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# EEC Competition Rules Apply to the Insurance Sector: *VdS v. Commission*

*Philippe De Smedt\**

## I. INTRODUCTION

In 1984 the European Court of Justice rendered judgment in *Verband der Sachversicherer v. Commission*.<sup>1</sup> As the direct result of this judgment, a “trade” association which represents the interests of insurers may infringe upon the competitive rules of Article 85(1) of the EEC Treaty<sup>2</sup> by recommending or requiring that its members uniformly increase their premiums. In terms of its historical and practical significance, however, *VdS* stands for a much broader proposition: it would appear that the insurance sector as a whole is now subject to the EEC rules of competition, in particular Articles 85 and 86 of the Treaty of Rome.<sup>3</sup>

Within the context of the specific situation confronting the court, this article will demonstrate that the *VdS* judgment should have a major impact on insurance companies and other insurance-related undertakings doing business in the EEC.

## II. THE FACTS

This procedure stemmed from certain activities of Verband der Sachversicherer (*VdS*), a Cologne-based association which represented the interests of property insurers, including those providing fire and consequential loss coverage, which are authorized to do business in West Germany.

To be more precise, the controversy in *VdS* centered on one of the *VdS* “special committees.” It appeared that *VdS* established, in addition to its three organs (membership section, board of directors, and director), special committees pertaining to the various kinds of property insurance represented in the

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<sup>1</sup> Case 45/85, Judgment of January 27, 1984 (not yet published). Any references to the court judgment herein are to the official French translation, whereas any reference to the Conclusions of Advocate General Darmon are to the original French text.

<sup>2</sup> Treaty Establishing the European Economic Community *done* at Rome, March 25, 1957, 298 U.N.T.S. 3, art. 85 [hereinafter EEC Treaty].

<sup>3</sup> *Id.* at arts. 85 and 86.

membership. One of these special committees, representing the interests of members providing fire and consequential loss coverage, "recommended" premium increases for VdS members providing such coverage. This price recommendation, which was approved by the VdS board of directors, provided for uniform premium increases of 10 per cent, 20 per cent, or 30 per cent, depending on the circumstances. This recommendation went into full effect in August 1980 and the Commission was notified two years later. By a decision taken on December 5, 1984, the Commission determined that the recommendation amounted to a "decision" by an association of undertakings which infringed Article 85(1) of the EEC Treaty and refused to grant a negative clearance or an exemption under Article 85(3).<sup>4</sup> VdS then sought to annul this decision in the European Court of Justice on the basis of Article 173.<sup>5</sup>

### III. LEGAL DISCUSSION

The application of VdS to the court raised six grounds for annulment: (1) that the EEC competition rules do not apply in the sector of insurance; (2) that the Commission is not competent to intervene in the economic policy of a member state; (3) that the disputed recommendation did not constitute a "decision" of an association of undertakings; (4) that the disputed recommendation had neither the object nor effect of restricting competition; (5) that trade between member states would not be affected by the recommendation; and (6) that the Commission wrongfully refused an exemption under Article 85(3).

#### A. *Application of the EEC Competition Rules to the Insurance Sector*

The first and primary argument of VdS began with the assumption that the EEC competition rules (Articles 85 *et seq.*) do, in principle, apply to the insurance field. It was asserted, however, that the application of this Article, "sans restrictions ou réserves," could not take place until or unless the Council of Ministers, pursuant to Article 87(2)(c),<sup>6</sup> had determined the particular aspects of the insurance sector which were subject to the EEC competition rules. In this particular factual and legal context, the applicant was arguing that Article 85 (1) could not be enforced without prior Council approval. It was not disputed that the Council had not taken action under Article 87(2)(c) bringing the insurance sector within the ambit of the EEC competition rules.

In making this argument, VdS was suggesting a novel reading of Article 87(2)(c), which merely provides that any regulations or directives adopted by the Council which gives effect to Articles 85 and 86 shall be designed "(c) to

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<sup>4</sup> *Id.* at art. 85.

<sup>5</sup> *Id.* at art. 173.

<sup>6</sup> *Id.* at art. 87.

define, if need be, in the various branches of the economy, the scope of the provisions of Article 85 and 86 . . . .” VdS did not appear to dispute that Article 87(2)(c) does not, on its face, compel the Council to expressly determine each activity to which the EEC competition rules would apply. Rather, VdS contended that Article 87(2)(c) imposed an obligation on the Council to temper the restrictions of the EEC competition rules to the extent necessary to guarantee the survival of certain kinds of economic activity.

VdS maintained that the insurance sector was an area of economic activity protected from the application of the EEC competition rules in the absence of Council action under Article 87(2)(c). VdS posited that, if Articles 85 and 86 were to apply to the insurance field without qualification, its financial security as an industry could be seriously endangered. As evidence of this proposition, VdS explained that insurance contracts contain a risk factor which is not present in other kinds of agreements. In addition, VdS noted, fluctuations in the probability of certain kinds of losses, such as fire, require insurers to collaborate in determining necessary reserves and fiscal planning. To further demonstrate its position, VdS pointed out that in West Germany, Article 102 of the Gesetz gegen Wettbewerbsbeschränkungen (GGW), the national antitrust provision which prohibited agreements and decisions restricting competition, was not applicable to insurance industry practices already under the supervision and surveillance of the federal office governing insurance matters.

The court quickly disposed of VdS’s contentions. First, the court relied on its recent judgment in *Ministère Public v. Asjes*<sup>7</sup> in which the court had said that “where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect.”<sup>8</sup> The court pointed out that such derogation had been made with respect to the production and trade of agricultural products under Article 42<sup>9</sup> but not, however, in the field of insurance.

Secondly, the court dismissed the interpretation given to Article 87 by VdS, noting that Article 87 did not compel the Council to spell out each and every mode of application of Article 85 and 86. Rather, Article 87 was intended to provide the Council with an opportunity to exclude, in whole or in part, the application of Articles 85 and 86 to specific economic activities “if need be.” The court observed that the Council had already excluded certain modes of transportation from the operation of Regulation 17/62 but had not taken action with respect to insurance. Accordingly, the broad conclusion reached by the court was that the EEC competition rules, in particular Articles 85 and 86 and Regulation 17/62, are fully applicable to the insurance sector.

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<sup>7</sup> Case 209–213/84, 3 Common Mkt. L.R. 173 (1986).

<sup>8</sup> 3 Common Mkt. L.R. 215 (1986).

<sup>9</sup> EEC Treaty, *supra* note 2, at art. 42.

This first submission of *VdS* dealing with whether the insurance sector is covered by the EEC competition rules was not an entirely new one for the court. Advocate General Darmon pointed out in his Conclusions that the court had already decided in *Van Ameyde v. Ufficio Centrale*<sup>10</sup> that the national bureaux for automobile insurance are subject to Articles 85 and 86.

In *Van Ameyde*, a case referred to the court under Article 177, the court was confronted with a number of questions involving the application in Italy of the so-called "green card" system.<sup>11</sup> As the result of this system, an injured party in an accident could report the accident to a "national bureau" (an association of auto insurance undertakings) established in his member state, which would then seek indemnification from the "sister" bureau established in the member state of the foreign driver. One of the questions submitted to the court for preliminary ruling related directly to the practices of the national bureau in Italy which participated in this system. The question was whether an agreement or concerted practice among the members of the national bureau, or the decision of the bureau itself, could establish that the national bureau assumes sole responsibility for the settlement of claims for damage caused in the territory of that member state by vehicles insured by foreign insurance companies, and exclude from membership those undertakings which are engaged solely in the negotiation of such settlements. The court held as follows:

A decision or a course of conduct of a national bureau or concerted practices of its members which have the object or effect of excluding undertakings whose business consists solely in the settlement (in the sense referred to above), of accident claims on behalf of insurers, may possibly fall under the prohibition of Article 85 and, if the national bureau is in a dominant position, under the prohibition of Article 90 of the Treaty in conjunction with Article 86.<sup>12</sup>

One could argue that the court in *Van Ameyde* had already decided that the insurance sector is subject to the EEC competition rules, leaving to *VdS* the more sublime question whether Article 87(2)(c) might justify an exclusion of the insurance industry from the application of the EEC rules. It would appear, however, that neither of the above interpretations are accurate and that, in fact, the court intended *VdS* to play the determining role in subjecting the insurance industry to the EEC competition rules. First, the court's judgment in *Van Ameyde* was expressly limited, undoubtedly as the result of the Article 177 reference, to the issue whether the acts in question of the national bureaux violated Article

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<sup>10</sup> Case 90/76, 1977 E. Comm. Ct. J. Rep. 1091, 2 Common Mkt. L.R. 478 (1977).

<sup>11</sup> This system allows drivers from one member state to travel to other member states without requiring the purchase of insurance in the country visited, nor presenting a risk of impoundment of the vehicle in the event of an accident on foreign soil.

<sup>12</sup> 1977 E. Comm. Ct. J. Rep. at 1126, 2 Common Mkt. L.R. at 505 (1977).

85(1). There is no language in *Van Ameyde* broadly subjecting the industry as a whole to the EEC competition scheme. This interpretation is supported by Advocate General Darmon who, as we suggested above, read *Van Ameyde* in its narrow factual context. On the other hand, the court in *VdS* very lucidly uses the occasion to extend the application of the EEC competition rules to the entire insurance industry. This interpretation is suggested not only by the plain language of the judgment but also by its procedural context. In seeking an annulment of the Commission decision, *VdS* mounted an aggressive attack on the very proposition that the EEC competition rules applied to the insurance industry. These circumstances gave the court an opportunity to answer dispositively, in the affirmative, the question whether the insurance industry was subject to the competition rules.

The court's response to the Article 87(2)(c) argument in *VdS* was critical to the ultimate result achieved. The court's reasoning closely followed that of Advocate General Darmon. Mr. Darmon had argued, firstly, that the field of application of Article 85 and 86 did not depend on the prior delineation of the Council; rather, Article 87(2)(c) leaves to the Council discretionary power to set limits on the application of Articles 85 and 86, "le cas échéant."<sup>13</sup> Secondly, added Darmon, even if Article 87(2)(c) compelled the Council to take action delineating the field of application of Article 85 and 86, the application of these two Articles, which the court had deemed to be immediate and direct, could not be suspended pending such Council action. Darmon therefore concluded here that measures taken under Article 87(2)(c) only facilitated the application of Articles 85 and 86 and were not intended to amount to prerequisites to the application of these two Articles. Finally, Mr. Darmon disagreed with *VdS*'s argument that the insurance sector deserved relief from EEC antitrust enforcement, as shown by the favorable West German legislation, and that, therefore, this sector was protected from the application of Article 87(2)(c). Here, Darmon observed that the West German legislation in question, far from being consistent with Article 85(1), was actually in contradiction of the Treaty objectives of the unification of the Common Market and the free movement of goods. Quoting from *Commission v. Italy*,<sup>14</sup> Darmon stated that if Articles 85 and 86 could be subordinated to conflicting national legislation, the foregoing two Treaty objectives would lose their meaning.<sup>15</sup>

The court's discussion of Article 87(2)(c), as amplified by the Conclusions of Advocate General Darmon, shows that the repercussions of *VdS* extend far

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<sup>13</sup> Case 45/85, *supra* note 1, Conclusions of Advocate General Darmon, at 13.

<sup>14</sup> Case 193/80, Recueil, at 3019, point 17 (not published) ("Le principe fondamental d'unité de marché et son corollaire, la libre circulation des marchandises, ne sauraient—en toutes circonstances—être subordonné à la condition préalable du rapprochement des législations nationales, car une telle sujétion obligatoire viderait ce principe de son contenu.")

<sup>15</sup> Case 45/85, *supra* note 1, Conclusions of Advocate General Darmon, at 15.

beyond the insurance sector. In short, *VdS* reaffirms the direct effect of the EEC competition rules and their supremacy over conflicting state laws.

B. *Interference in the Economic Policy of a Member State*

In its second argument, *VdS* posited that Article 85(1) of the Treaty applies only to individuals and undertakings and was not intended to interfere with or nullify the economic policies of any of the member states. *VdS* argued that the West German government had implemented a coherent economic policy applicable to the insurance industry, as evidenced by the governmental supervision of the industry and by the derogation from Article 102 of the GGW, which derogation allegedly permitted undertakings operating in West Germany to partition the national market. *VdS* maintained that this national economic scheme could not be compromised by the application of Article 85(1).

Addressing this second submission, the court observed preliminarily that the Commission's censure of the *VdS* recommendation could not have had any inhibitory effects on the alleged economic policy of West Germany because the Commission action concerned an agreement in the private sector to fix the prices of services. The court appeared to suggest that the alleged economic policy, to the extent that it may have actually existed, did not include or envision government-sanctioned price fixing.

The court further noted that the West German regime of supervision in the insurance sector was not implemented to attain objectives similar to those of the EEC competition rules, and that, consequently, the functioning of this governmental regime could not be affected by any application of the EEC competition rules in the insurance sector. In any case, the court added, the applicant failed to prove that the application of Article 85 (1) in the instant controversy would interfere with the functioning of the alleged economic policy.

Finally, the court pointed out that if the economic policy asserted by *VdS* did, in fact, conflict with the EEC competition rules, there could be no doubt that the national policy would be subordinated to Community law. For each of the foregoing reasons, the court rejected *VdS*'s second submission.

Advocate General Darmon pointed out that the subordination of the state economic policy to the EEC competition rules was compelled by the previous judgment of the court in *Walt Wilhelm*,<sup>16</sup> in which the court had said:

The EEC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures

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<sup>16</sup> Case 14/68, 1969 E. Comm. Ct. J. Rep. 1, 8 Common Mkt. L.R. 100 (1969).

capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as the result of internal measures, lest the functioning of the Community system should be impeded and the achievements of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.<sup>17</sup>

In *VdS*, the state economic policy asserted by the applicant had been embodied in particular legislation. Thus, it was clear that the policy had itself become an "internal act" or "national rule" within the meaning of *Wilhelm*. It follows, therefore, that the court in *VdS* did not need to extend its jurisprudence beyond that of *Wilhelm* or *Commission v. Italy* in order to decide that a state "economic policy" is subordinated to the EEC competition rules. It would appear, moreover, that even if the economic policy asserted by the applicant had not constituted a legislative or judicial act, the argument would appear even stronger that such a policy is subordinated to the EEC competition rules, as governmental policies, strictly speaking, are not enforceable rules of law which conflict in a legal sense with mandatory EEC rules.

### C. *The Non-Obligatory Nature of the Recommendation*

In its third argument, *VdS* maintained that the recommendation at issue did not constitute a "decision" within the meaning of Article 85 (1). *VdS* alleged three grounds in support of this position: (1) the recommendation was non-obligatory as to the *VdS* members concerned, as evidenced by the denomination of the measure as a "recommendation"; (2) the special committee for fire insurers was authorized by *VdS* to study technical questions and not to make decisions which were to bind either its committee members or the association as a whole; and (3) only the membership section of *VdS* or its board of directors were competent to make decisions which were binding on any of the *VdS* members, and neither of these two organs had adopted the recommendation in question. The response of the court was threefold and closely followed the Conclusions of Advocate General Darmon.

First, the court observed preliminarily that *VdS* did not contest that the insurer members of *VdS* had an "intérêt commun" in stabilizing the market with an increase in premiums.<sup>18</sup> Evidently, this interest was particularly strong in the case of fire insurers, which had suffered a considerable decrease in

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<sup>17</sup> 1969 E. Comm. Ct. J. Rep. at 14.

<sup>18</sup> Case 45/85, *supra* note 1, Judgment, at 13.



premiums between 1973 and 1980. As the Commission decision noted, however, in a point which was not disputed by VdS, the insurers did not react individually to this fall in premiums because they were accustomed to acting as groups of insurers or as represented by VdS.

It was also clear to the court that the denomination of the measure as a "recommendation" was not controlling as to its true character. Examining the substance of the recommendation, the court found that it prescribed in imperative terms a collective linear increase in premiums. The court cited as further evidence of the obligatory character of the recommendation the fact that reinsurers had decided collectively, after receiving the VdS recommendation, to include in their contracts of reinsurance a special clause for the calculation of premiums which would effectively increase the premiums when in the case of an accident insurance coverage was insufficient.

Finally, in response to VdS's argument as to the lack of authority of the special committee concerned and the failure of VdS to adopt the recommendation, the court made three points: (1) that the bylaws of VdS empowered VdS to coordinate the activities of its members, particularly in the antitrust area; (2) contrary to VdS's assertion, the special committee for fire insurers was established for the very purpose of coordinating the tariff policies of its members; and (3) that decisions and recommendations of this special committee became binding on its members when approved by the board of directors.

These elements led the court to conclude that the recommendation amounted to an imperative issued by the applicant, which was both authorized by VdS's bylaws and binding on its recipients. Therefore, the third submission of VdS was rejected. In its response to the third submission, the court virtually adopted the conclusions of Advocate General Darmon, who in turn relied heavily on the conclusions of Advocate General Mayras in *VCH v. Commission*.<sup>19</sup>

In *VCH* the court had found that the cement dealer's association of the Netherlands, Vereeniging van Cementhandelaren (VCH), had violated Article 85(1) of the Treaty by recommending prices to its members for deliveries of cement exceeding one hundred tons. Advocate General Mayras concisely explained the difference between the "decision" of an association and an "agreement" between undertakings as follows: "Decisions by association of undertakings differ from simple agreements in that, by belonging to the association, traders, whether they are natural or legal persons, accept its constitution and its discipline and are bound by the majority decisions adopted by the advisory or executive organs of the association."<sup>20</sup> In *VCH*, the facts revealed that the board of directors, elected by the VCH members, was authorized to make

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<sup>19</sup> Case 8/72, 1972 E. Comm. Ct. J. Rep. 977, 12 Common Mkt. L.R. 7 (1973).

<sup>20</sup> 1972 E. Comm. Ct. J. Rep. at 998.

decisions which were binding on the members, particularly in the area of prices. Compliance with these decisions was ensured by disciplinary measures, including expulsion from the association. On this basis, Advocate General Mayras concluded that decisions of VCH were of a binding nature "the implementation of which is ensured by means of a disciplinary system, internal to the association."<sup>21</sup> In respect to VCH's argument that the recommended prices were not compulsory and therefore not binding and unable to impair competition, Advocate General Mayras stated the following:

First of all, the target prices, although they differ from minimum standard prices, are on that account no less binding on all the members of the association and, by preventing them from themselves determining their own selling prices completely independently, limit their commercial freedom no less. They are prices fixed by a binding majority decision; in this respect the trade rules in question certainly come within the field of application of Article 85(1)(a) which refers expressly to cartels which "directly or indirectly fix purchase or *selling* prices or any other trading conditions."<sup>22</sup>

The court in *VCH* fully agreed with the conclusion of Advocate General Mayras that recommended prices become binding on the association through the internal system of sanctions:

If a system [which] imposed selling prices is clearly in conflict with that provision (Article 85(1)), the system of "target prices" is equally so. . . . In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be . . . and *those provisions must in addition be considered within the framework of the internal rules of the applicant association as a whole which are characterized by strict discipline in conjunction with inspections and penalties.*<sup>23</sup>

In *VdS*, the court was less methodical than it was in *VCH* in that it failed to make the necessary linkage of the recommended premium increases to the potential imposition of sanctions by the association. This seems to have been an oversight, however, rather than the reflection of a conscious change in the court's position due to the fact that the court was obviously adopting the Conclusions of Advocate General Darmon, who himself incorporated the reasoning of *VCH*. And, it should be added, that Advocate General Darmon did not overlook the aspect of sanctions, as he noted that Article 3, paragraph 5(b) of

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<sup>21</sup> 1972 E. Comm. Ct. J. Rep. at 998, 11 Common Mkt. L.R. at 15.

<sup>22</sup> 1972 E. Comm. Ct. J. Rep. at 999, 11 Common Mkt. L.R. at 17 (emphasis added).

<sup>23</sup> 1972 E. Comm. Ct. J. Rep. at 989-90, 12 Common Mkt. L.R. at 22 (1973) (emphasis added).

the VdS by-laws empowered the board of directors to expel those members who were guilty of serious or repeated breaches of the by-laws or “un comportement manifestement contraire aux intérêts du groupement.”<sup>24</sup>

D. *The Object or Effect of Restricting Competition*

In this fourth submission, VdS attempted to refute the finding of the Commission that the recommendation had the “object” of restricting competition. VdS set forth in essence a two-part argument. First, the recommendation was solely a manifestation of cooperation in the insurance sector, which was both necessary and customary due to the element of risk which is inherent in this industry. Second, even if the recommendation had the object of restricting competition, it could not have had this “effect” because the recommendation would not have been put into practice by the members concerned.

Addressing the first part of VdS’s argument, the court stated that by means of the recommendation VdS sought to achieve a collective linear increase in premiums. In short, the manifest object of the recommendation was to fix the price of services offered by the VdS members. The court reminded VdS that a decision by an association infringes Article 85(1)(a) if it has the object of “directly or indirectly fix[ing] purchase or selling prices or any other trading conditions.” Since the VdS recommendation had this object, the court concluded that it was unnecessary to consider whether the recommendation had an additional or alternative purpose.

Having concluded that the VdS recommendation had an illegal “object,” the court concluded that there was no reason to consider whether the recommendation also had an anti-competitive “effect.” Here, VdS had ignored the well-established jurisprudence of the court, which had consistently held that the “object or effect” clause of Article 85 (1) must be read disjunctively. In other words, if the conduct involved satisfies the “object” test, its effect need not be examined. Thus, it is only when an illegal object cannot be found that it becomes necessary to analyze the anti-competitive effects of an agreement, decision, or concerted practice. For the above reasons, the court rejected this fourth submission.

When one considers the superficiality of the two arguments asserted by VdS, it is clear that the court correctly dealt with this submission. VdS’s first argument was that the recommendation did not have the object of restricting competition, but rather was a necessary manifestation of cooperation in the insurance industry. In short, VdS did not deny that the desired result of the recommendation was to produce a collective, linear increase in premiums, but rather defended its “motive” for issuing the recommendation. Here, the court was

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<sup>24</sup> Case 45/85, *supra* note 1, Conclusions of Advocate General Darmon, at 28.

correct in focusing on what the recommendation was *intended to produce or suppress* rather than on *why* the recommendation was circulated. This approach was recently reflected in *BNIC v. Clair*<sup>25</sup> in which the court held:

*By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market.*<sup>26</sup>

This logic was also shown in *FEDETAB v. Commission*,<sup>27</sup> in which the court said, "Article 85 (1) also applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress."<sup>28</sup> Perhaps most cogent of all is the viewpoint of Advocate General Mayras in *VCH*, who stated:

I think that in this case the very existence of rules to which penalties are attached and which aim to organize the market in cement by enclosing traders in a tight and closely-knit network of provisions which not only relate to prices but also to the conditions of sale and delivery sufficiently reveals the aim pursued by VCH.<sup>29</sup>

VdS's second argument, which was equally transparent, was that VdS did not infringe Article 85 (1) because the recommendation did not have an anti-competitive effect. Here, VdS had overlooked the long-established rule of *Consten and Grundig v. Commission*<sup>30</sup> in which the court held that the "object or effect" clause of Article 85 (1) contains disjunctive requirements.<sup>31</sup> Though the *de minimis* rule of *Völk v. Vervaeke*<sup>32</sup> compels the investigation of the intended effects of the recommendation, it is now pretty much axiomatic that a decision to fix prices, which is listed under Article 85 (1) at the first example of an infringement, would amount almost always to a case of infringement.<sup>33</sup>

<sup>25</sup> Case 123/83, 1985 E. Comm. Ct. J. Rep. 391, 2 Common Mkt. L.R. 134 (1985).

<sup>26</sup> 1985 E. Comm. Ct. J. Rep. 423-24, 2 Common Mkt. L.R. at 39 (1985).

<sup>27</sup> Case 209-215/78 & 218/78, 1980 E. Comm. Ct. J. Rep. 3125, 32 Common Mkt. L.R. 134 (1981).

<sup>28</sup> 1980 E. Comm. Ct. J. Rep. 3250, 3 Common Mkt. L.R. at 225 (1980).

<sup>29</sup> Case 8/72, 1972 E. Comm. Ct. J. Rep. at 1000, 3 Common Mkt. L.R. at 17 (1973).

<sup>30</sup> Case 56 & 58/64, 1966 E. Comm. Ct. J. Rep. 299, 2 Common Mkt. L.R. 418 (1966).

<sup>31</sup> 1966 E. Comm. Ct. J. Rep. 342, 2 Common Mkt. L.R. 470 (1966).

<sup>32</sup> Case 5/69, 1969 E. Comm. Ct. J. Rep. 295, 2 Common Mkt. L.R. 273 (1969).

<sup>33</sup> Several commentators have noted the following:

[P]rice-fixing agreements between undertakings in the same member state may fall within Article 85(1) even if they do not expressly apply to imports or exports between member states. Ordinarily, such an agreement will fall within Article 85(1) if its effect is to contribute to the continuing isolation of the national market by making it more difficult for suppliers in other member states to penetrate that market. In particular, a restrictive agreement extending over the whole of the territory of a member state "is by its very nature liable to have the effect of reinforcing the compartmentalization of markets, on a national basis, thereby holding

E. *The Effect on Trade between Member States*

In its fifth submission, VdS contested the finding of the Commission that the recommendation may affect trade between member states. VdS argued that such a trans-national effect in trade did not exist because performance of insurance services outside of West Germany was allegedly prohibited by national legislation, which required foreign insurers wishing to operate in West Germany to establish a local branch office. Furthermore, in the view of VdS, the affairs of these branch offices could not be attributed to the foreign headquarters because the branches were "unités économiques autonomes."<sup>34</sup> In any case, argued VdS, the recommendation concerned only national situations; foreign-based insurers were not affected by the VdS measure.

The court observed, at the outset, that the West German legislation cited by VdS only required foreign insurers to establish branch offices in West Germany. The national law did not forbid these branch offices from performing services in other member states. Moreover the court said, even if it were assumed that the branch office were "independent" of the foreign headquarters, the VdS recommendation was capable of affecting the financial relations between the branch office and the foreign headquarters. By this, the court appeared to suggest that the economic ties between a parent company and its subsidiary or branch office in another member state would be sufficient to affect trade between member states. Moreover, the court noted that the recommendation of linear increases in premiums could potentially have an effect on foreign insurers which are able to offer services in West Germany at more competitive prices than those set forth in the recommendation but which are discouraged by the recommendation from establishing local branch offices.

In this fifth submission, the court visibly adopted much of the thinking of Advocate General Darmon whose analysis was trenchant and thorough. Advocate General Darmon's discussion began with a recitation of the scope of the "effect on trade" element of Article 85(1), which, not surprisingly, is quite broad. Advocate General Darmon stated:

For this requirement to be fulfilled, it must be possible to foresee with a *sufficient degree of probability* on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States . . . [I]t is necessary to consider in particular whether it is *capable of bringing about a partitioning of the*

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up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production."

C. BELAMY & G. CHILDS, *COMMON MARKET LAW OF COMPETITION* 76 (2d ed., 1978). See also KORAH, *AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW* 62 (3rd ed., 1986).

<sup>34</sup> Case 45/85, *supra* note 1, Judgment, at 18.

*market* in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.<sup>35</sup>

The liberality of this test led Advocate General Darmon to posit that this condition is satisfied each time that there is a risk of contradiction between the envisaged agreement and the economic objectives of the Treaty.

In *VdS*, there was no doubt for Advocate General Darmon that the recommendation was capable of affecting trade between member states. First, he pointed out that the relevant West German legislation did not prohibit insurance contracts across the national frontier. Second, he noted that a branch office established in West Germany and its foreign parent company constituted a single economic entity with the result that even "national" business conducted by the West German branches would have a transnational effect. In support of this conclusion, Advocate General Darmon observed that the West German legislation itself provided that the branches to be established in West Germany would be obliged to satisfy administrative and fiscal requirements enabling West German assureds to file claims locally rather than with the foreign home office. The lack of autonomy between the parent and branch office was also manifested by the fact that the branch offices could transfer both their profits and losses to the home office. Finally, Advocate General Darmon noted that even apart from the evidence of dependency between the home office and the foreign branch, it was beyond doubt that a recommendation to increase premiums would, in and of itself, have an effect on trade between member states. For this proposition, Advocate General Darmon cited the recently decided *SSI* judgment<sup>36</sup> in which the court held that a price-fixing agreement between undertakings established in one member state which does not expressly apply to sales between member states will, nonetheless, affect trade between member states. As applied to *VdS*, foreign insurers without a strong reputation in West Germany may have difficulty selling insurance in West Germany at the prices stated in the *VdS* recommendation. The recommendation may, therefore, discourage trade between member states.

#### F. *The Application of Article 85(3)*

In its final argument, *VdS* contended that the Commission erred in refusing to grant *VdS* an individual exemption under Article 85(3) and that *VdS* had satisfied all of the conditions for granting the exemption. The principle argument of *VdS* was that the recommendation was necessary to reestablish the

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<sup>35</sup> Case 56/65, see *Société Technique Minière v. Maschinenbau Ulm*, 1966 E. Comm. Ct. J. Rep. 235, 249, 3 Common Mkt. L.R. 357 (1966).

<sup>36</sup> Case 240-42, 261-62, 268-69/82, Judgment of December 10, 1985.

profitability of insurers while safeguarding the interests of the assureds. Thus, VdS reinforced the position that it maintained when it sought the exemption, which, at the time, was that the recommendation contributed to an improvement in the performance of services by insurers.

Before confronting VdS's position, the court observed preliminarily that the objective of the Commission in evaluating whether VdS satisfied the criteria of Article 85(3) was to determine whether the recommendation contributed to the improvement of services in the insurance sector. This determination involved a three-part test: (1) whether the recommendation had the object of confronting real problems in the insurance sector which resulted from the steady fall in premiums collected by fire insurers; (2) whether the recommendation was appropriate for confronting such problems; and (3) whether the means employed (i.e. the premium increases) exceeded what was necessary to accomplish the object of the recommendation.

For purposes of the application of VdS, the court found that the only real issue under Article 85(3) was whether VdS satisfied the third point of the above-mentioned test. Thus, assuming the acceptable goal of stabilizing the insurance sector and the appropriateness of the measure (i.e., recommending an increase in premium), the question was whether the collective, linear increase in premiums exceeded what was necessary to accomplish such an objective. In this regard, it was the view of the court that the measure taken by VdS was excessive. First, the court observed that the increase in premiums encompassed not only direct costs resulting from losses suffered by the assureds, but also the administrative expenses of the insurer, which differed from one insurance company to another. Thus, in compelling a global increase in premiums which failed to account for the individual financial needs of its members, VdS was taking action which exceeded what was necessary to accomplish its professed goal. Consequently, the court said that the advantages of the means selected by VdS were outweighed by its disadvantages from the viewpoint of the EEC competition rules. On the above stated grounds, the court rejected this sixth submission.

In addressing the sixth submission of VdS, the sole object of the court, in its judicial review, was to conduct "an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom."<sup>37</sup> The only issue taken up by the court was whether the Commission was correct in determining that VdS adopted means exceeding what was necessary to stabilize the sector of fire and consequential loss insurers. Though the court agreed with the Commission's assessment that the recommendation exceeded what was reasonable because it included profit, the court's conclusion should be viewed in a wider perspective. For purposes of future agreements and decisions of

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<sup>37</sup> Case 56-58/64, 1966 E. Comm. Ct. J. Rep. at 347, 3 Common Mkt. L.R. at 478 (1966).

associations in the insurance sector, it would appear that premium-fixing may be tolerated under Article 85(3) to the extent that the specific measure employed does not exceed what is necessary to stabilize the market in the insurance sub-sector involved; in other words, that only costs directly related to insured losses be recouped.

#### IV. CONCLUSION

This comment has attempted to show that the *VdS* judgment concerns not only insurance-related issues but also several interesting questions relating to "decisions" of associations to recommend uniform prices. From the viewpoint of the insurance industry, the impact of *VdS* is considerable. Efforts of insurance associations to bolster the fortunes of financially precarious sub-sectors by means of premium increases must now assess the likelihood of obtaining an exemption under Article 85(3). Theoretically, this may not appear to represent a potential threat to the industry as long as the collective increase is designed to recoup the monies paid out for insured losses. But, practically speaking, the court's judgment is likely to discourage even the collective increases which would satisfy Article 85(3) under the court's formula. The reason for this is simple. If the sub-sector of the industry involved is already in the midst of a financial crisis, there is little that an exemption, granted two or three years after the application is made, may be able to accomplish. During the waiting period, the industry is likely to turn to alternative forms of raising capital, such as acquisitions and mergers. In the long run, competition could be seriously weakened.

With respect to its interpretation of Article 85(1), *VdS* provides several new insights into the meaning of a binding "decision." First, it was shown that a decision is binding on its members, not only by virtue of its adoption by the members, but also as a result of potential sanctions imposed by the association. Moreover, it was shown that a decision to "recommend" prices may amount to the substantive equivalent of a decision to fix mandatory prices if the recommendation may be internally enforced by disciplinary measures. These rules affect not only the insurance sector but all professional associations operating in the EEC which are empowered to make binding resolutions on behalf of their members. In terms of its long-term value, therefore, *VdS* should be noteworthy for its contribution to the interpretive literature on Article 85(1).