SPEECH BY MR TUGENDHAT ON THE OCCASION OF THE EUROPEAN DAY OF THE FRENCH FEDERATION OF INSURANCE COMPANIES

Paris 20 January 1978

When your President, Mr Gaudet, suggested that I participate in this European Day, I immediately accepted because I considered it an extremely suitable occasion to inform French insurers of the measures undertaken by the Community in this field, the results obtained and the difficulties encountered. I will not hide from you that my object in coming here is to do more than simply explain the objectives we are pursuing but also to try to convince those of you who feel reluctant to support the Commission's approach towards the creation of a genuine European common market in insurance.

As we are all aware it is at the level of freedom to provide services that misunderstandings persist and it is these that I shall endeavour to clear up.

Before coming to that I should like to recall rapidly what the Community's objectives have been from the beginning, to summarize the results obtained in respect of establishment and, finally to tackle the question of freedom to provide services.

/The Community's

The Community's objectives

The Council, in adopting the first Directive on the coordination of direct insurance other than life assurance on 24 July 1973, laid the foundations for a common market in insurance. This directive went much further towards harmonising laws laying down conditions governing the taking-up and pursuit of a profession than at that time had been achieved in many other fields of endeavour.

I am deliberately stressing this since it appears to me to be important. The coordination introduced by the directive, especially as regards financial guarantees, eliminated a number of obstacles not only to freedom of establishment but also to the implementation of freedom to provide services. From that point on in Europe, with the exception, - I hope only temporarily - of Italy and the Netherlands, insurance undertakings have been subject to a series of controls and financial requirements which at the same time ensure that they benefit from conditions of fair competition as well as giving policy holders the assurance that established companies possess sufficient financial resources to reduce considerably the risk of bankruptcy.

This first coordination directive is therefore an achievement which should, logically, have been supplemented shortly thereafter by the adoption of a directive of the same character, this time covering life assurance.

/As you are

As you are aware, results have not measured up to expectations! A proposal for the latter was transmitted by the Commission in December 1973 but has still not been adopted by the Council.

The Permanent Representatives' Committee has been confronted by two main problems which are currently a stumbling block: namely the coverage of the solvency margin and the action to be taken in respect of composite undertakings established in Member States which do not apply the principle of specialisation.

Insofar as the first point is concerned, I will spare you from discussing the differences of opinion between those who faroured the solvency margin being covered by explicit assets and those who advocated that account be taken of implied assets. The dispute has now moved on to the question of which implicit assets should be chosen.

I believe however, from what my staff tell me, that a solution is gradually emerging whereby the supervisory authorities would be able to allow undertakings established in their territory the choice between two forms of coverage for implied assets, the first being based on future profits and the second on the differences arising from the base selected for calculating mathematical reserves.

/With regard to

With regard to the question of the coexistence of composite and specialised companies, the solution originally proposed by the Commission was based on the obligation to provide separate management, accompanied, in the case of agencies and branches of composite companies, by the ability to establish in Member States which apply specialisation.

Unfortunately I must say that this solution has not been received with unanimous support. Here again, I am convinced that with a little goodwill we could arrive at a solution.

In my view it is quite Utopian to seek to compel existing composite companies of insurance to transform themselves immediately or even in the short term into specialised companies. I think I can say from my direct experience that composite undertakings do not deserve this degree of mistrust.

It is the case that the Commission has decided in favour of specialisation in the sense that in future it will not be possible to set up new composite companies. At the same time, however, the Commission is not prepared to prohibit the continuation, in the short or medium term, of existing composite companies.

/What then will

What then will become of such companies as regards establishment? One possible solution which has the support of the Commission is that where such a company wishes to become established in another Member State, it should be allowed to choose its legal form - either a subsidiary agency or branch for life assurance or indemnity insurance.

In other words, in a case where it decided to engage in indemnity insurance through an agency or branch, it would then have to engage in life assurance by setting up a subsidiary.

The Permanent Representatives' Committee will undoubtedly return to its work at the beginning of the year and I very much hope that once these two questions have been settled the directive will then be quickly adopted.

I now come to the question of freedom to provide services, which, as I said at the outset, currently constitutes, I believe, the fundamental problem in the area with which we are concerned. I shall begin by quickly reviewing where we stand now.

Freedom to provide services

A directive aimed at facilitating intra-Community coinsurance transactions was forwarded by the Commission to the Council in May 1974.

/Its object is

Its object is to eliminate obstacles which still exist in some States to the covering of a risk situated in their territory by co-insurers established in other Member States. Though this proposal has been at the final adoption stage for more than six months it is still held up in the Council.

A directive which aims in a more general manner at facilitating freedom to provide services in respect of indemnity insurance was transmitted by the Commission in December 1975. The Council began examining it in May 1977 even though Parliament has not yet been able to deliver its opinion.

Recalling dates in this way gives you an immediate idea of the difficulties we have encountered, and the interests at stake.

As far as the Commission is concerned there is one paramount interest to be taken into consideration: that of Europe. Delays of this length cast doubts on the willingness of some Member States to create a genuine common market in insurance. We must not delude ourselves. The creation of a common market necessarily involves adoption of freedom of service directives. Moreover, the creation of a common market in insurance is the only means whereby we will be able to counter effectively the increasing competitiveness of certain countries from non-member countries.

ne preservation

The continuation of private preserves within the Community would not only run counter to the spirit and letter of the Treaty but would also be contrary to the real interests of the European insurance sector.

Although some people consider that a genuine opening up of frontiers is a leap into the unknown which, if we are to behave rationally, can only be achieved gradually, the Commission cannot agree to this being made subject to the implementation of a multitude of prior coordinating directives.

Yet this was the choice faced by the Commission when it came to discuss the proposal for the directive referred to above. I shall confine myself to this directive and deliberately leave aside co-insurance, which is only a first step.

There were, then, two propositions: on the one hand to undertake extensive prior coordination of existing national legislation, and, on the other, to give precedence to bringing about freedom to provide cover services for certain risks such as transport and large industrial and commercial risks, - it being understood that any further extension of freedom to provide services would then be accompanied by, or preceded by those coordination measures considered essential to provide both effective and identical protection for policy holders at Community level.

/As you are

As you are aware, it is this second approach which was finally adopted and which, in the light of experience, appears increasingly to me to be the only practical one if we genuinely want to obtain concrete results within a reasonable period.

I would like to illustrate my remark by referring to two specific problems: that of freedom of choice of the law applicable to the contract and the equally sensitive one of the taxation of the contract in the context of freedom to provide services.

On the first point, the CEA took the view in 1974 that coordination of the law applicable to the contract should be regarded as a prerequisite to the effective exercise of freedom to provide services and, that it should cover five points considered essential for the adequate protection of the policy holder and identical conditions of competition for insurance companies.

An attempt was indeed made in the proposal for a Directive to find a formula between the two providing in principle for freedom of choice for the parties but also for the application, pending coordination, of legal provisions in force in the Member State in which the risk was situated which covered the CEA's five points.

/At the same time

At the same time this directive did of course provide that freedom of choice would apply without restriction for transport and large industrial and commercial risks. As a result, however, of the reactions of the Council Working Party on Economic Questions and the Parliament's Economic and Monetary Committee the Commission stated that it was prepared to amend its initial proposal by making a much clearer distinction between the law applicable to contracts covering transport and large risks, for which there would be total freedom, and the law applicable to other contracts, in respect of which, pending subsequent coordination, the law applicable would be purely and simply that in force in the Member State in which the risk was situated.

This avoids creating a situation in which it would have been necessary to apply two different legal systems to cover the same risk.

The advantage of this solution is that freedom of choice becomes a reality in the case of transport and large risks, this being, in my view, a decisive development in the pursuit of freedom to provide services. It is easy to imagine how an industrial enterprise with branches in different Community Member States would react if it were required to conclude contracts which were subject in each instance to the law of the Member State in which the risk was situated.

/If Europe is to

If Europe is to acquire a reputation for being well administered, it must be possible for a company to be able to sign a single insurance agreement covering all its European branches and for such a contract to be subject to a single system of law chosen by the parties.

As for large-scale risks, freedom to provide services will probably take effect only when progress has been achieved on the coordination of contract law.

This is currently engaging the particular attention of the departments of the Commission and, as you know, the directive itself provides that this work must be completed within three years. In this connection I feel I must, unfortunately, moderate the excessive optimism which I have heard expressed in some quarters about the possibility of completing work of this nature quickly. Since the Working Party on Insurance Contracts started meeting, profound differences have emerged between the views of the Member States on such basic problems as the declaration of the risk, aggravation of the risk or the sharing of responsibility between insurer and insured. In addition, some experts consider that the list submitted by the CEA is much too short and should include several other points. Other experts, on the other hand already find the work of harmonisation quite a burden. Last, but not least, consumers who have just recently entered the fray have made some severe judgements about the initial work carried out by the Working Party, and contend that the relevant guidelines for the work in hand should be to

/select from

select from each national system of law those provisions which are most favourable to the insured and that, furthermore, it should be stipulated that the directive thus drawn up represents only minimum requirements, which Member States may at any time amend further in favour of policy holders.

The CEA has already notified you of the Consumers' Consultative Committee's attitude and it is currently being discussed by government experts. We must, I think endeavour to get the right balance between the interests of the offerer of insurance and the taker of insurance. At the same time we must recognise that if there is one area in which the interest of the consumer has especially to be borne in mind, it is in the field of insurance. This is the view of the Member States, who have legislated very extensively to provide both policy holders and insured persons with the necessary protection. Equally, the Commission recognises that when one is engaged in the process of opening up markets, there can be no question of disregarding the existence of such legislation. The Commission is cognisent of this and, as I have already stated, it was precisely to avoid suddenly depriving small policy holders of the protection of their own national law that the Commission decided in favour of a gradual approach whereby precedence would be given to dealing with obstacles to freedom to provide services in respect of industrial, commercial and transport risks.

Any further progress on large-scale risks will have to be preceded by the harmonisation of certain laws, which will take full account of the interest of consumers.

Taxation

Let me now say a word about taxation. Recently the Chairman of the Working Party on Economic Questions thought it worth holding a discussion on this with the government representatives who are members of the Group.

It may help if I recall that the solution adopted by the Commission is to maintain the principle of territoriality, that is to say, to provide that "without prejudice to subsequent harmonisation of indirect taxes on insurance, all insurance contracts concluded by way of the exercise of freedom to provide services shall be subject solely to the relevant taxation in force in the Member State in which the risk is situated".

The effect of this principle is that the choice made by the policy holder as to his insurance is in no way influenced by the very considerable differences between Member States concerning the taxes applicable to contracts.

During that same meeting a whole set of observations was made which has so far prevented any further progress.

Some people consider that abuses should be prevented by strengthening national supervision, but is the Commission entitled to dictate to national authorities how they should conduct their supervision? Others believe that the ideal system would be to authorise Member States to make insurance companies subject to VAT when they consider it appropriate. But it is hardly sensible to suppose that after the difficulties encountered in adopting the Sixth Directive on VAT, its

/amendment could

amendment could be envisaged in the near future in order to comply with a request of this nature. On this occasion national tax experts and Commission experts are in agreement that such a step would be inappropriate under present conditions.

Other experts believed that the ideal situation would be for the Commission, at the earliest opportunity, to present a proposal for a Directive covering both the amount and the method of levying tax on insurance contracts. A final draft to this effect exists. I believe, however, that my predecessor, Mr Simonet, was wise to consider it inadvisable to submit this document to the Council.

It became apparent that if there was only a remote chance of the proposal being adopted when the Community was still the Community of six, this became totally unrealistic with the accession of three Member States, none of which consider it desirable to tax transactions which are regarded as being in the public interest since they reflect sound management on the part of policy holders of both their property and their duty to protect third parties.

To conclude on this point, and I believe this is important, government representatives on the Working Party were in agreement that industrial companies and businesses which have availed themselves of the provision of services, have not so far encountered any tax difficulties in connection with such transactions.

Government experts took the view that the necessary checks on companies had been quite straightforward and that payment had been made without difficulty - either directly by the company or by agents or brokers.

I am therefore even more convinced than before that the problem of taxation is an artificial one at least so long as freedom to provide services applies only to fairly big risks.

I think therefore that on this question of prior coordination I could sum up my attitude in the following terms: - in the absence of tackling practical questions such as big risks, prior harmonisation is of little value in itself; moreover, better and more rapid means of getting to the same goal exist in any case. And, as the French Insurance Controller is present today, I would like, for his benefit, to underline the precautions which have been taken in the directive to enable the supervisory authorities of the Member States fully to exercise their responsibilities in the field of freedom to provide services.

Thus, before providing services a company will have to be authorised for this purpose by the supervisory authority of the Member State in whose territory it is established. Authorisation will be granted only after the supervisory authority of the Member State in which the company intends to provide services has been properly informed and consequently has been given the opportunity to submit its observations.

The directive also goes further. It provides that where such a company provides services in another Member State it will be subject to the strict control of that State, which will be able to deal effectively with any infringement of national law which, we should remember, continue to apply. The draft also provides that compulsory insurance will remain subject to all national laws - with the exception of course of compulsory insurance covering risks classed as transport or industrial and commercial risks.

Third countries

There remains the question of third countries. You are aware that the Commission had originally provided that agencies and branches of companies whose head office was situated in a non-member country would benefit from the provisions of the directive provided that they satisfied the requirements of Title III of the First Coordination Directive which, you will remember, lays down a series of minimum requirements at Community level with which these agencies and branches must comply.

The Commission is aware of the virtually unanimous criticism of this approach which, it is felt in some quarters, would offer a gratuitous advantage to such agencies and branches at a time when their large-scale establishment in the Community poses an increasing number of problems.

/In such circumstances

In such circumstances it seemed that it would be better to make application of the directive dependent on the conclusion by the third countries in whose territory the head offices of these agencies or branches are situated, of an agreement with the Community, as provided for in Article 29 of the First Coordination Directive, based on the principle of reciprocity. In the European Parliament last Wednesday, I indicated in reply to Mr Schwörer's report on the Directive that I accepted this viewpoint. I am convinced personally that it is on the basis of reciprocity that we must proceed with third countries.

It must be obvious that I have been deliberately emphasising the current problem of freedom to provide services in respect of indemnity insurance. That, however, is not the only subject in the field of insurance with which the Commission is concerned. The law of contract is one area. The winding up of insurance companies, where the proposal for a directive is already far advanced is another field where coordination of national law will be important. It is also clear from work in progress that we can expect a proposal on the presentation of insurance company accounts. And when the discussions which are in train at the moment at the Conference of Community Insurance Supervisory Services are completed, it will be possible to lay down general rules for calculating technical reserves. Finally, it will not have escaped your attention that the removal of obstacles to freedom to provide services concerning, in particular, insurance against civil liability in respect of the use of motor vehicles will involve major harmonisation work.

And of course at the moment an important part of the Commission's work is concerned with freedom to provide services for indemnity insurance.

Life assurance

The problem of life assurance will of course have to be tackled. As you are aware this is closely linked with progress made on the free movement of capital. This means of course that for the foreseeable future we shall not be able to settle a number of problems which arise in the insurance sector.

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In conclusion I would like to set out the major lines being followed by the Commission in its current work.

As I have already stressed, the creation of a genuine common market in insurance seems to me to be the only possible solution for meeting the challenge offered by certain third countries in this field. As well as an appropriate objective on the European spirit, responding appropriately to the challenge would result in a source of revenue for our balance of payments which would not be negligible.

Progress in this direction necessarily entails the elimination of various obstacles which still exist in some Member States to freedom to provide services.

/It satisfies

It satisfies a genuine need which already exists of both the transport industry and of big industrial and commercial concerns.

Without in any way discarding harmonisation, we must accept that the route leading to practical results will be long and arduous and, that consequently, for the moment, it is better to channel our efforts towards achieving early liberalisation of freedom to provide services for these particular categories of risks.

I would like, in conclusion and in order to allay the concern expressed, Mr Chairman, by many of your fellow countrymen concerning the steps being taken by the Commission, to stress that the authors of the Treaty, when faced with the problem of laying down provisions to eliminate customs duties and quantitative restrictions on imports and exports of goods between the Member States, also decided in favour of an approach similar to that now chosen by the Commission in the field of services.

They drew up a very strict timetable the implementation of which, - I am tempted to say fortunately - was not subject to any prior coordination of the law applicable to contracts, taxes, social security contributions, etc.

We know the result. The Customs Union was established even before the date fixed by the Treaty.

/The results are

The results are there to prove that this audaciousness has, in the end, been profitable for all Common Market countries.

I hope these few thoughts have enabled you to appreciate rather better the Commission's real objectives and that as a result, some of you will look at things in a new perspective - a development which could only contribute to the successful and speedy outcome of the work in progress, to the great advantage, I am convinced, of the parties involved.