COMMISSION DECISION

of 5 December 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.307 — Fire insurance (D))

(Only the German text is authentic)

(85/75/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (1), as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to the application for negative clearance or exemption filed, pursuant to Articles 2 and 4 of Regulation No 17, on 23 September 1982 by the Verband der Sachversicherer eV, Cologne, Federal Republic of Germany,

Having decided on 9 September 1983 to initiate proceedings in the case,

Having given the Verband der Sachversicherer eV an opportunity to reply to the objections raised by it, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

A. Facts

(1) On 23 September 1982 the Verband der Sachversicherer eV, Cologne (Association of Property Insurers — 'VdS'), as a precautionary measure, filed an application for negative clearance or exemption pursuant to Articles 2 and 4 of Regulation No 17 for, among other things, a 'Prämienempfehlung zur Stabilisierung und Sanierung des Geschäfts der industriellen Feuer- und Betriebsunterbrechungsversicherung' (Premium Recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business) issued in June 1980 (Annex 1).

1. *Structure of the market and the undertakings involved*

(2) 1.1. In the class of insurance that provides cover against industrial fire risks and consequential loss due to disruption of business activities, the common market is still split into several sub-markets corresponding to the territories of Member States in which premium rates vary considerably. One important reason for this is the continuing national regulation of insurance markets, which, despite all the progress that has been made towards integration, still plays a key role in a number of Member States. The situation has changed little since the restrictions on freedom of establishment for direct non-life insurance were removed under the Council Directive of 24 July 1973 (OJ No L 228, 16. 8. 1973, p. 20).

(3) Even the confirmation by the European Court of Justice (for the first time in van Binsbergen — Case 33/74 of 3 December 1974) of the freedom of Community undertakings to provide services in a Member State without needing to be established there has not yet in practice resulted in the business of industrial fire and consequential loss insurance being carried on throughout the common market from an insurance company's head office. Instead, fire insurers that also do business outside their own country establish branch offices or local subsidiaries in other Member States, as they do in non-Community countries.

(4) 1.2. In the Federal Republic of Germany 17 Community fire insurers having their head office in other Member States transact industrial fire insurance business through German

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

branch offices (without separate legal personality), which are treated as German companies under the Versicherungsaufsichtsgesetz (Insurance Supervision Act). The Community fire insurers are all members of the VdS. They hold only a small share of the market, put by the latest figures at under 3 % of annual gross premium income.

(5) Altogether, 126 domestic and foreign fire insurers provide industrial fire and consequential loss insurance in Germany. Not all of these, however, operate as independent suppliers on this market, supplying all their capacity as leading or sole insurers. Especially the smaller ones transact all or a major part of their business as co-insurers, where the conditions and premium rates are negotiated by the leading insurer and the participating co-insurers must either accept them or forgo the business.

(6) The Community fire insurers from other Member States that are represented in Germany by branch offices (without separate legal personality) are particularly dependent on this practice. Almost all of them transact the bulk of their industrial fire and consequential loss insurance business as co-insurers with a German leading insurer, so that the negotiation of the conditions and premium rates of the insurance contracts concluded by them is largely in the hands of the German insurers.

(7) The annual gross premium income earned in the Federal Republic of Germany on industrial fire and consequential loss insurance contracts in respect of German risks (i.e., situated in Germany) amounts to about DM 2 400 million. Of this figure, the insurance company with the largest market share accounts for 12,74 %, while the three, five and 10 largest companies account for 36,67 %, 50,95 % and 73,80 % respectively.

(8) 1.3. The Federal Republic can also be said to form a sub-market separate from the rest of the common market as far as the reinsurance of industrial fire and consequential loss insurance business is concerned. Although reinsurance has legally been liberalized in Germany, as in other Member States, in accordance with the Council Directive of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession (OJ No 56, 4. 4. 1964, p. 878/64), foreign reinsurers are indirectly supervised by the German supervisory authorities when they monitor the way reinsurance is arranged by the primary insurers whom they directly supervise. If the regulatory authorities have misgivings about a reinsurer's financial capacity or on some other ground, they try to get the direct insurer to reduce the proportion of the risk ceded to the reinsurer or to terminate the contract. To a certain degree, therefore, features of the previous domestic market have been retained also in reinsurance and this goes some way towards explaining the strong position of German reinsurers in Germany.

(9) 1.3.1. The domestic and foreign companies involved in reinsurance in Germany consist of both specialized reinsurers, which write reinsurance business almost exclusively and direct insurers which do so in addition to their direct business. Estimates of the volume of reinsurance business (gross premium income including incidental payments) transacted in respect of German industrial fire and consequential loss risks range from DM 1 200 million to DM 1 900 million a year, although mostly figures of between DM 1 700 million and DM 1 900 million are put forward. On the conservative market estimate of DM 1 700 million, the information obtained by the Commission indicates that the 26 German specialized reinsurers carrying on this class of insurance hold over two-thirds of the market.

(10) 1.3.2. The German specialized reinsurers therefore collectively occupy an extremely strong position in the insurance of industrial fire and consequential loss risks situated in Germany. This is true in spite of the fact that they face some competition from foreign rein-

surers and that active competition is also quite common between German reinsurers (including the non-specialized ones who mainly transact direct insurance). The point is that the multiple business links between German specialized reinsurers as a result of their regular cooperation in reinsuring proportions of the same risks and their reciprocal reinsurance of one another (retrocession) allow them at any time to act in concert *vis-à-vis* their business partners, the direct insurers, in matters of vital importance.

2. *Background to and contents of the premium recommendation*

(11) 2.1. The market in industrial fire and consequential loss insurance has always been subject to cyclical fluctuations in loss experience and premiums. For example, in Germany the loss ratio (losses to premium income) for this business rose from 72,1 % in 1978 to 93,4 % in 1979. Average premium rates, on the other hand, fell from 1,93 % in 1973 to 1,08 % in 1979, i.e. by 44 %, for industrial fire insurance and even more sharply, from 2,93 to 1,49 % over the same period, for consequential loss insurance. In the five years prior to implementation of the recommendation in Germany, the combined ratio (losses and expenses to premiums) invariably exceeded premium income (1976: 108,2 %; 1977: 113,4 %; 1978: 104,1 %; 1979: 125,4 %).

(12) In 1979, the year before the recommendation was issued, the loss ratio of 93,4 % for industrial fire and consequential loss insurance was a record. In the years that followed, the ratio fell to 93 % (1980), 91,1 % (1981) and 86,8 % (1982), but according to the VdS in 1983 it rose again to 97 %.

(13) 2.2. A similar decline in the performance of this class of insurance can be seen in other major industrialized countries such as the United States. Two main reasons are given as to why insurance companies have not responded by raising premium rates. First, the companies' investment income, which has been boosted by high interest rates, has enabled them to offset underwriting losses ('cash-flow underwriting'). Secondly, most fire insurers, as composites or through sister companies, are involved in several classes of commercial insurance at once and attempt to win substantial business in other classes by charging their commercial clients below-cost premiums for fire insurance. They have an incentive to do so if their other business with the customer is sufficiently profitable.

(14) 2.3. On the basis of preliminary work by its Committee of Experts on Industrial Fire Insurance, the association of German property insurers, the VdS, to which almost all fire insurers operating in Germany belong, wrote to the Federal Supervisory Office for Insurance and to the Federal Cartel Office on 21 May 1980 notifying them, in accordance with paragraph 102 of the German Act against Restraints of Competition, of a planned 'Non-binding recommendation on measures to re-establish stable and viable conditions in the industrial fire insurance and consequential loss insurance business' (Annex 1). Sections I, IV and V of the recommendation came into effect in June 1980 and the remainder on 1 August 1980. The VdS claims that not all its members have complied with the recommendation as it would have wished.

(15) The recommendation distinguished between measures to stabilize existing business (section I) and measures to put existing business back on to an economic footing (sections II and III). The latter involved increases in the premiums on contracts of a certain size that were shortly coming up for renewal.

On policies coming up for renewal between 31 December 1980 and 30 December 1981 and giving cover of DM 50 million or more, premiums were to be raised by at least 10 %. If the policy had had a claims ratio (claims to premiums paid) of more than 150 % over the preceding five years, the increase was to be at least 20 %.

On policies coming up for renewal between 31 December 1981 and 30 December 1982 and giving cover of DM 1 million or more, premiums were to be increased by at least 20 %. If the policy had had a claims ratio of more than 150 % over the preceding five insurance years, the increase was to be at least 30 %.

(16) Premiums on policies coming up for renewal after 31 December 1982 were to be brought into line with the new premium guidelines applicable with effect from that date ('Tarif "82" '). This part of the recommendation has thus now been superseded by the new tariff, which was notified to VdS members in a circular dated 25 June 1982 and came into effect on 1 January 1983. The tariff, which was notified to the Commission with the recommendation on 23 September 1982, is not covered by the present proceedings, however.

(17) 2.4. The German reinsurance companies, which are naturally as interested in charging economic premium rates as primary insurers, decided at the VdS's behest to back up the recommendation by including in reinsurance treaties from 1 January 1981 a special Prämienberechnungsklausel (premium calculation clause) (Annex 2). Under this clause, which had the approval of the German supervisory authorities, a risk that was not rated in line with the recommendation would, in the event of a claim, be treated as under-insured and the reinsurer's contribution reduced accordingly. Four reinsurers have told the Commission that they include this clause only in reinsurance treaties with German insurers and not in those with foreign insurers insuring German risks through a branch office.

(18) 2.5. The VdS recommendation was discussed by Commission and VdS representatives in Brussels on 10 February 1981. The discussions centred on whether the recommendation and the associated practices of the insurance companies concerned ought to be notified to the Commission under Article 4 of Regulation No 17. (A year earlier on 27 and 28 February 1980 Commission officials had met representatives of the VdS in Cologne and had advised them that it would be wise to notify existing and future premium recommendations or guidelines since it was possible they were caught by Article 85 (1).)

(19) Following the meeting in Brussels on 10 February 1981, the Gesamtverband der Deutschen Versicherungswirtschaft eV (General Association of the German Insurance Industry), also acting on behalf of the VdS, wrote to the Commission on 25 February 1981 rejecting its arguments regarding the applicability of Article 85 (1). The Association referred to a letter that the then Director-General for Competition had sent to the Secretary-General of the Comité Européen des Assurances (CEA) on 3 July 1962 (Annex 3) and on which it had published a statement in its Fifteenth Annual Report (1962/63, p. 108) (Annex 4). Throughout the proceedings the VdS consistently maintained the same position, that it was still, as it had always been, entitled to issue a recommendation like that of June 1980, regardless of Article 85.

(20) The Commission obtained information from a number of Community insurers about the application of the recommendation. In one case the company concerned refused to give the information and the Commission on 9 December 1981 took a decision requiring it to do so, giving as the reason the possibility that the recommendation and any resulting concerted practice between VdS members might constitute an infringement of Article 85 (1). The decision was not appealed and was published in the *Official Journal of the European Communities* (OJ No L 80, 26. 3. 1982, p. 36).

(21) The Commission asked the VdS for details of the figures on which it based its calculation of members' average expenses. The VdS sent a table of members' expenses ratios compiled from a 1980 survey (Annex 5), it pointed out that its calculation of required premium rates included 25 % for administrative costs/com-

mission, 5 % for fire protection tax and 3 % profit.

B. Applicability of Article 85 (1) of the EEC Treaty

(22) 3. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. As the Commission held in its Decision of 30 March 1984 in another case concerning the insurance sector (Case IV/30.804 — NUOVO CEGAM, OJ No L 99, 11. 4. 1984, p. 29), the agreements, decisions or concerted practices referred to in Article 85 can relate to either goods or services. It follows that Article 85 also applies to the insurance industry.

(23) 3.1. The VdS is an association of undertakings within the meaning of Article 85 (1) and, having legal capacity, is prohibited from taking decisions restrictive of competition of the kind referred to therein. The June 1980 recommendation was adopted by the competent body under the VdS's rules and duly brought by its executive to the notice of members as an official statement of the Association's policy. In spite of the fact, therefore, that the title of the recommendation describes it as being 'non-binding',. the recommendation was in the nature of a 'decision' by an association of undertakings within the meaning of Article 85. It is sufficient for this purpose that the recommendation was brought to the notice of members as a statement of the association's policy provided for in, and issued in accordance with, its rules.

(24) 3.2. The recommendation had the object of restricting competition in industrial fire and consequential loss insurance within the common market. This conclusion is not invalidated by the fact that the recommendation related only to risks situated in Germany. Competition 'within the common market' is still involved even if the demand for a particular good or service — here, for insurance of risks situated in Germany — is concentrated in one Member State.

(25) 3.2.1. The intention to restrict competition is clear from the wording of the recommendation itself, calling as it does for increases in premium rates of 10, 20 or 30 % in specified circumstances. It is irrelevant for the purposes of Article 85 (1), according to its clear wording, whether the object of the recommendation was always achieved. It is sufficient that the VdS's decision, which was made in accordance with German filing requirements and was widely publicized, had the object of appreciably restricting competition. It should be borne in mind that the VdS's membership includes all 126 insurers involved in industrial fire insurance in Germany.

(26) 3.2.2. The restriction of competition was significantly reinforced by the inclusion by German reinsurers of the special 'premium calculation clause' (see paragraph 17 above) in their reinsurance treaties from 1 January 1981 to back up the recommendation. This view is supported by the strong market position of German specialized reinsurers discussed at 1.3 above (paragraphs 8 to 10). Only a strong market position can explain how the German reinsurers were able to adopt a practice such as the uniform introduction of the 'premium calculation clause' from 1 January 1981 without the support of the other companies engaged in the reinsurance market and without having to fear any permanent loss of market share.

(27) On account of their strong market position the German specialized reinsurers were able by uniformly introducing the special 'premium calculation clause' in reinsurance treaties from 1 January 1981 to exert pressure on the primary insurers to comply with the anti-competitive recommendation issued by the VdS.

This applied particularly to those insurers which, although they had not formally distanced themselves from the Association's decision to issue the recommendation, had for business reasons little interest in abiding by it in practice.

(28) 3.2.3. The restriction of competition intended by the VdS's recommendation and reinforced by the conduct of the reinsurers cannot be justified on the ground that both the VdS decision to issue the recommendation and the reinsurers' decision to apply the 'premium calculation clause' was duly filed with the German supervisory authorities. An infringement of the EEC competition rules is not vindicated simply because national authorities, for reasons that may make sense from the point of view of the national interest, have sanctioned or tacitly approved the conduct of the undertakings involved. The argument that the Commission is obliged under the EEC Treaty and under Regulation No 17 (Article 10 (2)) to administer the competition rules in close and constant liaison with the competent authorities of the Member States does not alter this conclusion. The Commission, it is true, must endeavour in its interpretation and enforcement of the competition rules to avoid situations arising in which economic policy decisions of the national authorities are frustrated without valid reason. Where, however, as in the present case, there has been a clear breach of binding principles of EEC competition law, it is the settled case law of the European Court of Justice that in the event of conflict EEC law must prevail.

(29) 3.3. The likelihood of the recommendation affecting trade between Member States derives first from the fact that it was also addressed to the Community fire insurers members of the VdS that have their head offices outside Germany. It is irrelevant whether the Community fire insurers concerned transact business in Germany as leading or sole insurers or as co-insurers. In the former case, they were the direct addressees of the recommendation and directly subject to its effects. In the latter case, the recommendation could indirectly affect the profitability of cross-frontier co-insurance business and the incentive of Community insurers to participate in such business via its influence on the German leading insurers who largely took the decision whether or not to apply the recommended increase in premiums on renewed policies. The same would have applied if Community fire insurers having their head offices outside Germany and transacting German business entirely or predominantly as co-insurers had not belonged to the VdS.

(30) 3.3.1. Community fire insurers doing business in the Federal Republic of Germany but having their head offices elsewhere are taking part in trade, that is to say cross-frontier exchange of goods and services, between Member States. This fact is not altered by the rules for the establishment of foreign insurance companies under the German Insurance Supervision Act, which the Commission in any case believes are inconsistent with the freedom to provide services under Article 59 of the EEC Treaty and has now challenged before the Court of Justice (Case 107/84). Under these rules EEC insurers may only operate in the Federal Republic of Germany, except in cases governed by the Council Co-insurance Directive of 30 May 1978 [1], if they are represented there by a branch office (without separate legal personality). German legislation is entitled to treat such branches as independent domestic undertakings. However, this does not make them separate legal entities established in the Federal Republic for the purposes of Articles 85 *et seq.*

(31) Nor is the objection valid that the service which forms the essence of an insurer's activities, namely the assumption of specified risks, is provided within the Federal Republic of Germany. It is true that the insurance contracts are signed within the country by the insurer's representative who has underwriting authority, that foreign insurers must provide within the country certain financial guarantees for the observance of their contractual obligations and that claims are often paid by the foreign insurer from financial resources within the country. Nevertheless, the crucial fact remains that the insurance contract — the acceptance of a specified risk in return for payment of the insurance premium — arises solely with and for the benefit and to the det-

[1] OJ No L 151, 7. 6. 1978, p. 25.

riment of the foreign insurer (through his representative in the country). Furthermore, from the point of view of competition a branch office is merely an extended arm of the foreign insurer.

In this respect it is significant that on several occasions in the course of the investigation branch offices initially replied to requests for information stating that they would first have to refer to their head office abroad.

(32) Much more so than a subsidiary, a branch office is entirely dependent on the goodwill of the foreign insurer that has set it up. Branch offices are frequently required to arrange insurance cover for local subsidiaries of foreign companies insured with the branch owners and with which they have international insurance agreements. The management of the foreign insurance company not only lays down policy for the branch office but profits made on its operations also eventually accrue to the foreign insurer and in the event of persistent losses it is the foreign insurer that must replenish the branch office's local finances from its resources abroad. Lastly, and most importantly, national public law on insurance supervision does not prevent the foreign insurer as such deriving civil rights and obligations from the insurance contracts arranged by the branch office. In view of all these factors, it would be contrived to argue that insurance companies with branch offices in other Community countries did not take part in cross-frontier exchanges of services between those countries and the countries in which they have their head office.

(33) 3.3.2. The recommendation issued by the VdS was likely to affect trade between Member States appreciably even though the share of the German market held by other EEC insurers is relatively small (less than 3 % of gross premium income). There is always likely to be an appreciable effect on trade between Member States when a restriction of competition applies to virtually all the inter-State trade in the goods or services concerned that is currently found or could, in the absence of the restriction, develop in the foreseeable future.

(34) The fact that, as a result of the business and legal environment which affects the volume of inter-State trade, only a small amount of inter-State trade is currently found or can be expected, as in the present case, does not mean that measures that seek to reduce competition within such trade as exists do not have an appreciable effect and are therefore permissible. The share of the German market held by the Community fire insurers belonging to the VdS is in these circumstances not very relevant, since this market share accounts for the entire extent of cross-frontier provision of industrial fire insurance between other Member States and the Federal Republic of Germany and there is no actual prospect of significant numbers of new competitors based in other Community countries entering this market in the foreseeable future.

(35) 3.3.3. The VdS's premium recommendation, in conjunction with the German reinsurers' introduction of the 'premium calculation clause', was also likely to have the effect of helping to isolate national markets and of hindering the integration of the common market sought by the EEC Treaty. In this connection it must be made clear that the pressure exerted by German reinsurers through their introduction of the 'premium calculation clause' did also affect Community fire insurers doing business in the Federal Republic of Germany but based elsewhere. As stated at 1.2 above (paragraph 6), virtually all such insurers write the bulk of their industrial fire and consequential loss business as co-insurers with a German leading insurer. Under these circumstances they were affected by the application of the 'premium calculation clause', whether they arranged their own reinsurance with foreign reinsurers, say, in their own country, or with German reinsurers who did not insist on this clause in treaties with them (see above, paragraph 17). Although their reinsurance treaties did not include the German 'premium calculation clause', they were bound to feel its

restrictive effect through their German leading insurer who in most cases probably did place his reinsurance with German specialized reinsurers, in view of the particularly strong position held by German reinsurers on their own market.

(36) In these circumstances, the likelihood of an isolation of national markets arose from the fact that other Community insurers, who for insuring major risks are dependent on cooperation with a German leading insurer, were prevented by their relationship with the German leading insurer from offering cheaper premium rates than their German competitors in order to strengthen their position on that market. Under the freedom to provide services in other Member States without being established there, a right which the Commission maintains already exists (hence Case 107/84, see paragraph 30 above), large EEC insurance companies from other Member States ought to be able to act as leading insurers, and so to offer such rates, in Germany. In practice, however, they cannot act as leading insurers there — even under the less stringent requirements of the co-insurance Directive of 30 May 1978 (paragraph 30 above) — without being subject to the restrictive establishment rules of the German Insurance Supervision Act which are still enforced.

C. Non-applicability of Article 85 (3) of the EEC Treaty

(37) 4. Article 85 (3) provides that the provisions of Article 85 (1) may be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(38) 4.1. Under the second sentence of Article 4 (1) of Regulation No 17, the Commission may not take a decision in application of Article 85 (3) until the agreements, decisions or concerted practices in question have been notified to it. The VdS is not released from the notification requirement by Article 4 (2) (1) of Regulation No 17 whereby agreements, decisions or concerted pratices the only parties to which are undertakings from one Member State and which do not relate either to imports or to exports between Member States are dispensed from notification. Since the recommendation was issued as a decision by an association of undertakings to which Community fire insurers having their head offices in other Member States belong, the decision does not meet the conditions of Article 4 (2) (1). It is irrelevant that the Community insurers conduct their business in the Federal Republic of Germany through local branch offices (see section B 3.3, paragraphs 30 to 32).

(39) 4.2. An exemption under Article 85 (3) cannot be granted in respect of the period after 23 September 1982, when the recommendation was notified, because the necessary conditions are not met. The recommendation could not contribute to an improvement in the services provided by the fire insurers.

4.2.1. The main argument adduced by VdS, viz. that the loss statistics which individual companies possess fall a long way short of what is needed for the proper rating of risks, is correct as such. It does not, however, follow that a decision by an association to recommend premium increases of 10, 20 or even 30 % necessarily improves the services provided by the insurance industry. It is not sufficient to prove that premium levels had been held down by 'excessive' competition

and that because of financial constraints all insurers urgently needed increased revenue. Commercial constraints of that sort are common to all industries, particularly in a recession, and cannot by themselves justify restrictions of competition.

(40) 4.2.2. Nor is it a valid objection to argue that the purpose of insurance and the relevant statutory provisions require that the insurer must at all times be capable of meeting the obligations arising from insurance contracts while keeping the different classes of business separate. There must, of course, be adequate safeguards for policy-holders against commercial malpractice by insurers who behave irresponsibly. These are needed at least to the extent that policy-holders are not themselves in a postion to choose financially sound undertakings to provide their insurance cover. This does not mean, however, that a collective increase in premiums is a means of improving insurance services that would justify an exemtion from the competition rules under Article 85 (3).

(41) 4.2.2.1. As the Court of Justice has held in Grundig-Consten (Joined Cases 56 and 58/64 [1966] ECR 299, at 348), not every measure that has beneficial effects on the activities of the undertakings involved is to be regarded as an improvement in economic processes within the meaning of Article 85 (3). Instead, the dangers for competition flowing from a particular measure have to be weighed against the improvements to which it leads. The measure must, in particular, bring appreciable objective advantages that are such as to offset the associated disadvantages for competition.

(42) 4.2.2.2. This test is not met by the recommendation issued by the VdS. Calling as it does for across-the-board increases in premium levels, the recommendation goes far beyond what can be regarded as acceptable cooperation between insurers in collectively analyzing loss statistics and translating the results into practical guidance for writing policies. That the recommendation exceeded the bounds of acceptable cooperation is seen not only from the fact that across-the-board increases of 10, 20 or 30 % fail to take into account the cost and revenue situations of individual insurers but also that the increases were based on gross premiums, i.e. premiums in which individual cost and revenue situations were ignored by providing for across-the-board supplements for expenses and profit as percentages of statistically determined claims (including contingencies).

(43) A comparison between the expense components applied by the VdS in setting its gross premiums (see end of paragraph 21) and the expenses ratios given in Annex 5 (based on the last survey conducted by VdS in 1980) amply demonstrates that there are marked differences in the level of expenses from one company to another that ought to be reflected in the companies' tariffs. If varying tariffs based on collectively ascertained loss experience and individually calculated expenses are possible in other classes of property insurance, there is no reason why fire insurers too cannot focus their cooperation on loss experience.

(44) 4.2.2.3. If individual insurance undertakings were to endanger their capacity at all times to meet the claims arising from their insurance business by failing to make responsible provision for expenses in spite of a deterioration in their overall profitability, then the powers of intervention of the supervisory authorities would probably be sufficient to remedy the situation. Such intervention would seem to be a lesser evil compared with a system whereby inefficient insurers were kept afloat against the public interest whilst the efficient ones earned inflated profits taking into account their investment income.

D. Applicability of Article 3 (1) of Regulation No 17

(45) 5. For the reasons set out in sections B and C above, the Commission is obliged to find that the VdS's recommendation infringed

Article 85. Although the present recommendation was apparently only in effect from 1 June 1980 to 31 December 1982 (see paragraphs 14 to 16), in view of the legal view persistently taken by the VdS in this proceeding there can be no reasonable doubt that the association might in future issue similar recommendations unless it is made clear that the conduct objected to is incompatible with Article 85. It is therefore necessary to indicate the permissible limits under Article 85 of cooperation between insurance undertakings in the field to which the notification refers,

HAS ADOPTED THIS DECISION:

Article 1

The recommendation issued by the Verband der Sachversicherer eV to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business in June 1980 constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application for negative clearance under Article 2 of Regulation No 17 or exemption under Article 85 (3) of the EEC Treaty for the recommendation referred to in Article 1 is hereby refused.

Article 3

This Decision is addressed to the Verband der Sachversicherer eV, Cologne, Federal Republic of Germany, Riehler Straße 36.

Done at Brussels, 5 December 1984.

For the Commission
Frans ANDRIESSEN
Member of the Commission

ANNEX 1

Non-binding recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business ('Unverbindliche Empfehlung zur Stabilisierung und Sanierung des FI- und FBU-Geschäfts') (June 1980)

I. *Stabilization of existing business:*

1. In the case of contracts to which the 'Principles' (1) are applicable, the premium rate currently received will be changed only where this is necessary on account of objective changes in the rating characteristics.
2. Multi-year contracts will not be concluded and existing contracts will not be extended on a multi-year basis (point IV (2) of the 'Principles').

II. *Restoration of existing business to an economic footing:*

1. For contracts terminating between 31 December 1980 and 30 December 1981 in which the sum insured is at least DM 50 million, the premium rate received will be increased by at least 10 %. Where a contract has shown a claims ratio (claims to premiums received) of over 150 % over the last five insurance years, the increase will be at least 20 %.

   Contracts may be concluded for a maximum term of two years.
2. For contracts terminating between 31 December 1981 and 30 December 1982 and having a sum insured of DM 1 million or more, the premium rate received will be increased by at least 20 %. Where a contract has shown a claims ratio (claims to premiums received) of over 150 % over the last five insurance years, the increase will be at least 30 %.

   Contracts may not be renewed for more than one year.
3. Contracts terminating after 31 December 1982 will be brought into line with premium rates in the current premium guidelines.
4. Paragraphs 1 and 2 do not apply to contracts rated in accordance with the recommendations of the Rating Committee. Such contracts shall continue to be referred to the Rating Committee.
5. Additional insurance will be provided at the premium rate received under the main contract.

III. For the purpose of adjusting premiums as provided for in this recommendation, multi-year contracts will be cancelled where claims in any year exceed the annual premium or the claims ratio (claims to premium received) has exceeded 150 % over the last five insurance years.

IV. Except where otherwise provided in sections I to III, the 'Principles' and the relevant explanatory circulars ('F-GR-Rundschreiben') apply. This applies in particular to:

— new business (point III of the 'Principles'): New business in which the sum insured exceeds DM 50 million is to be referred to the Rating Committee,

— all the other particulars of contracts (point IV of the 'Principles'),

— the enquiry and investigation procedure (point VIII of the 'Principles'),

— exchange of information between managements (point X of the 'Principles'):

In co-insurance the leading insurer informs participating co-insurers of the intended measure and secures their agreement.

V. In case of doubt, this recommendation is to be interpreted in such a way as not to jeopardize the goal of re-establishing stable and viable conditions.

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(1) Grundsätze für die Tariffierung der industriellen und großgewerblichen Feuer- und FBU-Risiken (Principles for the rating of industrial and large-scale commercial fire and consequential loss insurance risks, as amended on 3 February 1977).

ANNEX 2

Premium calculation clause ('Prämienberechnungsklausel')

1. The ceding insurer shall transact industrial fire and consequential loss insurance covered by the reinsurance contract (including facultative business) in respect of risks situated in Germany in accordance with the 'Premium guidelines for industrial fire and consequential loss insurance' and the 'Non-binding recommendation to re-establish stable and viable conditions in the industrial fire and consequential loss insurance business' issued by the Verband der Sachversicherer e.V. in force at the relevant time.

2. The reinsurer will check that paragraph 1 has been observed whenever a loss occurs on a fire and/or consequential loss insurance policy which for 100 % of the policy amounts to DM 1 million or more.

3. Where the agreement as set out in paragraph 1 is departed from, the reinsurer shall treat the under-rating as under-insurance and shall correspondingly reduce his contribution to the claim. However, the maximum extra share of the loss borne by the ceding insurer on 100 % of obligatory insurance treaties shall be limited to the simple amount of his own retention under the cession in question. This additional loss layer may not be reinsured elsewhere.

4. In case of doubt as to the level of the premium to be charged in accordance with the agreement at paragraph 1, the matter shall be referred for arbitration to the Rating Committee of the VdS.

5. The implementation of the above provisions shall be negotiated when this reinsurance treaty is renewed on 1 January of each year.

ANNEX 3

Translation

Original French

European Economic Community,
Commission,
Directorate-General for Competition

To Mr Favre, Secretary-General

Dear Sir,

Your letter to Mr von der Groeben concerning Regulation No 17 has been brought to my attention.

Subject to a subsequent examination of the entire matter of the application of the competition rules in the insurance sector, I consider that the two questions put by you in your letter call for the following answers:

1. As regards agreements concluded between insurance undertakings with a view to pooling statistical experience, I feel that it must be recognized that such agreements do not generally have the object of restricting, distorting or preventing competition within the Community. Were the generalized dissemination of statistical data to lead to the acceptance of a uniform tariff, however, the view might be taken that the agreement even indirectly has as its object a restriction of competition between the insurance undertakings party to it.

2. Regarding the dispensation from notification under Article 4 (2) (1) of Regulation No 17, this dispensation is only granted where the sole parties to the agreement are undertakings from one Member State and the agreement does not relate either to imports or exports between Member States. In the insurance field, the supervisory rules generally require a foreign undertaking wishing to do business in the territory of a Member State to constitute itself as a company governed by national law or to appoint a representative who is a national of the country in which the insurance business will be carried on. Consequently, it appears that, within the territory of that country, different insurance undertakings rank as nationals, thereby permitting application of Article 4 (2) (1) of Regulation No 17.

(Complimentary ending)

The Director-General for Competition
P. VERLOREN VAN THEMAAT

ANNEX 4

Extract from the 15th Annual Report 1962/63 (p. 108) of the Gesamtverband der Deutschen Versicherungswirtschaft e.V. (General Association of the German Insurance Industry)

3. *Resident status for branch offices of foreign companies*

The treatment of branch offices of foreign companies as 'residents' for the purposes of Article 4 (2) (1) of Regulation No 17 appears to have once again been questioned.

In our last Annual Report (1) we reproduced the Commission's statement that for branch offices resident status and hence the application of Article 4 (2) (1) of Regulation No 17 can be assumed, so that agreements within a Member State are not deprived of that status and so lose the dispensation from notification where resident branch offices of foreign companies are party to them.

Consideration is now being given to limiting this approach to cases where the establishment has the form of a company specially incorporated in the country concerned (legally independent subsidiary), but not applying it in what is by far the commonest situation in Germany of appointment of a representative with underwriting authority. The sole reason for this is the contractual consideration that a representative acts as such and not on his own account and that the foreign undertaking he represents derives rights and obligations under the agreements entered into by him. The result would be that purely national agreements would in future rank as 'agreements between undertakings in several Member States' and hence be notifiable.

However this assessment ignores economic reality. The agreements are purely national agreements to which the foreign undertakings wish to be party only in respect of the national territory and can only become party through a representative since they cannot engage in any business in Germany directly. The conditions for branch offices in Germany require such a high degree of legal and financial independence that there is no distinction between a subsidiary and a branch office run by a representative with underwriting authority when it comes to participating in agreements.

(1) Annual Report 1961/62, p. 69.

ANNEX 5

Expenses ratios, from a 1980 survey

(including 5 % fire protection tax)

Expenses ratio (%)	Fire insurance		Consequential loss insurance	
	Number of undertakings	Market share	Number of undertakings	Market share
under 20	7	5,88	2	7,13
20 – under 22	4	0,30	1	0,19
22 – under 24	1	0,57	1	0,08
24 – under 26	6	5,99	1	0,02
26 – under 28	3	0,67	5	0,97
28 – under 30	4	3,05	9	7,39
30 – under 32	9	15,42	9	19,97
32 – under 34	19	15,59	11	5,88
34 – under 36	10	7,24	17	20,70
36 – under 38	11	3,90	9	3,41
38 – under 40	6	8,82	6	6,79
40 – under 42	5	2,82	6	7,55
42 – under 44	5	0,69	7	4,35
44 – under 46	5	0,19	3	0,57
46 and over	6	0,40	8	0,27
Total	101	71,53	95	85,27