaningless if that second part were also to be subject to limitations, such as the 5% rule, which are more appropriate to a system of supervision and control such as that governing the technical provisions.

48. Thirdly, the application of the 5% rule by a Member State to the insurance companies under its control significantly distorts the system of competition between undertakings of this type. Insurance companies established in Sweden but subject to the control of another Member State whose legislation does not contain that rule could acquire holdings in Swedish or foreign companies corresponding to more than 5% of the vote-carrying shares. They could thus plan their investment decisions as they think fit, in terms of market trends, and so improve their financial situation by pursuing a skilful investment policy. That opportunity is restricted in the case of insurance companies that are under the control of the Swedish authorities and they are consequently at a disadvantage compared with their competitors in the same sector.

49. Moreover, that distortion of competition cannot be regarded as being inspired by the motive of protecting the financial health of insurance undertakings by spreading the risks attaching to investment. As the appellant has explained, the 5% rule would not prevent it from investing all its disposable resources in one of the large companies quoted on the Swedish stock exchange, given the ratio of

Skandia's free assets to the stock market value of one of those companies.

tation of Article 67 of the Treaty,¹⁶ as amended by Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty¹⁷ and Annex I thereto.

50. This is altogether incompatible with a Community rule that is intended specifically to harmonise national legislation on insurance, in particular the rules on the assets of insurance undertakings, both the assets used as cover for the technical provisions and the disposable assets.

51. Lastly, the 5% rule is contrary to the Community rules on free movement of capital enshrined in Article 73b of the EC Treaty,¹⁵ since a limitation on insurance companies' holdings in Swedish or foreign joint-stock companies constitutes a restriction on the movement of capital in one of its most characteristic forms, namely investment in shares.

52. 'Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links' is one of the capital movements to be liberalised pursuant to List A of Annex I to the First Council Directive of 11 May 1960 for the implemen-

53. There is consequently no doubt that participation in the capital of an undertaking is among the capital movements that have been liberalised and that the Swedish 5% rule restricts the freedom thus accorded. Could it, however, be held to be justified by Article 73d of the EC Treaty, under which Member States may take '... all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions'?

54. In my view, the answer must be in the negative. I have already observed that the purpose of the 5% rule is not to protect the solvency of insurance companies but to limit their influence on other sectors of the economy.¹⁸ Such a broad and undifferentiated objective (undifferentiated in that it does not even distinguish between the economic

¹⁵ — As inserted by point 15 of Article G of the Treaty on European Union.

¹⁶ — OJ, English Special Edition 1960, p. 49.

¹⁷ — OJ 1988 L 178, p. 5.

¹⁸ — At the hearing, the Swedish Government representative contended that the 5% rule did not affect the free movement of capital, inasmuch as it applied only to Swedish insurance companies, a view which I clearly cannot share, since those companies too are active beneficiaries of that freedom. In the course of the same statement, he admitted that the aim of the rule at issue was to 'prevent an excessive number of votes falling into the hands of a single shareholder'.

sectors that may be protected)¹⁹ cannot in my opinion justify a clear restriction on the free movement of capital that has nothing to do with the prudential supervision of financial institutions.

55. This conclusion is unavoidable, particularly in an area of business activity open to the free play of competition and in which national rules have to be adjusted to meet the criteria for coordination established in the Community directives on the sector in question. Not only do those harmonised rules make no provision for the possibility of imposing a rule such as the 5% rule on insurance companies' investment of their disposable resources in other domestic or foreign undertakings, they actually preclude any national action to regulate those companies' choice of assets.

56. The prudential supervision of insurance institutions may certainly justify decisions by the national authorities, in particular cases

and in the light of the circumstances surrounding a particular investment of free assets, prohibiting investments which jeopardise a company's solvency margin, suggest that the company is taking excessive risks, or even show a significant change in its objects as a result of the establishment, acquisition or control of dummy companies outside the insurance sector. But, I must emphasise, this does not justify a general and comprehensive prohibition in principle, such as the 5% rule that is the subject of the order for reference in this case.

The second question

57. By its second question, the national court seeks, in brief, to ascertain whether, if the national rule is not compatible with the provisions of the aforementioned directives, those provisions are such as to render the conflicting national rule inapplicable.

58. Clearly, the question assumes that, at the relevant time in the dispute in the main proceedings, the period allowed for incorporating the insurance directives into Swedish law had expired, a point that is not at issue and requires no further comment.

19 — In Case C-148/91 *Vereniging Veronica Omroep Organisatie* [1993] ECR I-487, the Court held that the provisions of the Treaty on the free movement of capital and the freedom to provide services must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organisation established in that State from investing in a broadcasting company established or to be established in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

59. The answer to this question referred by the national court must be in the affirmative, as the Court has confirmed on numerous occasions. A national rule that is incompatible with Community law may not be applied, and national courts must consequently refrain from applying it, in disputes they are called upon to hear and determine. The uniform application of Community law would not be guaranteed if Member States were to give their own national rules precedence over Community provisions, that is to say if they could apply national law in preference to Community law in the event of a conflict between them.

60. From the ground-breaking judgment in *Simmenthal*²⁰ to the recent decision in *IN. CO. GE. and Others*,²¹ that principle has been stated in sufficiently categorical terms: every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect the rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

61. When, as in this case, the provision at issue is contained in a directive, the Court's interpretation of that provision is universally

binding. In this context, the relative clarity of the provision is immaterial: once the Court has explained its meaning and shown it to be incompatible with a conflicting national provision, the national provision may no longer be applied. The relative clarity of the Community provision, raised by the referring court, may be relevant in other circumstances (for example, in the context of a State's responsibility for failure to transpose a directive correctly) but not when the issue is the primacy of Community law over conflicting national provisions.

62. The Court has consistently held, most recently in *IN. CO. GE. and Others*, cited above, that 'the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 16, and Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 37)'.²²

20 — Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

21 — Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze v IN. CO. GE. and Others* [1998] ECR I-6307.

22 — Joined Cases C-10/97 to C-22/97 *IN. CO. GE. and Others*, cited in footnote 21 above, paragraph 23.

Conclusion

63. I therefore propose that the Court should give the following answer to the questions referred by the Regeringsrätten:

1. Article 18(1) of Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance and Article 21(1) of Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance preclude the application of a national provision to the effect that insurance companies may not, without special administrative authorisation, own more shares in a domestic or foreign joint-stock company than corresponds to 5% of the votes attached to all the shares.
2. A national court which is called upon to hear and determine an appeal against an administrative decision based on such a provision is under a duty to give full effect to the aforementioned directives, if necessary disapplying the provision in question.