IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Cases Nos. 1002/2/1/01(IR)
1003/2/1/01
1004/2/1/01

New Court
Carey Street
London WC2A 2JT

17 September 2001

Before:

SIR CHRISTOPHER BELLAMY (The President)
ANN KELLY
ADAM SCOTT

BETWEEN:

THE INSTITUTE OF INDEPENDENT INSURANCE BROKERS

Appellant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Supported by

THE GENERAL INSURANCE STANDARDS COUNCIL

Intervener

and

BETWEEN:

ASSOCIATION OF BRITISH TRAVEL AGENTS LIMITED

Appellant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Supported by

THE GENERAL INSURANCE STANDARDS COUNCIL

Intervener

Mr Nicholas Green QC and Mr James Flynn (instructed by Messrs Wilson Browne) appeared for the Institute of Independent Insurance Brokers

Mr Richard Fowler QC and Miss Kassie Smith (instructed by Messrs Nicholson Graham & Jones) appeared for the Association of British Travel Agents Limited

Mr Rupert Anderson and Mr Daniel Beard (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Director General of Fair Trading

Mr Aidan Robertson (instructed by Messrs CMS Cameron McKenna) appeared for the General Insurance Standards Council

JUDGMENT

Table of Contents

Note: For simplicity, this judgment will refer throughout to Articles 81 and 82 of the EC Treaty, whether in citations from judgments or otherwise, notwithstanding that the original citation referred to Articles 85 and 86 of the EC Treaty which were renumbered as Articles 81 and 82 by the Treaty of Amsterdam with effect from 1 May 1999.

I INTRODUCTION

The statutory framework

1. The Competition Act 1998 ("the Act") came into force on 1 March 2000. This case concerns the application of section 2(1) of the Act which provides:

> "2. – (1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which–
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part."

That prohibition is known as "the Chapter I prohibition": see section 2(8).

2. Section 3 of the Act provides that the Chapter I prohibition does not apply to the various cases excluded pursuant to Schedules 1 to 4. Schedule 2 excludes, notably, the arrangements giving various bodies and organisations regulated under the Financial Services Act 1986. Schedule 3 excludes notably agreements made to comply with a legal requirement (paragraph 5), and agreements excluded by the Secretary of State on grounds of public policy (paragraph 7). Additional exclusions may be added by the Secretary of State acting under sections 3(2) and (3) of the Act. Schedule 4 of the Act excludes rules made by various professional bodies, although in a press release of 9 March 2001 the Government has stated its intention to seek the repeal of that Schedule.

3. Section 4 of the Act provides that the Director General of Fair Trading ("the Director") may grant an individual exemption from the Chapter I prohibition. Pursuant to section 9, the criteria for the grant of an individual exemption are that the agreement:

> "(a) contributes to–
>
> (i) improving production or distribution, or
>
> (ii) promoting technical or economic progress,
>
> while allowing consumers a fair share of the resulting benefit; but
>
> (b) does not–
>
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
>
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question."

4. Under section 14 of the Act a party to an agreement may notify that agreement to the Director and apply to him for a decision as to whether the Chapter I prohibition has been infringed and, in the alternative, for the grant of an individual exemption.

5. These provisions are closely modelled on the corresponding provisions of Article 81 of the Treaty establishing the European Community ("the Treaty") and Council Regulation no. 17 OJ 1959-62, p. 87 as amended. So far as possible, the Act is to be interpreted and applied consistently with the principles of Community law: see section 60.

6. A party to an agreement in respect of which the Director has made a decision within the meaning of section 46(3) of the Act may appeal to this Tribunal against, or with respect to, that decision: sections 46(1) and 48(1).

7. Section 47 of the Act establishes a procedure for certain third party appeals. Where the Director has taken a decision as to whether the Chapter I prohibition has been infringed (see section 46(3)(a)), a person who is not a party to the relevant agreement but who demonstrates a "sufficient interest" may apply to the Director to withdraw or vary his decision. If the Director refuses that application, the third party may then appeal to this Tribunal under sections 47(6) and 48(1) of the Act. The appeals in the present case are both third party appeals brought under those provisions.

8. The powers of this Tribunal to determine appeals under sections 46 or 47 are set out in paragraph 3 of Schedule 8 of the Act, which provides:

> "3.–(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may–
>
> (a) remit the matter to the Director,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
>
> (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
>
> (e) make any other decision which the Director could himself have made.
>
> (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.
>
> (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

9. The procedure governing appeals to this Tribunal is set out in the Competition Commission Appeal Tribunal Rules 2000, S.I. 2000 No. 261 ("the Tribunal Rules").

The present appeals

10. On 30 June 2000 the General Insurance Standards Council ("GISC") notified to the Director, in a voluminous notification under section 14 of the Act, the Rules of the General Insurance Standards Council ("the GISC Rules"). The GISC Rules are intended to establish a system of self-regulation governing the selling, advising or broking of general insurance carried on from a permanent place of business in the United Kingdom. Under the GISC Rules the term "general insurance" is defined by reference to the categories of business set out in Schedule 2 of the Insurance Companies Act 1982, namely insurance in respect of accident, sickness, land vehicles, railway rolling stock, aircraft, ships, goods in transit, fire and natural forces, damage to property, motor vehicle liability, aircraft liability, liability of ships, general liability, credit risk, suretyship, miscellaneous financial loss, legal expenses and assistance.

11. The Members of GISC comprise both insurers and intermediaries. Most United Kingdom insurers writing general business are Members of GISC. The intention of those promoting GISC is that the GISC Rules should apply to all intermediaries active in the supply of general insurance in the United Kingdom. Pursuant to Rule F42, the Members of GISC agree not to deal with intermediaries engaged in the selling, advising or broking of general insurance unless the intermediary concerned is a Member of GISC or the Appointed Agent or Sub-Agent of a Member of GISC.

12. From 26 July 2000 onwards the Institute of Independent Insurance Brokers ("the IIB") engaged in an extensive correspondence with the Director objecting to the GISC Rules and, in particular, to Rule F42.

13. The IIB is an association established in 1987. According to the IIB, it represents some 1,000 independent insurance broking firms in the United Kingdom, which is approximately half of all such firms. The members of the IIB service the needs of around 5 million private clients and 250,000 small and medium-sized commercial clients. The IIB strongly objects to its members being obliged to become Members of GISC by virtue of Rule F42 and seeks to establish its own system of self-regulation for independent broking intermediaries.

14. Similarly, by letters to the Director between 23 June 2000 and 4 December 2000, the Association of British Travel Agents Limited ("ABTA"), also drew the Director's attention to its opposition to the GISC Rules, in particular Rule F42.

15. ABTA is a well-known association in the travel industry which, among other functions, imposes regulatory requirements on its members, including bonding requirements to protect customers in the event of failure of an ABTA member. ABTA members include about 1,900 travel agents and 700 tour operators, and account for about 90% of package holidays sold in the United Kingdom. ABTA objects to Rule F42, and in particular to its members being compelled to join GISC in respect of the sale of travel insurance when they are already subject to regulation by ABTA, notably under Clause 1.7 of ABTA's Code of Conduct.

16. Having examined GISC's notification under section 14 of the Act, on 24 January 2001 the Director adopted Decision No. 98/1/2001 entitled "Notification by the General Insurance Standards Council" ("the GISC Decision"). In the GISC Decision the Director decided that the GISC Rules did not infringe the Chapter I prohibition.

17. On 22 February 2001 the IIB applied to the Director, pursuant to section 47(1) of the Act, to withdraw or vary the GISC Decision and substitute a finding that the GISC Rules infringed the Chapter I prohibition. On the same day the IIB asked the Director to adopt interim measures, pursuant to his powers under section 35 of the Act, on the basis that the viability of the IIB itself was being fatally undermined by the bringing into force of the GISC Rules.

18. On 23 February 2001 ABTA also made an application to the Director under section 47(1) of the Act to withdraw or vary the GISC Decision and to find an infringement of the Chapter I prohibition.

19. On 22 March 2001 the Director rejected the IIB's request for the adoption of interim measures in respect of the GISC Rules.

20. By two decisions dated 11 May 2001 addressed to the IIB ("the IIB Decision") and to ABTA ("the ABTA Decision"), respectively, the Director decided, pursuant to section 47(4) of the Act, that no sufficient reason had been shown for him to withdraw or vary the GISC Decision. In consequence he rejected the applications made by the IIB and ABTA under section 47(1) of the Act.

21. Pursuant to section 47(6) of the Act, the IIB appealed to this Tribunal against the IIB Decision by an appeal lodged on 11 June 2001. On the same day the IIB also lodged an application for interim relief, pursuant to Rule 32 of the Tribunal Rules. Pursuant to section 47(6) of the Act ABTA appealed to this Tribunal against the ABTA Decision by an appeal lodged on 15 June 2001.

22. At a case management conference held on 21 June 2001, GISC, a party intervening in these proceedings, agreed to write to its members, in terms satisfactory to the IIB, stating that Rule F42 was not yet in force and that, until its introduction under transitional rules on 1 September 2001, members of GISC were free to deal with non-Members. On that basis, the IIB did not pursue its application for interim relief. The implementation of Rule F42 is currently suspended pending the outcome of these proceedings.

23. Although these appeals are formally directed against the IIB and ABTA Decisions respectively, the substance of both appeals concerns the correctness, or otherwise, of the Director's finding, in the GISC Decision, that the GISC Rules fall outside section 2 of the Act. It is common ground that GISC is an "association of undertakings" and that the adoption of the GISC Rules constitutes a "decision by an association of undertakings" within the meaning of section 2(1). Similarly, it is common ground that the GISC Rules affect trade within the United Kingdom within the meaning of section 2(1)(a), and that none of the exclusions referred to in section 3 and Schedules 1 to 4 of the Act apply.

24. In the result, the main issue in these appeals is whether the GISC Rules, and in particular Rule F42, "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom" within the meaning of section 2(1)(b) of the Act.

II FACTUAL BACKGROUND

The general insurance sector

25. General insurance covers most kinds of non-life insurance. As regards consumers, the main kinds of general insurance are motor insurance, home insurance (buildings, contents, public liability etc), insurance for caravans, boats, animals and other property, travel insurance, medical and dental insurance, personal accident insurance, extended warranty insurance, legal expenses insurance and payment protection insurance of various kinds. In the commercial sector, general insurance includes marine, aviation, transport and property insurance, insurance against third party liability and pecuniary loss, and other miscellaneous risks. The evidence before us indicates only the broadest outline of the structure of the sector.

26. Figures contained in a Mintel Report annexed to GISC's intervention indicate that the total value of the market for general insurance in the United Kingdom in 1999 was approximately £27.2 billion, made up as follows:

	£ '000 m
Property	7.6
Motor	9.1
Accident and health	4.3
Pecuniary loss	3.5
Liability	2.7
	27.2

Within the pecuniary loss category, travel insurance accounted for £0.5 billion in 1999 and appears from the Mintel Report to be on a rising trend.

— The insurers

27. There are, we are told, over 100 companies actively underwriting general insurance business in the United Kingdom, leaving aside reinsurance companies, overseas companies and companies trading internationally in the London insurance market. In addition general insurance is underwritten by over 200 syndicates of Lloyd's underwriters. The carrying on of general insurance business as a principal is subject to prudential regulation under the Insurance Companies Act 1982. We understand that that regime will continue under the supervision of the Financial Services Authority ("FSA") in accordance with the Financial Services and Markets Act 2000 ("the FSMA") when that Act is fully in force: see Article 10 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the Regulated Activities Order").

28. It appears from figures submitted by the IIB and not contested that a number of leading companies (CGU/Norwich Union, Royal & Sun Alliance, AXA, Zurich, Cornhill and Direct Line) together account for around 60% of the general insurance sector, with rather larger market shares in sectors such as property and motor insurance. In the travel sector, it appears from the Mintel Report already cited that the largest underwriter is GE Financial Insurance (26%), followed by CGU/Norwich Union (15%), and AXA (14%) with the remainder of the market being accounted for by a number of other companies and Lloyd's underwriters.

29. For the purposes of the GISC Rules, general insurance activities also include reinsurance and retrocession, carried out, for example, by Lloyd's syndicates or specialised re-insurance companies. However, the reinsurance sector has not figured in the arguments of the parties. Similarly the activities of London market insurers and Lloyd's syndicates in the international London market for insurance and reinsurance appear to fall outside the scope of this case.

— The selling, advising or broking of general insurance

30. In the United Kingdom domestic market, insurance companies sell general insurance directly through their own direct sales operations (mainly over the telephone, on-line, through direct

mail or direct response newspaper advertising), or through intermediaries. Direct selling by insurance companies, particularly to private consumers in sectors such as motor and household insurance, has expanded significantly since the establishment of Direct Line in the mid-1980s.

31. The main categories of intermediary have traditionally been (i) independent insurance brokers, including Lloyd's brokers, whose duty to the client is to give best advice and place the business with insurers on the most advantageous terms; (ii) single tied agents, who represent one insurance company; and (iii) multi-tied agents who under past practice have represented a number of insurance companies.

32. More recently, however, general insurance of various kinds has been increasingly sold by or through intermediaries who are not insurance specialists, but who offer insurance as a subsidiary part of their business or in connection with the sale of another product. Travel insurance, for example, is sold by travel agents, tour operators, supermarkets, banks, building societies, the Post Office and others, the policies being underwritten by insurance companies. Other insurance products are sold by banks, supermarkets and similar outlets. Many other concerns such as motor dealers, suppliers of computer equipment, household appliances and mobile phones, public utilities, furniture removers, suppliers of credit or store cards, and so on, offer various kinds of insurance as an ancillary part of their activities. As we understand it, these concerns will normally have arrangements with particular insurance companies either to introduce the business to them or to act as their agent in the sale of the product.

33. In a number of sectors intermediaries who offer insurance do not merely sell the insurance policies of insurance companies but devise their own insurance policies which they place with underwriters, as indicated in the evidence of Mr Howard, Chairman of the Association of Travel Insurance Intermediaries ("ATII"), filed on behalf of ABTA. According to Mr Kirsch, in evidence filed on behalf of the IIB, there is a "thriving intermediary market in insurance" where brokers set up special insurance schemes and themselves arrange underwriting for the policies in question. One particular example from the evidence of Mr Harris on behalf of the IIB appears to be that of Broker Direct Plc which apparently delivers motor insurance products to over 1,000 registered brokers under joint venture arrangements with Allianz Cornhill.

34. According to GISC's first consultation document published in 1998, brokers accounted for 50% of total premium income in the general insurance sector in the United Kingdom, other independent intermediaries (banks/building societies and others) accounted for 18% of premium income, and insurance company sales, directly and through company agents, accounted for 32%. GISC's notification to the Director indicates that, in 1998, 28% of sales of general insurance to

personal consumers were made through independent brokers, whereas in the commercial sector around 81% of sales were made through brokers. Some specialised types of insurance (e.g. title deed insurance) are sold through solicitors.

35. There are no firm statistics for the total number of insurance intermediaries in the United Kingdom. GISC originally estimated the number at 30,000 but we are told that GISC's latest estimate is around 15,000.

The regulation of insurance intermediaries

— The historical position

36. Until the developments associated with the introduction of the FSMA described below, the regulation of insurance intermediaries in the United Kingdom had three main aspects. First, the Insurance Brokers (Registration) Act 1977 ("the 1977 Act") established the Insurance Brokers Registration Council ("IBRC"). The IBRC regulated registered insurance brokers, and in particular established requirements regarding proper qualifications and training, the security of clients' money, adequate capital resources and other safeguards such as professional indemnity cover and a compensation fund. Under the 1977 Act, only intermediaries registered with the IBRC could use the title "insurance broker". Secondly, Lloyd's brokers, who were required by Lloyd's to be registered under the 1977 Act, were also subject to prudential regulation under the Lloyd's Act 1982. Thirdly, the Association of British Insurers ("ABI") established a voluntary General Insurance Business Code of Practice ("the ABI Code"). The ABI Code set out certain general principles regarding the sale of general insurance, and required non-registered independent intermediaries to carry professional indemnity cover. Under the ABI Code an intermediary could, subject to certain exemptions, be either the tied agent of one insurance company, or an agent of up to six companies (i.e. a multi-tied agent) or an independent intermediary. There were significant differences between the requirements of the ABI and those of the IBRC. The arrangements were regarded in some quarters as inadequate from the point of view of consumer protection and were notably the subject of a critical report published in 1997 by the National Consumer Council. A European Commission proposal for a Directive of the European Parliament and the Council on the regulation of insurance intermediaries in the European Union by means of a system of registration (COM (2000) 511 final) has not yet been adopted.

— Reform of the regulation of financial services: the 1998 announcements

37. In 1998 the Government announced its intention to undertake a wide ranging reform of the regulation of financial services. On 7 April 1998 the Economic Secretary to the Treasury (Helen Liddell MP) announced in Parliament that:

> "we propose to publish for consultation this summer draft legislation to reform the structure of financial services regulation. This will bring together regulation of investment business, deposit-taking and insurance business under a single regulator, the Financial Services Authority."

38. At the same time, the Government published a Treasury consultation paper – "Financial Services Regulatory Reform: Insurance Brokers and Other Intermediaries". The options considered in that paper were: not bringing the selling, arranging or advising on general insurance within the new regulatory regime, but taking powers to do so in the future; the establishment by the industry of "a clear standard of practice which will give customers an assurance of quality"; and the repeal of the 1977 Act. In that last connection the Treasury commented:

> "it would be open to the broker sector itself to establish a non-statutory successor body [to the IBRC] if it saw advantages in this. Such a body could operate a system, with all the necessary features – admission criteria, discipline and rules – for accrediting or recognising professional insurance brokers ... It might be appropriate for such a body to seek a Royal Charter and thereby to develop a form of chartered professional status for insurance brokers."

39. On 27 July 1998 the Economic Secretary to the Treasury (Helen Liddell MP) informed Parliament that the Government had decided to repeal the 1977 Act and to "look to the industry itself to put the desired standards on a soundly established footing from which they will command widespread support." A press release of the same date stated that "a majority [of those consulted] felt that the best way forward was offered by self-regulation by a body having support across the insurance industry, independent of insurers and intermediaries but taking their interests and those of their customers into account."

— The reaction of the IIB to the 1998 announcements

40. Following those announcements, in August 1998 the IIB called an extraordinary general meeting of its members which, we are told, was attended by over 500 brokers. That meeting agreed unanimously that the IIB should promote its own regulatory body to be a substitute for the IBRC. In the meantime, the IBRC itself had, following the Government's announcement, issued redundancy notices to its staff and began to wind up its affairs. In those circumstances the IIB suggested to the Treasury that it could provide the necessary infrastructure to enable regulation by the IBRC to continue to function until the effective repeal of the 1977 Act. The

IIB was awarded a contract to do this and took on the necessary staff and premises. In this way the IBRC continued to regulate some 5,000 registered brokers until the eventual repeal of the 1977 Act which took place on 1 April 2001.

41. During that period the IIB itself worked on the principles and later the details of a set of rules known as IBRC Mk II which would form the basis for the continued regulation of IIB members by the IIB after the abolition of the IBRC. We are told that about 5,000 individual brokers applied to be registered on the IIB's "Institute Register of Insurance Brokers".

The development and "empowerment" of GISC

42. Meanwhile, in November 1998 the ABI, the Association of Insurance Intermediaries and Brokers, the British Insurance and Investment Brokers Association, the International Underwriters Association/London Insurance and Reinsurance Market Association, Lloyd's and The Lloyd's Insurance Brokers Committee published a first consultation document proposing the establishment of GISC as a single regulatory body for the sale of, and advice on, general insurance and reinsurance in the United Kingdom. According to GISC those sponsoring bodies together accounted for the vast majority of insurance placed and written in the United Kingdom.

43. It was recognised from the outset that GISC would not succeed unless there was some way in which all firms selling or giving advice on general insurance products could be brought within the GISC regime. The ABI consulted its members on this issue in September 1998 and concluded that "the only way to get organisations to submit to regulation by GISC would be for insurers to agree to deal only with distributors who are GISC members, and if they are direct writers, to be members themselves" (see GISC's notification to the Director, Form N, Schedule 10).

44. This aspect is referred to in paragraphs 3.7 to 3.10 of GISC's first consultation document of November 1998 which state, under the heading "Empowerment":

> "3.7. It has become apparent that there is only one way in which all firms who sell general insurance or give advice on general insurance products can be brought within the regulatory net. It is proposed that:
>
> - insurers which sell direct will be regulated by GISC;
> - insurers which assume responsibility for their agents will be regulated by GISC;
> - insurers will deal with brokers and intermediaries only if they are regulated by GISC; and

- insurers will only deal with agents for which they do not assume responsibility if the agents are regulated by GISC.

3.8 ABI members have already indicated preliminary agreement to these conditions, subject to seeing the details of the new regime. Everyone selling out of Lloyd's will be regulated either by Lloyd's or by GISC.

3.9 At first sight some may view this as insurers in some way 'capturing' the new regime or acting as regulators. This is not the case. The regulatory functions of setting the rules, monitoring of compliance, and taking disciplinary action against non-compliance will lie with GISC which will be independent of any particular sector of the industry.

3.10 It is true that empowerment of GISC will ultimately be achieved through insurers (for intermediary compliance) and trade associations (for insurer compliance). This is the only way in which such a regime can work. However, it is envisaged that GISC would only have recourse to insurers or trade associations as a very last resort, if it proved impossible to resolve compliance issues through any other route."

45. According to GISC, the response to its first consultation document was highly favourable. For example, a letter to GISC from Royal & Sun Alliance dated 3 February 1999, states:

> "As the largest non-life insurer in the UK, we fully support the establishment of a credible system of self-regulation, but strongly believe that this will only work if all interested parties agree to abide by "the rules". We are particularly concerned that significant sections of the market do not appear to have committed to the proposed regime. As an industry which is already subject to government scrutiny, we cannot afford to be divided on this issue and we all need to work hard to ensure that the system is upheld by all players. The consequences of failure will cost the industry dearly.
>
> ...
>
> We would only reiterate the point made in our covering letter regarding the absolute necessity of having the whole industry committed to the self-regulation process. Anything less than this position will mean that the industry has failed to obtain support for self-regulation and the reserve powers of the FSA/Treasury will be implemented. We firmly believe self-regulation represents the best way forward."

46. The Financial Services and Markets Bill was laid before Parliament on 17 June 1999. On 28 June 1999, Alan Milburn MP, Chief Secretary to the Treasury, said in Parliament:

> "Finally, on general insurance, my honourable friend will be aware that schedule 2 [of the FSMA Bill] provides for the regulation of a number of areas that are currently unregulated, including general insurance. We want to see whether the industry's own efforts through the new General Insurance Standards Council, can safeguard the public interest in the way that we want. We want to give that a fair wind and again, we shall monitor how well the industry puts its own house in order."

47. Similarly, on 1 July 1999, in a House of Commons Written Answer, the Economic Secretary to the Treasury (Patricia Hewitt MP) stated:

> "I am pleased that the insurance industry, including general insurance intermediaries, has risen to the challenge outlined [by Helen Liddell MP]. A broad-based range of support has developed for the GISC, a new voluntary body to promote high standards of professional conduct among general insurance intermediaries.
>
> The GISC is committed to strengthening industry standards and developing the general insurance intermediaries' services to the public in all parts of the market. It plans to complement the statutory responsibilities of the FSA while stripping away unnecessary regulatory requirements on general insurance intermediaries. The GISC has gathered support with impressive speed. If it can fulfil its promise, it will provide valuable services to both general insurance intermediaries and their customers.
>
> There may in future be a case for statutory regulation of general insurance intermediaries. If so, the Financial Services and Markets Bill contains a provision which would enable the Treasury to specify regulated activity, and to give regulatory responsibility to the FSA. For the moment, I have no plans to specify advice on general insurance as a regulated activity."

48. On 20 October 1999 the ABI sent a circular to its members headed "Insurer Empowerment of the General Insurance Standards Council". In that circular the members of the ABI were asked to sign and return a form to the ABI confirming that, subject to being content with the final shape of GISC, the insurer in question would "undertake to join GISC if it sells direct, and to do business only through third party distributors that are also members of GISC."

49. On 25 October 1999 GISC issued its second consultation document setting out its proposals in more detail. According to GISC, the response to that document continued "to reflect overwhelming support for the concept of GISC as a single, independent, self-regulatory body for the insurance industry."

50. On 28 October 1999 the Economic Secretary to the Treasury (Melanie Johnson MP) stated at a Parliamentary Standing Committee on Delegated Legislation: that "the case for statutory regulation [of general insurance is] not proven ... I am pleased to say that progress in forming a General Insurance Standards Council has so far been very encouraging. I hope that all businesses that gain financially from the distribution of general insurance will respond positively to the challenge of self-discipline."

51. GISC was formally launched on 3 July 2000. On the occasion of the launch Stephen Timms MP, Financial Secretary to the Treasury, said:

> "In 1998, the Economic Secretary, Helen Liddell MP, challenged the industry to put in place arrangements that would offer a real alternative to statutory regulation of general insurance intermediaries. Has the industry risen to the challenge?
>
> ... I am both pleased and encouraged that the industry, in the broadest sense, has achieved so much in setting up the General Insurance Standards Council. No one

should doubt that the Government and the public want to see high standards of professional conduct among those who distribute general insurance products: from insurance companies and from insurance intermediaries..."

III THE CONSTITUTION OF GISC AND THE GISC RULES

GISC

52. GISC is a company limited by guarantee. The members of the company are at present the directors. GISC does not operate for profit but earns revenue from membership fees which are used to pay the costs of conducting regulation. GISC estimates that its future annual fee income will be of the order of £15 million when all United Kingdom intermediaries are members of GISC. Its current revenue from membership fees is about £6.5 million. GISC is not registered for VAT because, it says, it is not involved in the supply of goods or services.

53. At the date of these proceedings the Board of GISC was composed as follows. The brackets indicate each director's commercial background.

Director	**Employer**	**(Background)**
Anthony Howland Jackson – Chairman	Formerly of Aon Group Ltd	(Lloyd's broker)
John Barton	Jardine Lloyd Thompson plc	(large independent broker)
Simon Bolam	E H Ranson & Co	(small independent broker)
The Rt Hon Baroness Dean of Thornton-le-Fylde		(public interest member)
David Gittings	Lloyd's – Regulatory Division	(Lloyd's)
Anthony Latham	Royal & Sun Alliance Insurance plc	(insurer)
George Lowe	Formerly of Automobile Association Insurance Services Ltd	(large motor insurance intermediary)
Dr Oonagh McDonald CBE		(public interest member)
Christopher McKee	Direct Line Insurance plc	(insurer selling direct)
John Miller	Anchor (UK) plc	(small intermediary)
Robert Newton	Formerly of CGU plc	(insurer)
Michael Pendle	Abbey National General Insurance	(large intermediary)
Michael Slack	Road Runner Group	(intermediary)
David Slade	Perkins Slade Ltd	(intermediary)
Previously – Stephen Wells who has now resigned as director	Formerly of National Westminster Insurance Services Ltd	(subsidiary of a bank)
Andrew Young	NFU Mutual	(insurer)
Christopher Woodburn – Chief Executive	GISC	

54. According to the material before us, the final constitution of GISC is not yet settled. In a third consultation document issued in December 2000 GISC proposed that: (a) GISC remain a company limited by guarantee; (b) there should be 16 directors, 10 elected, 5 independent, 1 Chief Executive; (c) regulated firms should become members of the company; (d) at least initially, there should be two categories of member, namely insurers and intermediaries; (e) members should be able to elect directors in their category; (f) there should be weighted voting rights; and (g) there should be a nominations committee to appoint the independent directors.

55. More specifically, in this consultation document the Board rejected for the time being the suggestion that a majority of the Board be independent directors, but proposed an increase in the number of independent directors from two to five. Of the ten elected directors, four would be elected by insurers and six by intermediaries.

56. As regards regulated firms becoming members of the company, the Board considered that the advantages of the regulated firms becoming members were:

> "accountability and transparency – the regulated businesses will have company law membership rights. The Board is therefore required to report to regulated businesses in their capacity as members of the company and regulated businesses can ultimately provide a check on the power of the Board.
>
> GISC is a self-regulating organisation and if regulated businesses are not members they will have no legal right to say how GISC is run;"

The Board concluded that:

> "the accountability and transparency provided by giving the regulated businesses a greater say in the running of the company will make GISC more attractive to potential members and, ultimately, enable it to meet its objectives more effectively."

57. As regards weighted voting rights, the Board considered:

> "that it is appropriate to acknowledge that a large business in the industry should, in principle, have a greater number of votes than a smaller business. This, of course, does not mean that the smaller businesses will have no influence. In practice, considerably more small businesses will be members of GISC and, together, they should be properly represented. The Board is therefore proposing that on balance 'weighted' voting would be appropriate, at least in the initial stages of GISC's development."

58. In relation to the election of directors, the Board considered that the advantages of members electing directors were:

> "5.4.1.1 the Board would be directly accountable to regulated businesses; and
>
> 5.4.1.2 an election process gives increased transparency;"

The Board concluded that the election of directors by the members:

> "gives the members a role in governance so they can satisfy themselves that an appropriate governance structure is in place (as proposed by the Cadbury Committee) and provides a formal and transparent procedure (in accordance with the Combined Code).

(We understand that the "Combined Code" is the document developed following recommendations of the Cadbury and other committees on corporate governance in public companies.)

59. The initial funding of GISC was approximately £2.1 million, of which intermediaries contributed just over 50%.

The GISC Rules

60. GISC's objective, as set out in Section A (paragraph 2) of the GISC Rules, is "to establish a single regulatory regime to monitor and enforce standards in all areas of General Insurance Activities". The various terms used in the Rules are defined in Section B. The requirements for membership are set out in Section F. The Rules themselves contain, notably, a code for private customers (Section C); a commercial code (Section D); practice requirements relating to e-commerce (Section E); membership practice requirements (Section G); rules relating to monitoring and investigation (Section H); and enforcement, disciplinary and appeal procedures (Sections I, J, and K). Details of the membership fees are at Appendix 2.

— Definitions

61. Under the GISC Rules as amended on 15 June 2000 and 24 October 2000, 'Regulated Activities' includes one or more of selling, advising or broking a 'General Insurance Product', that is to say one of the general insurance contracts listed in Schedule 2 to the Insurance Companies Act 1982. 'General Insurance Activities' means Regulated Activities carried on from a permanent place of business within the United Kingdom in connection with one or more General Insurance Products.

62. 'Insurer' means a person who writes a general insurance contract within the terms of Schedule 2 of the 1982 Act. 'Intermediary' means anyone who engages in General Insurance Activities who is not an Insurer, an Appointed Agent or Appointed Sub-Agent, an Introducer, a Service Provider or an Outsourcing Provider. An "Independent Intermediary" means an Intermediary who, in respect of any product type, offers or sells the products of more than one Insurer. A "product type" is defined as "any category of products which are competing or substitutable for one another".

63. An 'Appointed Agent' means a Non-Member who engages in General Insurance Activities on behalf of a Member pursuant to an Appointed Agent Agreement, and for whose General Insurance Activities the Member accepts responsibility. An 'Appointed Sub-Agent' is a Non-Member who engages in General Insurance Activities on behalf of an Appointed Agent or another Appointed Sub-Agent pursuant to an Appointed Sub-Agent Agreement and for whose activities the Member again accepts responsibility. An 'Introducer' introduces customers to members, Agents and Sub-Agents in return for fees or commission but does not advise or sell. We have not heard argument regarding Service Providers (e.g. actuaries, loss adjusters, salvage agents, vehicle repairers) and Outsourcing Providers (e.g. telephone call centres) who supply various ancillary services.

— *Membership*

64. Under Rule F1, Insurers and Intermediaries who engage in General Insurance Activities from a permanent place in the United Kingdom are able to apply for membership. Applicants not based in the United Kingdom may be considered for membership. Membership is determined by a Membership Committee, and is subject to appeal to a Membership Appeal Tribunal. The applicant must show that he is in a position to comply with the GISC Rules.

— *Rule F42*

65. For present purposes the most important Rule in the Membership Section is Rule F42 which provides:

> "Dealing with intermediaries
> Subject to any Rule waiver issued by GISC, Members shall not, and shall ensure that their Appointed Agents and Appointed Sub-Agents shall not, in the course of their General Insurance Activities, deal directly with any person in circumstances which would involve that person in engaging in General Insurance Activities as an Intermediary where that person is not a Member."

66. The effect of Rule F42 is that where an intermediary is not a Member of GISC, the insurer may deal with that intermediary only if he becomes an Agent or Sub-Agent of that insurer.

67. Rule F34 provides that "[w]here a Member decides to resign from Membership it must ensure that any General Insurance Activities which are outstanding are properly completed or responsibility for compliance with the Rules in respect of the resigning Member's Customers is accepted by another Member prior to resignation". Rule F37 provides that a Member remains subject to GISC's authority and jurisdiction for a period of two years from the date of termination or resignation of Membership.

68. Rule F14.18 provides that Members must agree to "state that they are Members of GISC in all advertising and communications with Customers and potential Customers in connection with General Insurance Activities and only use the GISC logo in accordance with instructions issued by GISC". We understand that the GISC logo has been registered by GISC as a service mark under the Trademarks Act 1994.

— Agents and Sub-Agents

69. Members may appoint Agents, who may in turn appoint Sub-Agents, who engage in general insurance activities on behalf of the Member and for whose conduct the member is responsible.

70. Rule F24 provides:

> "24. Insurers may not appoint an Independent Intermediary as an Appointed Agent or permit an Independent Intermediary to be appointed as their Appointed Sub-Agent for the purposes of offering or selling their General Insurance Products.
>
> An Independent Intermediary may only be appointed as an Appointed Agent or Appointed Sub-Agent of one Intermediary."

71. The effect of Rule F24, read with the definition of 'Independent Intermediary' is that an intermediary (for example a travel agent) cannot become an Agent of an insurer if he offers or sells the products of more than one insurer in respect of "the same product type". It follows that an intermediary such as a travel agent selling, for example, holiday cancellation insurance, must either become a Member of GISC or be tied to one insurer for holiday cancellation insurance.

— The Codes

72. The Private Customer Code is intended to ensure that general insurance customers are treated fairly and reasonably. The requirements cover such matters as explaining the service offered, matching the customer's requirements to the products and services offered, giving appropriate information, confirming the cover, observing service standards e.g. as to handling claims and issuing documentation, confidentiality, and handling complaints.

73. The Commercial Code contains similar requirements, based on a series of core principles, but is rather more broadly drawn. Failure to observe the Commercial Code is not apparently regarded as a breach of the GISC Rules as such.

74. The E-Commerce Code sets out requirements and advice regarding the offer of general insurance via the Internet, and in particular the information that must be supplied to the

Customer. The Member's website must display the GISC logo and a hyperlink to GISC's own site must be provided.

— Membership Practice Requirements

75. Section G contains the Membership Practice Requirements. Practice Requirement G1 covers the financial requirements which apply to intermediaries. The obligations cover areas such as segregation of insurance monies, holding and investing of insurance monies, investment principles, professional indemnity insurance, solvency and reporting and monitoring. Practice Requirement G1.18.2 disapplies the requirement for intermediaries to segregate clients' monies from their own monies where GISC is satisfied that "General Insurance Activities are secondary to the main business activity of the Intermediary". Practice Requirement G2 covers requirements concerning complaints handling. Practice Requirement G3 covers competence and training. Members must ensure that employees are properly trained and they must assess employees' competence on a regular basis. Employees should be adequately supervised and undertake continuing professional development.

76. Section H contains the rules regarding monitoring and investigation. GISC has appointed PricewaterhouseCoopers and Ernst & Young as monitors for an initial period of four years.

— Enforcement and Discipline

77. Where GISC considers that a GISC member may have breached one of the GISC Rules, it will refer the matter to an "Enforcement Committee". This Committee may impose on an infringing member a public reprimand; a fine; terms and conditions for continuing membership; suspension of membership; and expulsion and prohibition on re-application. The Enforcement Committee is selected from an "Enforcement Panel", the latter being appointed by the Board and consisting of public interest representatives, general insurance industry representatives, other individuals with sufficient experience of the general insurance industry, legally qualified individuals and Board members. The chairman or the deputy chairman of the Enforcement Panel (who must both be legally qualified and not a member of the Board) selects a minimum of four members from that panel to constitute an Enforcement Committee. The Enforcement Committee must include a minimum of a legally qualified chairman, two individuals with practical experience of the area of business relevant to the case and one public interest representative. If a GISC member does not agree with the decision of the Enforcement Committee, he has the right to have the case referred to a "Disciplinary Tribunal". A Disciplinary Tribunal is constituted from the Disciplinary Panel which is drawn from the same categories of persons as the Enforcement Panel but excluding Board members. There is a right

of appeal against any decision of a Disciplinary Tribunal to a "Disciplinary Appeal Tribunal". The Disciplinary Appeal Tribunal consists of a legally qualified chairman, one individual who has practical experience of the area of business relevant to the case and one public interest representative. Such an appeal only lies with permission and on a point of law or misinterpretation of the GISC Rules.

— Fees

78. Appendix 2, paragraph 7 of the GISC Rules sets out the membership fees payable by the GISC members. An intermediary must pay 0.1% of the amount due to it in relation to general insurance activities, net of all brokerage, fees, commissions and other income such as administration charges and overriders. An insurer must pay 0.025% of the gross premium income which it derives from general insurance activities, less any commission it pays to intermediaries or introducers. The minimum fee for membership of GISC is £200 per annum and the maximum annual fee is £100,000.

— Exclusion of liability

79. Rule A18 provides that "[i]n the absence of bad faith, GISC shall not be liable in damages for any loss, cost, damage or expense which arises from any act or omission of GISC in the discharge or purported discharge of GISC's powers or obligations under the Rules or in pursuance of its objective, whether arising from negligence, breach of contract or otherwise".

The implementation of Rule F42

80. It was envisaged from the outset that Rule F42 would be implemented in stages. The first step was taken by Lloyd's, who informed all Lloyd's Brokers by a circular of 31 May 2000 of an amendment to the Lloyd's Brokers Bye-law to the effect that:

> "A Lloyd's broker who is not a member of GISC by 3 July 2000 will not be permitted to place new or renewal business at Lloyd's until it becomes a member of the GISC. A Lloyd's broker who is not a member of the GISC by 1 September 2000 will be deregistered by Lloyd's."

81. By December 2000, according to GISC's third consultation document, GISC had about 800 members, including all Lloyd's brokers. According to GISC, it was envisaged that Members of GISC should not deal with intermediaries in breach of Rule F42 from 1 September 2001 with certain transitional arrangements applying until 1 January 2002. The evidence indicates, however, that at some stage members of GISC believed that 1 April 2001 was to be the starting date.

82. The following documents before the Tribunal indicate that considerable pressure has been placed on intermediaries to join GISC:

— A circular from AXA Insurance in October 2000 states that AXA Insurance "has joined GISC and is actively encouraging all distributors of general insurance products to do the same" and that "Right now, membership is voluntary and open to all brokers, intermediaries and direct sellers of general insurance. But in time – probably late 2001, early 2002 – when the Competition Authorities have given appropriate clearance, membership will become mandatory".

— A circular from PPP Healthcare, a subsidiary of AXA, in October 2000 refers to GISC as the "new regulator within the general insurance industry" and states that "we are now able to consider full terms for intermediaries currently holding Corporate only terms of business. This can be arranged provided you are, or once you become, a member of the GISC".

— A letter of 23 October 2000 from Groupama Insurances to an IIB member states that "the expected implementation of GISC Rule 42 in April 2001, will create a single, coherent regulatory system for the general insurance industry. This will in effect make membership mandatory for independent intermediaries and brokers (…) In simple terms, Groupama Insurances has taken the decision to trade only with full time insurance intermediaries registered as GSIC members and we are now establishing user friendly procedures to ensure compliance in this important area" (…) "With effect from April 2001, no organisation will be permitted to carry on general insurance business or offer advice without becoming a member. With this in mind, we believe that it is vital for you to apply for membership now so that you are ready and able to trade under the new regime".

— A letter of 7 February 2001 from Western Provident Association to its intermediaries states that "WPA will only recognise GISC member intermediaries from [1 April 2001], and all non registered agreements will be terminated (…) Therefore, if you are not presently registered with the GISC, I urge you to do so immediately to ensure your agreement with WPA is not affected in any way."

— A letter from PPP Healthcare of 1 March 2001 to an IIB member states that "it has been decided that as from 1 April 2001, membership of the GISC will be mandatory for all intermediaries wishing to set up Terms with PPP healthcare. Therefore, we recommend that you apply to them without delay. (…) If you respond and we are able to process your application by 16 March 2001, we will consider your request for Terms. (…) We regret that if we do not hear from you by 16 March 2001, we will have to lapse your application, unless you have registered with the GISC".

— A letter of 6 March 2001 from Iceni Motor Facilities to an IIB member states that "we will require written confirmation from yourselves of the name with which you appear on the GISC membership list in order that we can confirm your membership and continue to arrange the policy via your Company" (…) "…if we do not hear from you by 01/04/2001 we shall assume that you are not a member of the GISC and we will therefore deal direct with the client from that point".

— A circular of 4 May 2001 from Highway Insurance requests details of intermediaries' GISC membership number and date of application. It also states that "Highway Insurance will not be able to trade with any firm which is not a GISC member, or a GISC applicant, after [1 September 2001]. After 31 December 2001, we can only trade with GISC members".

— A letter of 7 July 2001 from Legal & General to an IIB member states that "as a member of GISC Legal & General will as from 1 September 2001 only be prepared to deal with GISC members or those that have applied for membership at that time".

— A letter of 12 July 2001 from Markel 702 (UK) Limited to an IIB member states that Markel has "taken a Management decision to deal only with those Agents who are existing GISC members or who will apply for membership prior to 1 September 2001". It goes on "I must advise you that we will be unable to issue any renewal documentation to you, provide quotations or accept any new business for risks renewing/incepting on or after 1 September 2001." (…) "Consequently you may wish to make alternative arrangements for your Clients after 1 September".

— A letter of 13 July 2001 from Zurich Insurance states that Zurich "strongly advise all our agents to join GISC in line with rule F42 (…) It is important that we establish your intentions regarding GISC, as this matter needs to be resolved before September (the deadline for applications to GISC)."

— A letter of 18 July 2001 from Alexander Forbes requests the "current status with regard to [the IIB member's] membership with GISC".

83. The Tribunal notes that a number of these letters were written after these proceedings had been commenced and after GISC had reminded its members, by a letter put on its website on 25 June 2001, that Rule F42 was not yet in force and that GISC Members were free to deal with non-Members until 1 September 2001. It was on the basis of that letter that the IIB decided not to pursue its claim for interim relief.

84. Following the fixing of the date for hearing of these appeals, the deadline of 1 September 2001 was postponed until 15 October 2001. Following the hearing on 20 and 23 July 2001, GISC confirmed to its members by letter of 27 July 2001 that the operation of Rule F42 will remain suspended pending the outcome of these proceedings, thus postponing both the 15 October and 31 December 2001 deadlines.

85. We were told that, as at 24 July 2001, more than 85 to 90% of United Kingdom insurance companies active in the general insurance sector were Members of GISC, although few Lloyd's syndicates had so far joined. As regards intermediaries, about 4,200 had been admitted to Membership, and another 1,500 applications were being processed. Since there are estimated to be over 15,000 intermediaries in the United Kingdom, that leaves about 9,000 to 10,000 intermediaries who are not yet Members of GISC. Of those, some 2,500 are ABTA members. On the evidence before us, about 1,000 broking firms are members of the IIB, a large number of which have, apparently, not so far joined GISC. As to the remainder, we were told by GISC on the second day of the hearing that "many firms may decide to go down the agency route and therefore they stop being a potential intermediary, they actually become an agent, and so the number of intermediaries may yet further decline".

86. As far as the IIB is concerned, the IIB applied to GISC for a waiver of Rule F42 by letter of 26 October 2000. That request was refused by GISC by letter of 21 November 2000. The IIB applied again to GISC for a waiver by letter of 20 February 2001 which request was refused by GISC by letter of 15 March 2001, mainly on the ground that such a waiver would undermine the principle of GISC as a sole regulator. It appears from a letter from ABTA to GISC of 7 March 2001, which records comments made by GISC during a working party on Rule F42, that GISC does not consider waivers in favour of organisations such as ABTA to be appropriate. GISC's letter to ABTA of 18 June 2001 indicates that GISC could see no justification "for compromising the fundamental principle that where there is customer choice regulatory responsibility should rest in one place…"

IV THE PROCEDURE BEFORE THE DIRECTOR AND THE GISC DECISION

The submissions made to the Director

87. Meanwhile, following the GISC notification on 30 June 2000, GISC, the IIB and ABTA all made submissions to the Director prior to the adoption of the GISC Decision on 24 January 2001. The Tribunal has no information as to the observations submitted to the Director by any other persons, notably in response to a public invitation to submit comments published by the Director in the Office of Fair Trading Weekly Gazette (Issue 35/2000, 21–27 October 2000).

88. A number of meetings and regular communication took place between representatives of GISC and the Director both before and after the notification. By letter of 3 March 2000, before the notification had formally been made, the Director asked GISC to ensure that all material information, including information on the extent to which membership of GISC was in practice required, was provided to him. In very brief outline, GISC's main arguments were as follows.

(i) GISC is instituted, with the blessing of the Government, to provide a harmonised set of standards for those engaging in general insurance activities from a permanent place of business in the UK. This system is well suited to the variety of different distribution channels that have developed over recent years including direct selling, internet sales and the growth in sales of financial services products by intermediaries such as supermarkets.

(ii) The Director's decision is sought on the basis that up to 100% of insurers and intermediaries who are eligible to join GISC will do so.

(iii) The overall aim of the GISC regime is pro-competitive and the analysis of the GISC Rules should be undertaken in that context: it will serve the public interest by delivering an appropriate level of customer protection whilst introducing a level-playing field for competition. It will tackle the inadequacies of the current regime, harmonise the system and remove unnecessary fetters on the operation of competition. Consistent market conditions will facilitate more open competition and contribute to greater opportunities for distribution of general insurance products.

(iv) It was established by the European Commission in the *London Futures* cases (*London Grain Futures Market* 0J 1987L19/22; *London Sugars Futures Market* OJ 1985 L369/25; *London Cocoa Terminal Market* OJ 1985 L369/28; *London Coffee Terminal Association* OJ 1985 L369/51) that systems of self-regulation do not fall within Article 81(1) provided that membership is open, clear and objective; and that the rules are proportionate to the aims of the association. The GISC regime fulfills all of these criteria. Moreover, in accordance with Case C-250/92 *Gøttrup-Klim v DLG* [1994] ECR I-5641, there are no provisions which are directly restrictive of competition: no group within the market will be able to use control of GISC to distort competition in its favour; the GISC Rules are necessary and proportionate to GISC's regulatory objectives; and small firms will benefit from the GISC regime.

89. The IIB made the following main points as regards the Chapter I prohibition. (The IIB also advanced arguments under the Chapter II prohibition imposed by section 18 of the Act (abuse of a dominant position) but those arguments have not been pursued before us.)

(i) The GISC Rules have as their object or effect the prevention, restriction or distortion of competition within Chapter I. By virtue of Rule F42 non-member intermediaries will be denied access to 80% of the insurers' market and the whole of the Lloyd's underwriting market. In addition, regulation of intermediaries by insurers is subject to material conflicts of interests, would result in the loss of independent advice, and lead to a general levelling down in standards of regulation. Since GISC seeks to regulate those intermediaries who have not previously been able or willing to satisfy the requirements of the IBRC, the GISC Rules will inevitably lead to lower standards of advice and a loss of protection for both consumers and businesses.

(ii) GISC cannot be granted an individual exemption under section 4 of the Act: (a) the restrictions are not indispensable, since other forms of regulation exist; and (b) the effect of the GISC Rules will be to eliminate competition in respect of independent insurance intermediary services. Brokers will not be able to continue to operate through their own regulatory regime unless they also join GISC. The burden on those brokers of two regulatory regimes will distort or prevent competition.

(iii) Should the Director fail to act, the result will be that brokers and intermediaries will be forced into GISC as a fait accompli and it will not be possible to reverse the position.

90. ABTA raised the following main points:

(i) The cost of GISC's regulation of the travel industry, which accounts for a tiny proportion of general insurance sales in the United Kingdom, is disproportionate: ABTA members' sale of insurance typically accounts for less than 2% of their total turnover. The costs of joining GISC will place a financial burden on the travel industry in excess of £2 million a year.

(ii) Travel agents will effectively be tied to one intermediary or insurer and will be unable to offer a range of travel products. This stifles competition and narrows consumer choice.

(iii) Rule F42 introduces a "closed shop" system which excludes ABTA members who do not join GISC from access to the insurance market. It reduces the ability of travel agents and tour operators to compete with mainstream insurers in the sale of travel insurance policies. ABTA should remain as the regulator for the travel industry, including travel insurance activities.

The GISC Decision

91. The GISC Decision first summarises the facts and the contents of GISC's notification. Paragraph 8 of the Decision makes it clear that GISC has requested a decision on the basis that it

will regulate the whole of the general insurance community in the United Kingdom, estimated at up to 16,000 eligible members: (see also paragraph 25 of the GISC Decision).

92. At paragraphs 24 and 25 of the GISC Decision, the Director found that GISC is an association of undertakings; that GISC's adoption of the Rules is a decision of an association of undertakings for the purposes of section 2 of the Act; that the Rules may also be characterised as an agreement or concerted practice between the members of GISC who are undertakings for the purposes of section 2 of the Act; and that the Rules affect trade within the United Kingdom within the meaning of section 2 of the Act.

93. As regards the issue whether the GISC Rules "have as their object or effect an appreciable prevention, restriction, or distortion of competition", paragraph 27 of the GISC Decision states that the Director has considered whether the Rules:

> "(i) impose or increase barriers preventing entry into or continued operation in the general insurance industry;
>
> (ii) reduce or distort competition between insurers, between intermediaries or between insurers and intermediaries; or
>
> (iii) result in the exchange of price or non-price information.

94. At paragraphs 29 to 32 of the GISC Decision the Director states:

> "29. The Director has decided that none of the Rules notified by GISC, by themselves or in combination with the other Rules, have as their object or effect an appreciable prevention, restriction or distortion of competition within the UK for the purposes of the Chapter I prohibition. The Rules are aimed at ensuring that members of GISC are competent to carry on general insurance activities and that there are safeguards in place to protect consumers. In order to achieve these necessary protections, the Rules impose standards which members must meet and procedures for enforcing them. To be effective, a self-regulatory framework of this nature will necessarily act as a control, to ensure competence and consumer protection, on the undertakings that operate in the relevant market. It does not follow from this that such a framework will, therefore, result in an appreciable prevention, restriction or distortion of competition. Indeed, in this case the Director is satisfied that the consumer benefits flowing from the Rules will not be undermined in this way. The Rules do not impose significant barriers to operating in the general insurance industry as the requirements and costs of compliance appear to be reasonable and will not result in an appreciable reduction or distortion in the overall level of competition. To be sure, the Rules impede businesses that lack competence or that operate in ways that jeopardise consumers. But that is not anti-competitive. Indeed, it may be positively pro-competitive as between the competent businesses that have proper safeguards in place to protect consumers.
>
> 30. The Director considers that the terms of membership and the membership application, enforcement and intervention procedures in GISC's Rules are transparent, non-discriminatory and based on objective standards. GISC's

membership fees do not operate as a barrier preventing entry into or continued operation in the general insurance industry for the purposes of section 2 of the Act. The Rules contain a clear description of the membership application, enforcement and intervention procedures that GISC will operate, under which GISC must provide reasons for its decisions and which include an appeals procedure.

31. The financial requirements in the Rules are transparent, non-discriminatory and based on objective standards. The exceptions to the financial requirements that are provided for in the Rules seek to make the application of the Rules proportionate to particular sectors and reflect the size and diversity of the general insurance community that GISC intends to regulate through its Rules.

32. The Director has not identified any provisions in the General Insurance Code for Private Customers or the Commercial Code which have as their object or effect an appreciable prevention, restriction or distortion of competition within the meaning of the Chapter I prohibition. In particular, the provisions in the Codes (and the Rules more generally) do not introduce artificial regulatory barriers in the number of insurers with whom an intermediary may do business or vice versa. The Director does not have any evidence to suggest that the Rules will result in the exchange of commercially sensitive information between those regulated by GISC which may raise concerns under the Chapter I prohibition."

95. The Director deals with Rule F42 at paragraphs 34 to 35 of the GISC Decision:

"34. Rule F42 is the means by which GISC will try to achieve its objectives and establishes a common regulatory framework for intermediaries, who will have to comply with GISC's Rules whether they choose to join GISC as full members or are regulated as appointed agents or appointed sub-agents via their relationships with members. Rule F42 does not require that all intermediaries become full members of GISC. The definition of intermediary in the Rules excludes, among others, appointed agents and appointed sub-agents. This section of the general insurance community is regulated through a principal member of GISC, with whom they have entered into an appointed agent or appointed sub-agent agreement. The principal will accept responsibility for their appointed agents' and appointed sub-agents' compliance with the Rules.

35. Rule F42 will prevent members of GISC and their appointed agents and appointed sub-agents from carrying on general insurance business with UK intermediaries who are not members of GISC. The Director does not have any indication that this Rule will result in significant numbers of intermediaries exiting from the market such that competition in the market will be reduced appreciably. Furthermore, it is open to members to enter into appointed agent and appointed sub-agent agreements to allow them to continue to do business with intermediaries who choose not to become GISC members. The Director has therefore concluded that Rule F42 will not give rise to an appreciable restriction or distortion of competition.

V THE SECTION 47 DECISIONS

The IIB's Section 47 Application

96. In its section 47 Application dated 22 February 2001, which was supported by a number of witness statements by IIB members, the IIB submitted: that Rule F42 forces IIB Members to join GISC – at a high cost – and thus prevents them from submitting to regulation by other bodies, with a consequent restrictive effect on competition between providers of regulatory services; the 'exit test' applied by the Director at paragraph 35 of the GISC Decision was the wrong test in assessing whether competition was prevented, restricted or distorted by Rule F42; the GISC Rules would adversely affect the competitiveness of intermediaries, notably in impeding businesses that have higher regulatory standards than those required by GISC, in depriving such businesses of the possibility to differentiate themselves by virtue of higher regulatory standards, and in forcing certain independent intermediaries into 'agency' status to the advantage of GISC Member networks; the membership fees discriminated in favour of insurers; the relaxation of the requirement of segregation of clients' monies for firms where insurance was a secondary part of their activities gave such firms an unfair competitive advantage; and GISC's ability to grant waivers of Rule F42 was wholly subjective and not susceptible of appeal.

97. The IIB also made an application for interim relief also dated 22 February 2001 on the basis of infringements of both Chapter I and Chapter II. The IIB drew the Director's attention to the pressure being put on intermediaries to join GISC to which we have already referred (namely the circulars from AXA and PPP Healthcare in October 2000, the letter from Groupama Insurances of 23 October 2000 and the letter from Western Provident Association of 7 February 2001) and contended that the IIB was facing a drain of members that would make it impossible for the IIB to establish an alternative basis of regulation.

98. The IIB wrote to the Director reminding him of the gravity of the situation by letters of 5, 7, 14 and 19 March, 2001 again drawing attention to the pressure to join GISC being exerted on IIB Members by GISC members and referring to the letters from PPP Healthcare of 1 March 2001 and Iceni Motor Facilities of 6 March 2001. On 20 March 2001 the IIB informed the Director that they would have to make staff redundant and requested a definite response by 21 March 2001. The Director rejected the IIB's application for interim relief by letter of 21 March 2001.

99. The IIB continued to press the Director for a decision on the section 47 application, so as to enable the IIB to bring the matter before this Tribunal, by letters of 23 March, 26 March, and

12 April 2001. The Director replied on 18 April 2001 to the effect that 'no firm date' could be given.

100. On 30 April 2001 the IBRC was wound up pursuant to the repeal of the 1977 Act. According to the IIB, about 5,000 individual brokers had by then been registered on the Institute's register, but the IIB did not feel it could confidently proceed with IBRC Mk II without either a positive response from the Director or a successful appeal to this Tribunal. In a press release of 1 May 2001, Mr Paddick expressed his disappointment that the IIB had still not received a reply by the Director to the IIB's section 47 application of 22 February 2001, commenting that "such a ridiculous situation must either amount to competition law gone mad or being very wrongly applied".

101. On 3 May 2001 the IIB notified to the Director that, as a result of the absence of a decision under section 47, they had been obliged to make their entire regulatory division redundant and to put their premises on the market.

102. The Director rejected the section 47 application by the IIB Decision of 11 May 2001.

The IIB Decision

103. As regards the IIB's submission that the GISC Decision failed to analyse the impact of Rule F42 on competition between providers of supervisory and regulatory services, the Director found as follows at paragraph 17 to 18 of the IIB Decision:

> "... [The GISC Decision] did not address the question of whether the Rules could or were intended to affect competition within a market for supervisory and other regulatory services.
>
> As noted at paragraph 29 of the Decision, the Rules are aimed at ensuring that members of GISC are competent to carry on general insurance activities and that there are safeguards in place to protect consumers. The Director considers that regulation of this nature is not an economic activity but is implemented in the wider public interest. The function of GISC is to consider, prepare and implement rules which regulate the economic activities of undertakings in the general insurance sector. In light of European case law, this does not constitute an economic activity. Furthermore, GISC does not itself carry out general insurance activities. Consequently, the Director has no grounds for believing that, in carrying out its regulatory functions under the Rules, GISC competes economically with the IIB or any other trade association or supervisory body. On this basis, the Director is of the view that, for the purposes of the Act, GISC is not an undertaking in its own right."

104. As regards the IIB's submission that Rule F42 would drive out of business firms that do not join GISC and adversely affect the competitiveness of those who did join, the Director said at paragraphs 20 to 25 of the IIB Decision:

> "20. The Director concluded [in the GISC Decision] that a mandatory scheme of this nature would not infringe the Chapter I prohibition provided the agreement which establishes it does not, to an appreciable extent:
>
> — impose or increase barriers preventing entry into or continued operation in the general insurance industry; or
>
> — reduce or distort competition between insurers, between intermediaries or between insurers and intermediaries (for example, by resulting in the exchange of price or non-price information).
>
> 21. In the Decision, therefore, the Director considered whether the Rules would, individually or collectively, have any of these effects and was satisfied that they would not. He therefore concluded that Rule F42 will not give rise to an appreciable restriction or distortion of competition in the general insurance market.
>
> 22. The IIB has submitted that changing regulatory regimes may, in the future, impact on the ability of an intermediary who is a member of GISC to compete with other intermediaries, insurers and other industry players. GISC has introduced a new self-regulatory regime for the entirety of the general insurance community that it intends to regulate. In these circumstances, there is no reason to believe that intermediaries who fall within GISC's regulatory framework will, by virtue of this, be disadvantaged as compared with their competitors.
>
> 23. The IIB submits that the Director has failed to consider the impact on competition through the lowering of regulatory standards. Under Section 14(2) of the Act, the Director was asked to consider the application of the Chapter I prohibition to the Rules notified by the GISC. This required an objective analysis of the Rules to determine whether they had as their object or effect an appreciable prevention, restriction or distortion of competition within the UK. For these purposes, as set out in the Decision, the Director considered whether the Rules would impose or increase barriers to entry into or continued operation on the general insurance market; reduce or distort competition between markets participants; or otherwise prevent, restrict or distort competition, for example through the exchange of information. It was not necessary and would not have been appropriate for the Director to carry out a comparative analysis of the different types of regulation that may currently or in the future exist in the industry. The primary concern of the Director was to determine whether the GISC Rules themselves were objective, transparent and non-discriminatory and did not raise barriers to entry, a position that would stand regardless of the existence of alternative forms of regulation which may impose higher or lower requirements on those that they regulate.
>
> 24. As noted by the IIB, the Rules do not prohibit members of GISC from also being members of other trade associations or regulatory bodies. It is open to independent intermediaries and other segments of the market to seek to differentiate their services from others by setting up and promoting themselves as being subject to enhanced standards. The Director's Decision does not prevent this from occurring. The IIB has submitted that there are additional costs involved in belonging to a further trade association or

regulatory body in addition to GISC. This was not the basis on which the Director considered the application of the Chapter I prohibition to the Rules. In his analysis, the Director considered the Rules and concluded that they do not impose significant barriers to operating in the general insurance industry as the costs of compliance with GISC regulation appear to be reasonable.

25. The IIB has not produced any evidence to show that Rule F42 will work substantially to the business advantage of GISC member networks such that competition would be restricted or distorted to an appreciable extent."

105. As regards the granting by GISC of waivers of Rule F42, the Director said at paragraph 31:

> "31. The Director considered whether the terms of membership and the membership application, enforcement and intervention procedures in the Rules were transparent, non-discriminatory and objective and was satisfied that they were. As noted at paragraph 30 of the Decision, the membership application, enforcement and intervention procedures that GISC will operate are clearly described, require GISC to provide reasons for its decisions and include an appeals procedure. In the light of these points and of his overall assessment that Rules do not give rise to a barrier to entry and do not restrict or distort competition, the fact that GISC has the ability to waive Rule F42 does not alter the Director's assessment of the competitive effects of the Rules."

106. The Director also considered, and rejected for lack of evidence, the IIB's submissions on the questions of membership fees and segregation of monies under the GISC Rules (see paragraphs 26 to 30 of the IIB Decision).

ABTA's Section 47 Application

107. In its section 47 application dated 23 February 2001 ABTA submitted, notably, that Rule F42 is prima facie an appreciable restriction on competition since it places a restriction on the persons with whom an undertaking may deal and forms part of a large scale collective exclusive dealing arrangement covering practically the whole of an important economic sector. The Director's contrary view, at paragraph 35 of the GISC Decision, contains two errors: (i) the Director's 'exit' test represents only a part of the test for a material restriction on competition, and overlooks the fact that Rule F42 will in practice force ABTA members into membership of GISC, thus causing additional costs and affecting their competitiveness; (ii) the possibility that ABTA members could avoid becoming members of GISC by accepting appointments as Appointed Agents or Sub-Agents of GISC members overlooks Rule F24 which in effect precludes Appointed Agents or Sub-Agents from dealing with more than one insurer. That would severely limit the commercial freedom of ABTA members who customarily deal with several insurers. In addition, ABTA submitted that in paragraph 30 of the GISC Decision the Director had failed adequately to analyse the discriminatory effect of the GISC fees which

resulted in transactions through intermediaries being charged at a rate that was four times that charged for transactions through insurers selling direct.

The ABTA Decision

108. As regards Rule F42, the Director rejected ABTA's submissions at paragraphs 16 to 22 of the ABTA Decision:

> "16. When carrying out any analysis under the Chapter I prohibition of the Act, it is important to consider the overall effect of an agreement, taking account of the characteristics of the market on which it will operate, rather than just to consider individual provisions of the agreement in isolation. On this basis, the Director does not accept ABTA's submission that Rule F42 is prima facie a restriction of competition within the meaning of the Chapter I prohibition.
>
> 17. As noted at paragraph 25 of the Decision, GISC intends to regulate the whole of the general insurance community in the UK. Rule F42 is intended to achieve this since, once in force, it will bring into effect a form of compulsory regulation for intermediaries.
>
> 18. The Director concluded that a mandatory scheme of this nature would not infringe the Chapter I prohibition provided the agreement which establishes it does not, to an appreciable extent:
>
> — impose or increase barriers preventing entry into or continued operation in the general insurance industry; or
>
> — reduce or distort competition between insurers, between intermediaries or between insurers and intermediaries (for example, by resulting in the exchange of price or non-price information).
>
> 19. In the Decision, the Director considered, therefore, whether the Rules would, individually or collectively, have any of these effects and was satisfied that they would not. He therefore concluded that Rule F42 will not give rise to an appreciable restriction or distortion of competition in the general insurance market.
>
> 20. This conclusion took account of the fact that the Rules (including Rule F42) are intended to apply across the general insurance industry in the UK. Further in reaching that conclusion, the Director considered the membership fees of GISC and was satisfied that they would not operate as a barrier to entry or continued operation in the general insurance industry.
>
> 21. The Director noted at paragraph 35 of the Decision that the appointed agent and appointed sub-agent regime in the Rules provides one way in which intermediaries may avoid becoming full members of GISC. The Director recognises, however, that non-member intermediaries which enter into such arrangements remain subject to restrictions as to the member intermediaries and member insurers with which they can deal and that, given these restrictions, intermediaries may conclude that it will be more commercially advantageous to become full members of GISC. Nevertheless, given his conclusion that the Rules do not impose significant barriers to entering or operating in the general insurance market, this does not alter the Director's assessment set out in the Decision of the competitive effects of the Rules. For the same reason, the Director does not consider that the restrictions on those with which non-member agents may deal (and on the ability of

members to deal with non-member agents) are capable of constituting an appreciable restriction or distortion of competition in the relevant market.

22. The Director is not convinced that it will be so commercially unattractive to enter into agency and sub-agency agreements that intermediaries will be forced to exit the market. In any event, for the reasons set in paragraphs 16-21 above and in the Decision, the Director does not consider that Rule F42 will appreciably restrict competition between member insurers or distort competition between non-member agents and member intermediaries."

109. At paragraphs 23 to 25 of the ABTA Decision, the Director rejected ABTA's arguments regarding the GISC membership fees, on the basis that it was not demonstrated that the fee structure conferred any significant advantage on insurers. As regards the burden of regulatory costs, the Director considered (at paragraph 26) that these were not shown to be significant and that it was open to the members of GISC to belong to other trade associations or regulatory bodies. The Director added: "It would be open to other organisations, such as ABTA, to resolve any concerns they have about the costs to their members of regulation by, for example, reducing their own membership fees or ensuring that, when calculating their members' fees, they do not take into account revenue generated from their members' general insurance activities and on which their GISC membership fees are based."

110. We note that a detailed explanation of the basis for the calculation of the membership fees was provided to the Director by GISC on 17 May 2001, shortly after the adoption of the IIB and ABTA Decisions.

VI THE PROCEDURE BEFORE THE TRIBUNAL

111. The applications in these appeals were lodged at the Registry on 11 and 15 June 2001 by the IIB and ABTA respectively. The IIB also submitted an application for interim relief pursuant to Rule 32 of the Tribunal Rules.

112. By documents lodged at the Registry on 13 and 18 June 2001, GISC submitted requests for permission to intervene in support of the Director in relation to the IIB and ABTA proceedings respectively, pursuant to Rule 14 of the Tribunal Rules.

113. At the case management conference held on 21 June 2001 the Tribunal (i) granted GISC permission to intervene in all three cases; (ii) ordered, by consent, that the Director disclose to the IIB and ABTA all correspondence between himself and GISC; and (iii) made no order on the IIB's request for interim relief: see paragraph 22 above.

114. The Director's Defence was served on 3 July 2001 and GISC's Statement of Intervention was served on 6 July 2001. No applications were made to lodge further pleadings. Oral argument was presented on 20 and 23 July 2001. Prior to the hearing the Tribunal drew the parties' attention to an article by Kay & Vickers entitled "*Regulatory Reform: an Appraisal*", in G Majone *Deregulation or Reregulation? Regulatory Reform in Europe and the United States* (1990) ("the Kay and Vickers article"). In that article, the authors discuss issues affecting competition and regulation, including competition between regulators.

115. The IIB requests the Tribunal:

- to set aside the IIB Decision;
- to withdraw the GISC Decision in so far as it concludes that Rule F42 does not prevent, restrict or distort competition;
- to rule on the eligibility of the GISC Rules for an individual exemption and the conditions to be attached to any such exemption, alternatively remit that issue to the Director with such directions and/or indications as the Tribunal may think fit; and
- to award the IIB its costs.

116. ABTA requests the Tribunal:

- to set aside the ABTA Decision and the GISC Decision;
- to declare that the GISC Rules and/or Rule F42 materially restrict or distort competition;
- to declare that the GISC fee structure is discriminatory and a restriction or distortion of competition; and
- to award ABTA its costs.

117. The Director requests the Tribunal:

- to dismiss both the IIB's and ABTA's appeals; and
- to order both the IIB and ABTA to pay their costs.

118. GISC requests the Tribunal:

- to dismiss both the IIB's and ABTA's appeals; and
- to order the IIB and ABTA to pay GISC's costs, in proportions to be determined.

119. The Tribunal determines, for the purposes of any procedural questions that may be relevant, that these proceedings are proceedings before a tribunal in England and Wales: see Rule 16 of the Tribunal Rules.

VII ARGUMENTS OF THE PARTIES

The IIB

120. In its Notice of Appeal, the IIB contends that the Director erred in law in concluding that Rule F42 of the GISC Rules does not constitute an appreciable restriction on competition within the meaning of section 2 of the Act, and did not give any adequate reasons for his conclusion. Furthermore, the Director erred in concluding that it was unnecessary and inappropriate to compare the GISC Rules with those of any other regulatory body. He further erred in concluding that insurance intermediaries could easily belong to both GISC and the IIB.

121. The IIB has no objection to GISC itself or the principle of regulation of the general insurance sector, but objects to GISC as the sole regulator. GISC is a private industry initiative. Its mandate as sole regulator is entirely self-assumed, and not required or sanctioned by statute or government policy. The strength and breadth of GISC's insurer membership is such that no intermediary can avoid doing business with the GISC insurer members. The effect of Rule F42 is that the members of the IIB will be forced to join GISC although they do not wish to do so.

122. In those circumstances Rule F42 self-evidently prevents, restricts or distorts competition: see the OFT's own publication *Trade Associations, Professions and Self-Regulating Bodies*, (OFT 408 at paragraph 6.3), an article by Dr Temple Lang (1984 Fordham Corporate Law Institute, p.605) and Commission decisions such as *Sarabex* (Eighth Report on Competition Policy), *Central Heating* 1972 OJ L264/22, *Rijwielhandel* 1978 OJ L20/18 and *IMA Rules* 1980 OJ L318/1. Moreover, the test applied by the Director to the effect that Rule F42 will not 'result in significant numbers of intermediaries exiting from the market' (GISC Decision, paragraphs 33 to 35) is inadequate, notably because it is based on the assumption that independent intermediaries *will* join GISC. But that puts the cart before the horse, because it is the market power of the insurers that compels intermediaries to join GISC in the first place.

123. Moreover, there is a restrictive effect on competition once intermediaries have joined GISC, since they are no longer able to differentiate themselves on the basis that they are subject to different or higher regulatory rules. According to the IIB, GISC's Rules represent a lowering of regulatory standards compared with those maintained by the IIB. The structure of GISC also

gives rise to an inherent conflict of interest where the insurers seek to regulate the distributors with whom they themselves are competing.

124. It is not correct to assert that intermediaries could be subject to regulation by both GISC and the IIB: the costs of dual regulation and differences between the two regulatory regimes rule this out. Since the GISC regime is both less strict and more expensive than the IIB's IBRC Mk II, the Director's assertion at paragraph 29 of the GISC Decision that the GISC Rules are "pro-competitive" is not sustainable. Similarly there is nothing to support the Director's conclusion that the costs of GISC "appear to be reasonable".

125. The Director's argument at paragraph 35 of the GISC Decision that intermediaries have the option of becoming an Agent or Sub-Agent of a GISC Member is a non point: this would simply prevent IIB members from continuing to be independent intermediaries. Moreover, GISC's powers to grant waivers of Rule F42 are not exercised in a transparent, objective and fair way, as evidenced by GISC's rejection of the IIB's request for a waiver, from which there is no appeal. The Director's analysis of waivers at paragraph 30 of the GISC Decision does not address that issue.

126. Furthermore, the GISC Decision fails to consider the impact on competition in the market for the provision of regulatory and trade association services, a market in which the IIB and GISC are in competition. Contrary to the Director's arguments in the IIB Decision the regulation carried on by GISC constitutes an economic activity: see Cases C-159/91 and C-160/91 *Poucet v Assurances Générales* [1993] ECR I-637 (paragraph 14), Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, Case C-41/*90 Höfner v Macrotron* [1991] ECR I-1979, Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4014, Case 118/85 *Commission v Italy* [1987] ECR 2599 (paragraph 7) and Case T-144/99 *Institute of Professional Representatives before the European Patent Office v Commission,* 28 March 2001 (paragraphs 64 and 65). The latter case also establishes that there is no "public interest" defence which takes an agreement outside Article 81(1). If the GISC Rules are justified in the public interest that is a conclusion the Director is only entitled to reach after a thorough investigation under section 4 of the Act.

127. In any event GISC is an association of undertakings and subject to competition law in its own right: see Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL v Commission* [1980] ECR 3125 (paragraph 88); Joined Cases T-25/95 et seq *Cimenteries CBR and Others v Commission* [2000] ECR II-491; and Joined Cases 96 to 102, 104,105, 108 & 110/82 *NAVEWA*

v Commission [1983] ECR 3369. The IIB also refers to the publication *Trade Associations, Professions and Self-Regulating Bodies* (OFT 408) paragraphs 7.1 and 7.2.

128. The IIB further argues (i) that the fee structure in the GISC Rules is discriminatory, since the fees for intermediaries are charged at four times the rate for insurers; and (ii) that the requirement to segregate client monies in favour of intermediaries whose general insurance activities are secondary to their main business activity is discriminatory.

129. In oral submissions, the IIB referred to the Kay & Vickers article where the authors argue that competition between regulators is to be encouraged. The IIB emphasised that the Director's exit test (paragraph 35 of the GISC Decision) was irrelevant: the relevant question is whether an independent intermediary can better differentiate himself by being outside of GISC but subject to IIB or other regulatory rules. In failing to compare the GISC Rules with other possibilities such as regulation by the IIB the Director conferred on GISC a de facto regulatory monopoly for no other reason than it was the first mover, with the insurers behind it. According to the IIB, the ability of an independent intermediary to present himself to a client as providing best advice unconnected to an insurer is the essence of his function, but the GISC system either excludes or significantly dilutes that possibility. Branding and differentiation of service is a critical element of competition in this sector. Moreover, GISC's refusal to grant the IIB a waiver demonstrates that GISC has no intention of exercising its waiver policy by reference to a test of consumer protection. According to the IIB, there is a major difference between an exclusive dealing rule which contains a waiver possibility and one such as Rule F42 which does not. At the least, GISC decisions on waivers should be based on objective grounds, proportionate, and subject to independent appeal.

130. The IIB's case is supported by two witness statements by Andrew Paddick, the Director General of the IIB, and several witness statements from IIB members.

ABTA

131. In its Notice of Appeal ABTA submits, first, that Rule F42 is a restriction on competition since it limits the persons with whom an undertaking will deal. A large scale collective exclusive dealing agreement is clearly an 'appreciable' restriction of competition. Moreover there is a real possibility that Rule F42 will in practice force into GISC membership those who would otherwise choose not to become members, and that the additional direct and indirect costs of membership will affect the competitiveness of ABTA members. In particular, GISC membership duplicates existing costs because ABTA members are already regulated on the sale

of travel insurance; such duplication may have the effect of weakening ABTA's position as a regulator and undermining the training it provides.

132. Secondly, ABTA draws attention to the combined effect of Rule F42 and Rule F24, which is that an insurer Member of GISC may not deal directly with a non-member agent where that non-member agent is an agent of a competing insurer. ABTA members customarily deal with several insurers and negotiate tailor-made policies e.g. for dangerous sports, multi-trip cover etc. Those provisions severely limit the freedom of member insurers to deal with non-member agents and significantly restrict competition between member insurers. In support of its submissions ABTA refers to the European Commission Notice (2001/C 3/02) *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (OJ C3/2, 06.01.2001), paragraphs 164 and 165.

133. It follows that neither the Director's approach (at paragraph 16 of the ABTA Decision) that Rule F42 is not an appreciable restriction when the "overall effect" of the agreement is taken into account, nor his alternative argument based on the 'umbrella option' (at paragraph 21 of the ABTA Decision) is tenable. The Director has made no proper analysis of the impact of Rule F42.

134. Thirdly, according to ABTA the method of membership fee calculation under the GISC Rules results in a fee for intermediaries that is four times the amount payable by insurers and confers a competitive advantage on insurer members who deal directly with consumers against those who deal through intermediaries. ABTA refers to the publication *Trade Associations, Professions, and Self-Regulating Bodies* (OFT 408) at paragraph 319 and *R v Customs & Excise ex parte Lunn Poly* [1999] 1 CMLR 1357. The Director's response to these points at paragraphs 24 to 26 of the ABTA Decision is theoretical and not based on any investigation.

135. In oral submissions, ABTA emphasised that the correct test is whether there is an appreciable effect on competition in the market under the GISC Rules as compared with the market without the GISC Rules: see the classic Article 81 test set out in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235. In fact Rule F42 gives rise to an exclusive dealing agreement which is a "hard-core" restriction in accordance with Case T-374/94 et seq *European Night Services v Commission* [1998] ECR II-3141. It plainly has an appreciable effect, particularly in the light of the fact that it is "hard-core".

136. The Director's approach ignores the effects on competition as it would have been in the *absence* of the agreement embracing the GISC Rules. The effects of the universal imposition of GISC's

Rules can only properly be considered by examining the cost benefits of alternative regulatory systems, which the Director has not done.

137. Moreover, the Director's submission that regulation in the public interest is not subject to the Chapter I prohibition is contrary to Community law as expressed in the Opinion of Advocate General Léger of 10 July 2001 in Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*. The issue of a single regulator versus multiple regulators is a competition issue which goes to the costs that are going to be imposed; the ability of those in the regulated market to differentiate themselves by reference to different standards; and the incentives that may be created for those in the regulated market to adopt courses of action in order to escape the new regime. This latter possibility is open to ABTA members by going offshore to obtain their insurance as Airtours, one of the largest tour operators, who currently use a Dublin insurer, have done.

138. Contrary to the submission advanced by GISC no pro-competitive purpose has been shown: first, there is no basis for concluding that a single regulator for all intermediaries and insurers is better than having sector specific or multiple regulators. Secondly, GISC cannot act as a single regulator because it is not capable of covering those who deal only with off-shore insurers or off-shore intermediaries.

139. Finally, the Director was wrong to dismiss the impact of the direct costs of the GISC system as being too small to have any significant effect. The cost of GISC regulation for ABTA members as a whole is at least £1.5 million, an appreciable amount in an industry that is working on very low margins – 1.15%. The indirect costs of dealing with two regulatory bodies instead of one cannot be offset by ABTA reducing its fees in relation to the regulation of insurance activities, because ABTA will in any event need to continue to monitor and regulate the financial position of its members in relation to all of their activities, including any 'offshore' activities.

140. ABTA's case is supported by the witness statements of Riccardo Nardi, Head of Legal Services, Stephen Howard, Chairman of ATII, which represents intermediaries selling over 80% of travel insurance sold to the general public in the United Kingdom; John Harding, Sales Director of an independent tour operator called Travelscene Limited; and Daniele Broccoli of Britaly Travel, a small independent travel agency.

The Director

141. In his Defence the Director submits that GISC was formed in response to the Government's desire to replace the previous fragmented system of statutory and non-statutory regulation with a

comprehensive system of regulation for the benefit of the public. Rule F42 is central to GISC's aim of creating a common regulatory regime to which all participants would be subject. Such a regime does not appreciably restrict competition, for the reasons given in the GISC, IIB and ABTA decisions.

142. According to the Director, the issue whether there should be one or several regulators is a matter of regulatory policy, not competition law. Contrary to the IIB's submissions, in carrying out its regulatory functions GISC is not engaged in an "economic activity" or any form of "trade" or business and is not, therefore, "an undertaking"; nor is GISC a trade association aiming to advance its members' interests but a regulatory body intended to protect the public; as such, the GISC Rules are a form of surrogate for state regulation: see Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7; the Commission Decision *Film purchases by German television stations* 1989 OJ L284/36, at paragraph 38; and (in the context of VAT law) the decision of the House of Lords in *Institute of Chartered Accountants v Customs & Excise* [1999] 1 WLR 701, at page 706. Furthermore, regulatory activities are not to be treated as the subject of EC competition law, irrespective of whether they are underpinned by statute or not: Case 123/83 *BNIC v Clair* [1985] ECR 391 at page 395 per Advocate General Slynn; Case C-364/92 *Eurocontrol* [1994] ECR I-43; Case C-153/93 *Germany v Delta Schiffahrts* [1994] ECR I-2517, at paragraph 14; and Advocate General Jacobs in Case C-475/99 *Ambulanz Glöckner* (17 May 2001).

143. As regards the effect on competition in the supply of insurance, as distinct from regulatory, services, the restriction created by Rule F42 is no more than a restriction on insurers and intermediaries not to operate outside the system of regulation. That in itself cannot create an appreciable effect on competition unless it either creates barriers to entry to the market or the terms of the regulation are discriminatory. There is no evidence that the GISC Rules create barriers to entry or will encourage exit from the industry.

144. In particular the membership costs of GISC are insufficient to constitute material barriers. Even those costs can be avoided by entering into appointed agency agreements.

145. Similarly membership of GISC does not amount to "double taxation", since the fees for GISC membership and fees for membership of trade associations such as ABTA/IIB are for different purposes. The latter are trade associations with a remit to promote the interests of their members whilst GISC is simply there to regulate them. Furthermore, should intermediaries wish to have imposed on them higher regulatory standards, they are not prohibited from doing so. The indirect costs of complying with the GISC Rules do not appear to be significant.

146. Since no competition issue arises, the availability or otherwise of a waiver of Rule F42 is not material to the competition assessment.

147. As regards the discrimination in membership fees alleged by the IIB and ABTA, the higher percentage of revenue which intermediaries pay as fees merely reflects the different manner in which they generate their income from the supply of insurance and the extent of a member's activity in the market. It is not established that such differences as there are have any appreciable effect on competition.

148. As regards IIB's objection to the derogation concerning the segregation of monies in favour of undertakings which have insurance as their secondary business, there is less need for such a segregation requirement where insurance is a secondary activity. There are major practical difficulties in segregating insurance monies in organisations where insurance is not the main business.

149. In oral submissions, the Director emphasised that GISC is not an undertaking, since its functions are purely regulatory: see the Opinion of the Advocate General in *Wouters*, paragraphs 135 to 144. The rationale behind the cases relied on by the Director is not the presence or absence of statutory backing but the fact that the activity in question is not commercial in nature. In any event, GISC cannot be regarded as a purely private initiative since there are statutory powers to intervene under the FSMA should GISC not prove to be an adequate regulator. In the light of the case law, it would not be open to the Tribunal to find that GISC is an undertaking in its own right without referring that point to the Court of Justice under Article 234 of the Treaty.

150. As regards the Kay & Vickers article, the issue is whether or not *as a matter of law* GISC is to be regarded as engaged in economic activity. The balance of jurisprudence is that it is not, so the concept of competition between regulators is outside the scope of the Chapter I prohibition. The Kay & Vickers article also recognises that one can have a situation where some regulatory authorities set higher standards, which is entirely consistent with the Director's case that other bodies are free to set higher standards.

151. Rule F42 is a restriction on conduct which does not have any significant competitive consequences. The Director is not obliged to undertake a cost benefit analysis of alternative regimes or to assess whether the GISC regime will result in higher or lower standards than are appropriate for the insurance industry. Those are consumer protection, not competition, issues.

152. In answer to certain procedural questions put to the Director by the Tribunal, the Director submitted that there is no duty of the Director to respond in a decision under section 14 to third party observations, provided the decision sets out the basis upon which it is made. As to whether there exists on the Director a duty to respond without undue delay to an application under section 47, the Director submitted that he is currently working to a guideline of two months for dealing with section 47 decisions.

GISC

153. In its Statement of Intervention in support of the Director, GISC reiterates that it is an independent, non-profit making organisation, funded entirely by membership fees, whose main purpose is to make sure that general insurance customers are treated fairly. The GISC Rules lay down the minimum standards of good practice which all GISC members must follow when they deal with consumers buying general insurance. A key element of this new system of self-regulation is Rule F42 which enables GISC to enforce its Rules contractually.

154. GISC was set up as a result of the Government's review of the statutory regime for the regulation of financial services in the UK and the decision to repeal the 1977 Act. If the Government were to conclude that self-regulation were inadequate, the FSA would take over the regulation of general insurance through section 22 of the FSMA.

155. GISC does not accept that it "represents" particular constituencies within the general insurance market: the composition of GISC was designed to be independent of any vested interest in the general insurance industry. There are two "public interest" directors on the GISC board and all directors have to act strictly in accordance with their fiduciary duties to the company. As such, GISC is not comparable with a trade association set up to promote the interests of its members, such as the IIB or ABTA.

156. GISC rejects the IIB's argument that Rule F42 excludes IIB from an alleged market for regulatory services on three grounds:

    (i) Regulation is not an economic activity within the scope of Article 81(1) EC Treaty and the Chapter I prohibition, and GISC itself is not an undertaking: (illustrated by the fact that it is not registered for VAT). In addition to the cases cited by the Director, see: C-41/90 *Höfner & Elser v Macrotron* [1991] ECR I-1979, paragraph 21; Case C-343/95 *Cali & Figli v Servizi Ecologici Porto di Genova* [1997] ECR I-1547, paragraph 16; *Irish Aerospace (Belgium) NV v Eurocontrol* [1992] 1 Lloyd's Rep 383, at 398. It is irrelevant that GISC is a self-regulatory rather than a statutory organisation. Under English law a

self-regulatory organisation may form an integral part of a governmental framework for the regulation of financial activity: see *R v Panel on Take-overs and Mergers ex p Datafin* [1987] 1 QB 815.

(ii) Even if a market for regulatory services does exist, GISC submits that regulation by a single regulator falls outside Article 81(1) and the Chapter I prohibition under the rule of reason: see *Gøttrup-Klim*, paragraphs 34 and 36. Such a system is necessary to avoid fragmented and ineffective regulation. The GISC Rules are limited to what is necessary to enable regulation by a sole regulator to function properly.

(iii) The IIB is a trade association representing a particular group of intermediaries in the broker sector, and is ill-suited to the role of an independent and impartial regulator.

157. As regards Rule F42, it is not sufficient to allege a distortion of competition for a decision of an association of undertakings to fall within the Chapter I prohibition: a prevention, restriction or distortion of competition is only caught if it is *appreciable.* The Director found no evidence that membership of GISC would lead to significant numbers of intermediaries exiting from the market. There is nothing to stop an intermediary from joining the IIB and advertising its membership.

158. As regards the arguments put forward by ABTA, ABTA is not a suitable regulator of the sale of insurance policies by its members. ABTA does not carry out any monitoring of its members in relation to the sale of travel insurance policies and the provisions of ABTA's present Code of Conduct relating to insurance are minor and of little benefit. There is a clear need for GISC to regulate the sale of insurance policies by ABTA members.

159. GISC membership fees for ABTA members are proportionate and fair. To the extent that ABTA charges fees for regulation duplicated by GISC, ABTA could reduce its own fees correspondingly.

160. In oral submissions, GISC disputed the allegation that it is an insurer led or dominated organisation since (i) the majority of start-up funding for GISC came from insurance intermediaries, and not from insurers; (ii) less than half of GISC's board members come from insurers; and (iii) less than half of the members on the working parties set up to develop the GISC Rules were from insurers.

161. GISC emphasised that it does not engage in economic or commercial activity: see the Advocate General's Opinion in *Wouters*. GISC, however, opposed the Director's suggestion that the

Tribunal should make a reference under Article 234 of the Treaty on the question whether GISC was an undertaking, because of the delay involved.

162. In any event, regulation by a single regime is reasonably necessary for an effective scheme of regulation and as such falls outside Article 81(1) under the rule of reason (*Gøttrup-Klim*; *European Night Services*). Rule F42 is the least restrictive means of ensuring that GISC acts as an effective self-regulatory organisation. If GISC fails, general insurance will be brought under the responsibility of the FSA under the FSMA. That is the answer to the question of "who guards the guardian" raised by the IIB and referred to in the Kay & Vickers article.

163. In response to ABTA's submissions that the GISC regime would impose increasing costs on its members, or drive them overseas, GISC submitted, notably, that there is no credible evidence to support either claim. Similarly there is no evidential basis for IIB's arguments on differentiation or membership costs.

164. Finally, should either appeal succeed, GISC requested the Tribunal to set a short deadline for the Director to reach a fresh decision. GISC will not be in a position to commence full regulation until it is clear that the Rules do not offend the Act.

165. GISC's intervention is supported by a witness statement by its Chief Executive, Christopher Woodburn. On the issue of a single regulatory regime, Mr Woodburn argues that a fragmented system delivers ineffective regulation and is confusing for consumers. He also contends that a single system is pro-competitive: GISC creates a level playing field, to the particular benefit of small firms, whereas different systems of regulation based on different standards could lead to competitive inequalities and distort competition. Mr Woodburn stresses that:

> "it is paramount to the new system of regulation of general insurance that consumers have a single reference point. GISC branding ought to lead to greater consumer confidence that their interests are safeguarded appropriately regardless of the distribution channel chosen. I hope that GISC branding is particularly helpful to consumers in relation to the newest retailers of insurance products such as supermarkets which under the GISC regime will be competing on a level playing field with more traditional sellers of insurance."

VIII THE FINDINGS OF THE TRIBUNAL

The Issue

166. The main issue in this case is whether the GISC Rules, and in particular Rule F42, "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom" within the meaning of section 2(1)(b) of the Act. In determining that question, we

are required, by section 60 of the Act, to act with a view to ensuring that there is no inconsistency between the principles we apply and the decision we reach, on the one hand, and the principles laid down by the Treaty and the decisions of the Court of Justice and the Court of First Instance in determining any corresponding question arising out of Community law, on the other hand: see section 60(1), (2), (5) and (6)(b). For present purposes, the "corresponding question" is the meaning and effect of the words "have as their object or effect the prevention, restriction, or distortion of competition" in Article 81(1) of the Treaty. In resolving the issues before us we must, in addition, have regard to any relevant decision or statement of the Commission of the European Communities: section 60(3).

167. We stress at the outset that the issue before us is the interpretation of section 2(1)(b) of the Act on the basis of the facts before us. The issue before us is *not* whether the general insurance sector should be regulated or, if so, what regulatory system should be adopted. Similarly, a decision by this Tribunal as to whether or not the GISC Rules or any part of them are caught by section 2(1)(b) does *not* imply any value judgment, one way or the other, as to whether the GISC Rules should be implemented, or in what form. Nor does it imply any view as to the relative capabilities, as regulators, of any of the private parties before us. It is simply a decision on the question whether, as the Director contends, the Rules fall outside the Act altogether or, as the appellants contend, the GISC Rules fall within section 2(1)(b). Similarly, if the GISC Rules do fall within section 2(1)(b), that is not the end of the matter. In accordance with the structure of the Act, which closely follows that of Article 81, it is then for the Director to proceed to examine whether the GISC Rules qualify for an individual exemption from the Chapter I prohibition under sections 4 and 9 of the Act.

Synopsis of the relevant law

168. It is convenient to begin with some brief general comments on the structure of Article 81 and on how we understand the concept of an agreement "having as its object or effect the prevention, restriction or distortion of competition" is to be applied to Community law. In our respectful view, the law on this point is usefully summarised by Advocate General Léger in his opinion of 10 July 2001 in *Wouters*, a case concerning the rules of the Dutch Bar Association, at paragraphs 88 to 127.

169. In analysing an agreement under Article 81(1) the first step is normally to determine the 'object' of the agreement: Case 56/65 *Société Technique Minière* [1966] ECR 235 at 249. In general, the cases in which it has been held that the 'object' of the agreement is to restrict competition are cases involving price fixing or market sharing of one form or another: see e.g. Case 41/69 ACF

Chemiefarma v Commission [1970] ECR 661, paragraph 128 (market sharing); Case 123/83 *BNIC v Clair* [1985] ECR 391, paragraph 22 (fixing minimum prices); Case 45/85 *VDS* [1987] ECR 447, paragraph 41 to 43 (recommendation to increase insurance premiums). Such agreements 'by their nature' restrict competition and Commission is not required to examine whether the agreement in fact had the effect of restricting competition: Cases 56 and 58/64 *Consten and Gruding v Commission* [1966] ECR 299, at 342; Cases T- 25/95 etc. *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1531.

170. However, if it is not plain that the object of the agreement is to restrict competition, it is necessary to consider the effects of the agreement, taking into account the economic context in which the undertakings operate, the products or services covered by the agreements, the structure of the market concerned and the actual conditions in which it functions: see *Société Technique Minière* at 249 to 250; Case C-399/93 *Oude Luttikhuis* [1995] ECR I-4515, paragraph 10 and, most recently, cases 180 to 184/98 *Pavlov* [2000] ECR I-6451, paragraph 91. In analysing the effect on competition it is necessary to consider the competition that would occur in the absence of the agreement in dispute: *Société Technique Minière*, at p. 250.

171. In order for Article 81(1) to apply it has to be shown that the effect on competition is appreciable. In Case 5/69 *Völk v Vervaeke* [1969] ECR 295, the Court of Justice said at paragraph 7:

> "... an agreement falls outside the prohibition of Article 81(1) when it has only an insignificant effect on the markets, taking into account the weak position which the parties concerned have on the market of the product in question".

In Case 22/71 *Béguelin Import v. GL Export* [1971] ECR 949, the Court of Justice said, at paragraph 16:

> "... in order to come within the prohibition imposed by Article 81, the agreement must affect trade between Member States and the free play of competition to an appreciable extent."

172. In determining whether there is an appreciable effect on competition, the primary criterion is normally "the position and importance of [the parties] on the market concerned", taking account of the structure of the market in question (see *Société Technique Minière* at 250). In the Commission's current *Notice on Agreements of Minor Importance* (OJ 1997 C372/13), it is said that an agreement does not have an appreciable effect if the aggregate shares held by all the participating undertakings do not exceed 5% of the relevant market in the case of a horizontal agreement (i.e. an agreement between undertakings operating at the same level of production or marketing), or 10% of the relevant market in the case of undertakings operating at different economic levels (i.e. a vertical agreement). The Commission's more recent *Notice on Vertical*

Restraints (0J 2000 C291/1) indicates that, in certain cases, a vertical agreement may not bring about an appreciable restriction on competition even if the parties have a market share of over 30%, (see paragraphs 121 to 133 of the *Notice on Vertical Restraints*), 30% being the threshold above which vertical agreements do not benefit from the block exemption provided by Regulation 2790/99 (OJ 1999 L336/21). Similarly, in the Commission's *Notice on Horizontal Cooperation Agreements* (OJ 2001 C3/2) the Commission indicates that outside the category of price fixing and market sharing agreements, which normally fall automatically within Article 81(1), the most important factor for determining whether a horizontal cooperation agreement falls within Article 81(1) is the position of the parties in the market affected and the structure of the market (see section 3.1 of that Notice). In relation to both the *Vertical Restraints Notice* and the *Horizontal Cooperation Agreements Notice*, the Commission indicates, that in determining market shares, the guidance given in its *Notice on Market Definition* (OJ 1997 C (372/5)) should be taken into account. Apart from market shares, there may be other circumstances where, for one reason or another, an agreement cannot be said to have an appreciable effect on competition: a classic example is where two competitors form a joint venture to develop a new product which neither has the resources to develop alone: see the *Notice on Horizontal Cooperation Agreements*, at paragraph 24.

173. The concept of "appreciable effect" may be illustrated notably by reference to the judgment of the Court of First Instance in Cases T-374/94 etc., *European Night Services v Commission* [1998] ECR II -3141. In that case, the principal railway companies of the United Kingdom, France, Belgium and Germany set up a joint venture to run night passenger services from various destinations in Great Britain to various Continental destinations through a joint company, ENS. The Commission held that Article 81(1) applied, notably because competition was restricted as between the parent companies of ENS, who had disabled themselves from providing overnight passenger services other than through ENS, and for various other reasons. On appeal, the Court of First Instance held, first, that there was insufficient material before the Court to establish that the effect of the agreement was appreciable since the projected market shares of the parties hardly reached or exceeded the threshold of 5% for an agreement to be caught by Article 81(1) according to the Commission's *Notice on Agreements of Minor Importance*: see [1995] ECR II-3141, paragraphs 90-103. Secondly, as regards competition between the parent companies of ENS, the Court held that each of the national railway companies concerned was not in competition with the others on its national network, and the hypothesis that any of those railway companies could or might at some future date set up rival night rail services through the Channel Tunnel in competition with the others was economically quite unrealistic, not least because of the scale of the investment involved: see [1995] ECR II -3141, at paragraphs 133 et seq. At paragraph 136 of its judgment, the Court said that in

assessing an agreement under Article 81(1), "account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (…) unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (...) In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 81(1)".

174. Apart from the issue of "appreciable effect", there is another line of cases in Community law which seem to imply the existence of a form of "rule of reason" in the interpretation of Article 81(1). The "rule of reason" is a shorthand and somewhat dangerous phrase for the various techniques adopted over the years by the courts of the United States to mitigate the absolute prohibition of "every contract, combination (...) or conspiracy in restraint of trade" to be found in section 1 of the Sherman Act 1890, which has no provision for exemption equivalent to Article 81(3). In effect, the US courts have drawn a distinction between agreements that are prohibited "per se" under section 1 of the Sherman Act and agreements which may be justified under the "rule of reason". In over simplified terms, an agreement is prohibited 'per se' under the Sherman Act if it is an obvious restriction on competition (e.g. price fixing). However, under the rule of reason an agreement which is not under US law prohibited "per se" may fall outside section 1 of the Sherman Act if the pro-competitive effects of the agreement are judged to outweigh the anti-competitive effects.

175. Some authorities deny the existence of a rule of reason altogether: see Advocate General Cosmas in his opinion in Case C-235/92P *Montecatini v Commission* [1999] ECR I-4539, paragraph 45. However, Advocate General Léger was prepared to accept, at paragraph 103 of his opinion in *Wouters*, that under Article 81(1) the Court of Justice "has made limited application of the rule of reason in some judgments. Confronted with certain classes of agreement, decision or concerted practice, it has drawn up a competition balance-sheet and, where the balance is positive , has held that the clauses necessary to perform the agreement fell outside the prohibition laid down by Article 81(1) of the Treaty". Some of the cases where something resembling a 'rule of reason' approach seems to have been applied, include an exclusive dealing agreement necessary to enable a small undertaking to penetrate a new market (*Société Technique Minière*), qualitative criteria for selecting retailers in a system of selective distribution (Case 26/76 *Metro v Commission* [1977] ECR 1875, paragraphs 20 to 22); the grant of an exclusive patent licence for the dissemination of a new product (Case 258/78 *Nungesser v Commission* [1982] ECR 2015, paragraphs 54 to 58); a non-competition covenant entered into by the vendor of a business (Case 42/84 *Remia v Commission* [1985] ECR 2545, at paragraphs

17 to 20); clauses essential to the performance of a franchising agreement (Case 161/84 *Pronuptia* [1986] ECR 353, paragraphs 14-17) and a provision in the statutes of an agricultural co-operative forbidding dual membership of any other association in competition with the co-operative (Case C-250/92 *Gøttrup Klim* [1994] ECR I–5641).

176. However, as Advocate General Léger stresses at paragraph 104 of his opinion in *Wouters*, any 'rule of reason' in Community competition law "is strictly confined to a *purely competitive* balance-sheet of the effects of the agreement. Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article 81(1) of the Treaty. The only 'legitimate goal' which may be pursued in accordance with that provision is therefore exclusively competitive in nature". It follows from that conclusion that an appreciable restriction of competition is not taken outside Article 81(1) by the fact that it pursues some public interest objective, as Advocate General Léger points out at paragraphs 105 to 108 of his opinion in *Wouters*. In that case, a rule of the Dutch Bar Association prohibiting multi-disciplinary partnerships was argued to fall outside Article 81(1), not on the ground that it was pro-competitive, but on the ground that it protected such matters as independence and loyalty to the client. Advocate General Léger rejected this argument on the ground that "[i]n the first place, it amounts to introducing into the wording of Article 81(1) of the Treaty considerations which are linked to the pursuit of a public-interest objective. In the second, it sets all the questions of fact and of law in the context of that provision. It implies that the Court should consider, in the light of Article 81(1) of the Treaty exclusively, not only the question of determining whether a restriction of competition exists but also whether or not it might be justified. Such an interpretation is liable to negate a great part of the effectiveness of Article 81(3)…". The conclusion of Advocate General Léger on this point is supported by the judgment of the Court of First Instance in Case T-144/99 *Institute of Professional Representatives before the European Patent Office v Commission*, 28 March 2001. In that case, the Court of First Instance rejected an argument to the effect that professional codes of conduct could fall outside Article 81(1) on the basis of public interest considerations. The Court held that rules which organise the exercise of a profession cannot as a matter of principle fall outside Article 81(1) merely because they are asserted to be in the public interest; a case by case assessment is necessary to determine whether competition is appreciably affected : see paragraphs 62 to 67 of the judgment.

177. As the Court of First Instance indicates in *European Night Services*, there is in any event no scope for the application of any "rule of reason" type analysis in the case of agreements containing "obvious restrictions of competition such as price fixing, market sharing or the control of outlets" (paragraph 136 of the judgment, cited above). Similarly the Commission has

consistently taken the view that the ambit of any rule of reason in Community law is strictly limited, because otherwise there would be little scope for the application of Article 81(3). In the Commission's *White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty* (OJ 1999 C132/1), the Commission argues that "the structure of Article 81 is such as to prevent greater use being made of [a "rule of reason"] approach: if more systematic use were made under Article 81(1) of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article 81(3) would be cast aside, whereas any such change could be made only through revision of the Treaty" (paragraph 57 of the White Paper).

178. It follows that any given agreement will fall within the scope of Article 81(1) if it (a) constitutes an appreciable restriction on competition, and (b) there is no proper scope for the application of any so-called "rule of reason". In these circumstances, any positive benefits of the agreement may be examined only in the context of a possible exemption under Article 81(3).

Preliminary Analysis of Rule F42 under section 2(1)(b)

179. In applying the above principles to the GISC Rules, it is appropriate to consider first Rule F42, not least because it is clear on the evidence that GISC exists in its present form only because the insurer members of GISC have agreed to observe and enforce it. Indeed, it was only by virtue of a prior understanding among the members of the ABI that they were prepared to accept a rule along the lines of Rule F42 that GISC could be launched in the first place: see the "empowerment of GISC" discussed at paragraphs 42 to 45 above.

180. Rule F42 provides:

> "subject to any Rule waiver issued by GISC, Members shall not, and shall ensure that their Appointed Agents and Sub-Agents shall not, in the course of their General Insurance Activities, deal directly with any person in circumstances which would involve that person in engaging in General Insurance Activities as an Intermediary where that person is not a Member."

181. That Rule does not preclude any intermediary from dealing with any insurer, whether or not that insurer is a Member of GISC, nor does it explicitly require all insurers in the United Kingdom writing general business to join GISC, although the vast majority have done so. Rule F42 does, however, prohibit the insurer members of GISC from dealing with any intermediary who is not a member of GISC or the agent or sub-agent of such a member. Equally, it is not seriously disputed that it is, in effect, mandatory for any intermediary in the general insurance sector to be a Member of GISC or the appointed agent or sub-agent of a Member, otherwise the vast majority of insurers in the United Kingdom will not deal with that intermediary.

182. In our view, Rule F42 is, at first sight, to be regarded as a provision having as its object or effect a restriction or distortion of competition within the meaning of Article 81(1) of the Treaty and section 2(1)(b) of the Act.

183. That is so, in the first place, because Rule F42 limits the freedom of the insurer members of GISC to deal with whom they please. Freedom to compete implies the freedom to choose how, where, on what terms and with whom to do business. A contractual restriction which limits the intermediaries with whom an insurer may deal, entered into by a large group of competing suppliers (the insurer Members of GISC) and extending to intermediaries of all kinds, is, on its face, a restriction on competition. As the Court of Justice said in one of its earliest decisions under Article 81(1): "[it is] inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt in the common market including the choice of the persons and undertakings to which he makes offers or sells…" Cases 40/73 *Suiker Unie v Commission* [1975] ECR 1663, paragraph 173. On those grounds alone, Rule F42 falls, prima facie, within the Chapter I prohibition.

184. In the second place, from the point of view of the intermediaries concerned, an important aspect of the freedom to compete is the freedom to decide how and in what manner insurance is to be arranged on behalf of clients, or advice or other services rendered. Moreover, it is, in our view, an important part of the competitive freedom of an undertaking to decide whether to join any particular association relevant to its business and, if so, whether to accept any rules for the conduct of business and the associated disciplinary procedures, promulgated by that association. The imposition of mandatory rules for the conduct of business, coupled with a mandatory requirement to join a particular association, represent, in themselves, a significant fetter on the competitive freedom of an insurance intermediary to do business as it wishes. It is one thing voluntarily to accept certain minimum standards; it is quite another thing to have those standards imposed involuntarily through the exercise of market power by a group of suppliers acting collectively. On those grounds too, Rule F42 falls, prima facie, within the Chapter I prohibition.

185. However, as already indicated, it is necessary to examine Rule F42 in its context in order to determine whether it has, actually or potentially, an *appreciable* effect on competition. In that regard, we are told that Rule F42 applies to more than 85% of the insurers active in the general insurance market of the United Kingdom. The insurers to whom it applies include most of the household names and, notably, the top five or six companies which alone account for 50-60% of the market. The general insurance market of the United Kingdom is worth some £27 billion. Approximately 6,000 intermediaries, including all Lloyd's brokers, have so far joined or applied

to join GISC. It is conceded that it would be difficult, if not impossible, for an intermediary active in that market, of which there are some 15,000 in total, to remain outside GISC.

186. In those circumstances, applying the normal rules for assessing "appreciability" already referred to, we find that Rule F42 is to be regarded as an "appreciable" restriction on competition, affecting, as it does, the freedom to deal of the vast majority of insurers and intermediaries active in the general insurance market in this country.

187. We are reinforced in this view by the fact, established on the evidence before us, that in practice the GISC Rules can only be brought into force by means of a collective boycott or refusal to deal on the part of all or most of the major insurance companies in the United Kingdom. That is clear from the proposals for the "empowerment"of GISC set out at paragraphs 43 to 44 above, which show that the only way in which "all firms … can be brought within the regulatory net" is by the insurer members of GISC agreeing to deal only with intermediaries who belong to GISC or their appointed agents or sub-agents. The practical effect of that approach is shown by the commercial pressure applied to intermediaries, set out in paragraph 82 above. In effect, the only way for the GISC regime to work is for unwilling intermediaries to be effectively coerced into membership by a collective refusal to deal by insurers, accompanied, in some cases, by the threat that the insurer will deal directly with the intermediary's client if the intermediary does not join GISC (see the letter from Iceni Motor Facilities of 6 March 2001).

188. Leaving aside the question whether the 6,000 intermediaries who have so far joined or applied to join GISC have done so purely voluntarily or as a result of commercial pressure, it is established, on the evidence before us, that, as at the date of the hearing, some 9,000 to 10,000 intermediaries had, for whatever reason, not joined GISC. Even making allowance for a degree of uncertainty caused by the existence of these proceedings, it is striking that, with the deadline for joining GISC only a short time away, nearly two thirds of the estimated number of intermediaries have not done so. We have direct evidence that a significant number of intermediaries – namely the 1,000 member firms of the IIB, representing over half of the independent broking practices of the United Kingdom, together with the 2,500 members of ABTA, strongly object to joining GISC.

189. In our view, a collective boycott or refusal to supply, such as is required by Rule F42, undertaken by the vast majority of insurance companies in the United Kingdom in respect of up to 10,000 intermediaries, in itself amounts to an appreciable restriction or distortion of competition within section 2(1)(b) of the Act.

190. We note, moreover, that Rule F34 of the GISC Rules, set out at paragraph 67 above, serves to prevent a Member from resigning from GISC unless any outstanding general insurance activities "are properly completed" or responsibility for compliance with the GISC Rules is accepted by another Member. While the meaning of "properly completed" is not clear, that Rule would seem to make it effectively impossible for an undertaking to leave GISC without either discontinuing business altogether or ceding its business to another GISC Member. It follows that, however onerous the GISC Rules were to be, or, in future, become, or however inappropriate they were to be to the particular business concerned, that undertaking would have no practical means of escape from the GISC Rules once it has been compelled, by the market power of the insurers in question, to become a member of GISC. The practical difficulties of ever leaving GISC seem to us significantly to reinforce the restrictive effects of Rule F42.

191. The fact that those promoting GISC consider that it is in the public interest that all intermediaries in the United Kingdom join GISC, does not take Rule F42 outside the ambit of section 2(1)(b): that is a consideration relevant only to an exemption under section 4, as demonstrated by the Opinion of Advocate General Léger in *Wouters* and the decision of the Court of First Instance in *Institute of European Patent Agents* cited at paragraph 176 above.

192. For the foregoing reasons, on a preliminary analysis, Rule F42 seems to us to fall clearly within section 2(1)(b) of the Act. We therefore turn to consider whether the Director's reasoning in the GISC decision compels us to a contrary conclusion.

The Director's reasoning on Rule F42 in the GISC Decision

193. The Director deals with Rule F42 at paragraphs 34 and 35 of the GISC Decision, where two arguments are advanced. The first argument , at paragraph 34, is that Rule F42 does not require all intermediaries to join GISC, because those who do not wish to join GISC have the alternative of becoming agents or sub-agents of those that do join. This argument, which is repeated in the penultimate sentence of paragraph 35, we describe as "the agency point". The second argument, in the second sentence of paragraph 35, is that the Director "does not have any indication that Rule F42 will result in a significant number of intermediaries exiting from the market and that competition will be reduced appreciably". We refer to this as "the exit test". On those two grounds, the Director concludes that Rule F42 "will not give rise to an appreciable restriction or distortion of competition".

194. Dealing first with the agency point, the Director, without formally abandoning it, has scarcely relied on the agency point in the proceedings before us, and, in our view, rightly so. The

principal weakness of the agency point is, as both the IIB and ABTA point out, the effect of Rule F24 of the GISC Rules. Rule F24 provides:

> "Insurers may not appoint an Independent Intermediary as an Appointed Agent or permit an Independent Intermediary to be appointed as their Appointed Sub-Agent for the purposes of offering or selling their General Insurance Products.
>
> An Independent Intermediary may only be appointed as an Appointed Agent or Appointed Sub-Agent of one Intermediary".

Under the definitions in the GISC Rules, an "Independent Intermediary" means an "Intermediary who, in respect of any product type, offers or sells the products of more than one Insurer". A "product type" is defined as "any category of products which are competing or substitutable for one another".

195. We understand it to be common ground that the general effect of these complex provisions is that an intermediary who does not wish to join GISC but opts instead to be the Appointed Agent of an insurer (or the Appointed Sub-Agent of an Appointed Agent) can not deal with any other insurer in respect of products of the same product type – i.e. products which compete with each other. Similarly, if an intermediary who does not wish to join GISC chooses to become the Agent or Sub-Agent of an Independent Intermediary, as defined, Rule F24 again has the effect that the Agent or Sub-Agent cannot deal with any other Independent Intermediary.

196. The members of the IIB and other independent brokers carry on the business of giving independent broking services, the essence of which is their ability to place clients' business on the best terms in the market. Agency status, under Rule F24 of the GISC Rules, would simply destroy the functions of such brokers as independent intermediaries and would, in consequence, have a seriously detrimental effect on competition in the general insurance market. It is, in our view, important that there should be a substantial independent broking sector in the field of general insurance, able to "shop around" and give the client impartial advice, without being tied to any one insurer. The acceptance of Agency status under Rules F42 and F24 would however bring about the opposite result and largely eliminate the independence of the broking sector.

197. Similar considerations apply to travel agents. Travel agents typically sell the insurance offered by tour operators (to be found in the holiday brochure), insurance offered by a range of insurance companies, or insurance arranged by themselves or through intermediaries such as the members of the Association of Travel Insurance Intermediaries. Once again, the effect of a travel agent accepting Agency status under the GISC Rules is simply to reduce to one the number of insurance companies or independent intermediaries with whom the travel agent may deal. Instead of having the pick of the market, the travel agent is tied to the insurer (or

intermediary), whose agent s/he is in respect of all products that are competing or substitutable for one another. In that connection, we note from a letter from GISC to ABTA dated 18 June 2001 that GISC regards single trip, multi-trip and annual travel policies as substitutable for each other, and also regards the tour operators' travel policies as substitutable for the independent travel policies offered by the agent. In consequence, GISC seems to see little or no scope for a travel agent having Agency status to deal with more than one insurer or intermediary. It would appear to follow that the acceptance by travel agents of Agency status under GISC Rules is likely to give rise to a significant restriction of competition in the supply of travel insurance and, in consequence, a substantial reduction in consumer choice.

198. For these reasons we are not satisfied that the agency point mentioned in paragraph 34 of the GISC Decision mitigates the restriction on competition in Rule F42. If anything, the provisions of Rule F24 appear to reinforce the restrictive effects of Rule F42.

199. Turning to the "exit test" at paragraph 35 of the GISC Decision, we take the Director to mean that Rule F42 is not a restriction of competition, because not many intermediaries will leave the market altogether, (rather than, for example, becoming an agent instead of an intermediary with all the limitations implicit in such a move) as a result of having to comply with the GISC Rules or, in other words, that the GISC Rules are not so onerous that intermediaries will leave the market altogether because they are unable or unwilling to comply with them.

200. We can understand why the Director asked himself whether, for example, the GISC Rules were likely to be so onerous or expensive that a significant number of intermediaries would leave the market, with a consequent reduction in competition and consumer choice. In our view, however, a negative answer to that question is not in itself sufficient to demonstrate that Rule F42 is not a restriction of competition within the meaning of section 2(1)(b). It is not sufficient because it does not address the principal question of law with which the Director was confronted, namely, whether (i) the obligation on the vast majority of United Kingdom general insurers under Rule F42 to deal only with GISC Members or their Agents or (ii) the de facto obligation on the vast majority of intermediaries in the United Kingdom to join GISC, are to be regarded in themselves as appreciable restraints on competition for the purposes of section 2(1)(b).

201. It seems to us that the Director's conclusion, that not many intermediaries will leave the market *when* the GISC Rules become compulsory, merely side-steps what we consider to be the relevant and logically the first question, namely, whether the fact that the GISC Rules *are* compulsory by virtue of Rule F42 is in itself a restriction of competition within the meaning of

the Act. In other words, the Director's assumption that most intermediaries will choose to become members of GISC rather than see themselves excluded from the market, does not in our view logically demonstrate the absence of any restriction on competition within the meaning of the Act; it merely demonstrates, on the contrary, the market power of the insurer Members of GISC and the effectiveness of their collective agreement to compel most intermediaries to join GISC. The decisive question, to our mind, is not how many intermediaries will or will not succumb to the pressure of the insurers rather than exit the market, but whether the collective agreement among the insurers to compel all intermediaries to join GISC is, in itself, a restriction or distortion of competition within the meaning of the Act.

202. In any event, even assuming that an "exit test" has some relevance to the issues before us, we are not satisfied, on the evidence, that the Director's suggestion that few intermediaries will exit the market is a correct or complete appreciation of the facts. As at the date of the hearing, there were around 9,000 to 10,000 intermediaries who had not so far joined GISC. The point made to us by GISC, at the end of the hearing, was that a substantial number of these intermediaries were likely to opt for agency status, in one form or another, rather than become members of GISC in their own right (see paragraph 85 above). If that is correct, it seems to us that one effect of the GISC Rules may well be to cause a substantial shift in the structure of the market away from intermediaries, free to deal with whomsoever they please, to a system of tied agency arrangements of one form or another. Although that is not "exit from the market" in the sense of ceasing to do business, if what GISC told us was right, it would, or might, represent a substantial exit from the market of intermediaries who at present are not tied to any one insurer.

203. If, therefore, what GISC told us was right, one effect of the GISC Rules could be to cause the exit from the market of a certain number – perhaps a substantial number – of intermediaries who are at present able to deal with several insurers but who choose to transform themselves into Appointed Agents dealing with only one insurer in respect of general insurance products of the same product type. That seems to us to represent, at least potentially, a significant distortion of competition.

204. We are not satisfied, on the evidence before us, that this aspect of the matter has yet been the subject of adequate investigation by the Director, an issue to which we shall return when considering the orders to be made in this case.

205. For those reasons, the Director's reasoning in the GISC Decision does not, of itself, persuade us to modify the view we have already expressed that Rule F42 gives rise to an appreciable restriction or distortion of competition, for the reasons given at paragraphs 179 to 192 above.

The Director's principal argument

206. However, it has become apparent, since the GISC Decision, that the "exit test" there referred to is part of a wider argument which is in fact the principal argument addressed by the Director in this case. That argument, in essence, is that the GISC Rules, *in themselves*, do not have any anti-competitive consequences for the reasons set out at paragraphs 29 to 32 of the GISC Decision; therefore Rule F42, which is merely there to enforce rules that do not restrict competition, cannot itself be regarded as having as its object or effect an appreciable restriction or distortion of competition. On this approach, the Director is really able to finesse Rule F42 altogether, on the basis that a mandatory rule, which is there to enforce rules which are for the protection of the consumer and which do not themselves restrict competition, cannot be said to restrict competition either.

207. In our view this approach to Rule F42 does not emerge, at least at all clearly, in the GISC Decision itself, but it is signalled, at least in outline, at paragraphs 16 to 19 of the ABTA Decision (paragraph 108 above).

208. The same approach is indicated, albeit succinctly, at paragraphs 20 and 21 of the IIB Decision (paragraph 104 above).

209. In our respectful view, the Director's approach is erroneous.

210. For reasons that will shortly become apparent, we are not satisfied that the GISC Rules are in themselves, neutral in their competitive effects (see paragraphs 219 et seq below). But even if we were satisfied, which we are not, that the GISC Rules have no anti-competitive effects in themselves, we would still consider that Rule F42 is to be regarded in law as a provision having as its object or effect the prevention, restriction or distortion of competition. The essential reason is the mandatory nature of the GISC system. The means adopted for compelling observance by the intermediaries of the GISC regime is a horizontal agreement among competing undertakings, namely the insurers, not to deal with certain persons who do not respect certain rules which they (the insurers), together with others, consider that it is in the interests of the industry and the public to observe. As we have said, by so agreeing, the insurers have deprived themselves of an essential and intrinsic element of undistorted competition, namely the freedom of an undertaking to deal with whom it pleases without being restricted in that regard by an agreement made with its competitors.

211. Similarly a substantial number of intermediaries who, for whatever reason, consider it inappropriate or unnecessary to join GISC, are placed, in effect, in a situation of "take it or leave

it," the choice being to join GISC or go out of business. In our view, as we have already said, the *compulsion* to join a particular association and accept its rules seems to us, on the ordinary meaning of words, to be a restriction on the competitive freedom that the intermediaries in question would otherwise enjoy. They would not otherwise be required, for example, to pay fees to GISC, maintain specified solvency margins, segregate monies, obtain professional indemnity cover, and deal with the client in the particular way in which the GISC Rules compel them to do. Whether those compulsory requirements are *justified* is a separate matter for consideration only under section 4, and is not a reason for regarding the mandatory rules imposed by a decision of an association of undertakings as falling outside section 2(1)(b). When such restrictions or mandatory rules are accepted, or imposed, by the vast majority of the suppliers on all the intermediaries in the whole of an industry in the United Kingdom with a turnover of £27 billion, it is impossible to say that the restriction is not "appreciable" in the sense that concept is normally understood in Community Law.

212. In this connection, we do not find Cases C-180 to 184/98 *Pavlov* [2000] ECR I-6451, heavily relied on by the Director on the question of "appreciable effect", particularly helpful to the Director's case. In that case, legislation in the Netherlands provided for supplementary pension schemes to top up the low basic pension provided by the State. Many employers set up such schemes for their employees. The system applicable to the professions was that representative professional organisations could set up occupational pension schemes and then apply to the Minister for membership of that scheme to be compulsory for all members of that profession. Such a scheme had been set up by the Dutch association for medical specialists, and membership had become compulsory by a decree made by the Minister. Mr Pavlov and others claimed that the requirement of compulsory membership of the scheme was contrary to Article 81(1). The Court held, first, that although under its case law similar arrangements under Netherlands Law applying to employees fell outside the scope of Article 81(1), in the case of self-employed medical specialists the decision to set up an occupational pension scheme and apply to the Minister for a decree making membership of the scheme compulsory was a decision of "an association of undertakings", because self-employed medical specialists, unlike employees, were "undertakings". The Court then held, at paragraphs 91 to 97:

> "91 It is settled case-law that, in defining the criteria for the application of Article 81(1) of the Treaty to a specific case, account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10).
>
> 92. In this respect, it must be borne in mind that a decision of the kind just mentioned means that all the members of a profession arrange their

supplementary pension with one body and under the same conditions, except for their basic pension, which they may freely obtain from any authorised insurance company.

93. The conclusion must be that such a decision, which standardises in part the costs and supplementary pension benefits of medical specialists, restricts competition as far as concerns one cost factor of specialist medical services, inasmuch as one of its effects is that those medical practitioners do not compete with one another to obtain less costly insurance for that part of their pension.

94. However, as the Advocate General, observes at paragraphs 138 to 143 of his Opinion, the restrictive effects of such a decision on the specialist medical services market are limited.

95. The decision in question produces restrictive effects only in relation to one cost factor of the services offered by self-employed medial specialists, namely the supplementary pension scheme, which is insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. The cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists.

96. Furthermore, it should be observed that the implementation of a supplementary pension scheme managed by a single fund allows self-employed medical specialists to share the risks insured against whilst achieving economies of scale in the management of contributions and payment of pensions and in the investment of assets.

97. It follows from the foregoing that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme does not appreciably restrict competition within the common market."

213. In our view, *Pavlov* is a rather special case which must be seen in the context of the social security and pensions legislation widely applicable not only in the Netherlands but also in several Member States. Nonetheless, it emerges from *Pavlov* that the Court of Justice regarded the *compulsory* nature of the occupational pension scheme in question as, in principle, a restriction of competition (paragraph 93). Transposing that to the present case, it would seem to follow, a fortiori, that the compulsory nature of the GISC Rules would bring Article 81(1) into play. On the issue of "appreciability", however, the main factor that in our view distinguishes *Pavlov* from the present case is that in *Pavlov* there was no restriction on the persons to whom the specialists could supply their medical services. In the present case, there is such a restriction accepted by the vast majority of the suppliers and imposed on all the intermediaries in a market to a value of £27 billion, which is why, in our view, the test of "appreciability" is satisfied.

214. We appreciate that the fundamental point on which we differ from the Director is essentially a point of law and that none of the authorities cited to us by either side precisely match the circumstances of the present case. We have, therefore, approached the matter from first principles and have been unable to find anything in Community law that permits us to avoid the conclusion that Rule F42 is intrinsically a restriction on competition for the purposes of Article 81(1), quite irrespective of whether or not the mandatory rules which it supports are *in themselves* anti-competitive or whether the GISC Rules serve some wider public interest. In effect, we treat Rule F42 as analogous to "the control of outlets" within the ambit of the principle set out by the Court of First Instance at paragraph 136 of its judgment in *European Night Services*, with the consequence that benefits flowing from the Rule F42 fall to be examined under section 4, not section 2, of the Act.

215. In reaching that conclusion we bear in mind that, although section 60 of the Act enjoins us to construe section 2 consistently with Community law, our primary task, as a United Kingdom tribunal, is to construe the statute with which we are concerned. In our judgment, as a matter of the ordinary meaning of words, a provision such as Rule F42, whereby a group of suppliers, acting collectively, agree not to deal with certain persons, is a provision which has as its object or effect the restriction or distortion of competition. As we have said, the freedom to deal with whom one pleases is the essence of the competitive process, and a horizontal agreement whereby numerous suppliers collectively agree to deprive themselves of that freedom and to impose certain rules on others seems to us to be, in itself, a restriction of competition as those words are ordinarily understood in the English language.

216. Had Parliament wished to take arrangements such as the GISC Rules outside the ambit of the Act it could have so provided. However, insurance broking and related activities do not figure in the exclusions for professional rules in Schedule 4 of the Act, although many of the rules maintained by the IBRC were akin to at least some of the professional rules maintained by bodies which do figure in that Schedule. Similarly, Schedule 3 contains a large number of 'General Exclusions' but a system such as the GISC Rules does not figure among them. It would have been otherwise if the obligations of the GISC Rules were imposed in order to comply with a legal requirement (paragraph 5(1)), or if the GISC Rules were excluded by an order by the Secretary of State on the grounds that there were 'exceptional and compelling reasons of public policy' why the Chapter I prohibition should not apply (paragraph 7(1)), but neither of those provisions apply either. In addition, the Secretary of State has not exercised his power under section 3(3)(a) of the Act to provide for one or more additional exclusions, which he may do under section 3(4) in respect of certain agreements which in his view (a) do not in general have an adverse effect on competition or (b) are, in general, best considered under

Chapter II of the Act or the Fair Trading Act 1973. We note also that it would appear to be possible, if the scope of the FSMA were extended, by order under section 22 of the FSMA, to cover general insurance, for the GISC Rules to fall outside the Chapter I prohibition pursuant to section 164 of the FSMA, were GISC to become authorised by the FSA, and were the GISC Rules to "consist of provisions the inclusion of which in the agreement is encouraged by any of the authority's regulating provisions". In these circumstances, competition scrutiny of the GISC Rules would take place not under Chapter I of the Act but under the provisions of sections 159 to 163 of the FSMA which envisage an examination by the Director and, if necessary, consideration by the reporting side of the Competition Commission.

217. In the absence of action under any of these statutory provisions, the fact that the Government appears to be generally supportive of self-regulation in the general insurance industry, or even of the establishment of GISC, does not affect the statutory interpretation of section 2(1)(b) at which we have arrived, although it may well be relevant to an exemption under sections 4 and 9.

Conclusion on Rule F42

218. For all these reasons, we find that Rule F42 falls within the Chapter I prohibition.

GISC as a "sole regulator"

219. Having arrived at that conclusion, it is strictly speaking unnecessary for us to consider a number of the other arguments that have been addressed to us on the question whether the GISC Rules restrict or distort competition, but we do so for completeness. The remaining issues mainly revolve around the competitive effects said to flow from the fact that GISC has set itself up as the sole provider of a regulatory scheme for general insurance.

220. On this part of the case the IIB submits, essentially, that competition is restricted or distorted because GISC excludes the possibility of an alternative regulatory body or certification scheme for independent brokers, prevents such brokers from differentiating themselves from others in the general insurance sector and creates conflicts of interest between these brokers and the insurers who dominate GISC. This leads to a general lowering of standards (paragraphs 123-124, 126-127, 129 above).

221. ABTA submits that the Director has implicitly taken the view that GISC should be the regulator for the travel insurance activities of ABTA members, thus leading to an unnecessary duplication of costs, whereas what he should have done was to compare, in the context of an exemption

under section 4, the advantages and disadvantages of regulation by ABTA as compared with regulation by GISC (paragraphs 131, 137, 139 above).

222. The Director, supported by GISC, essentially denies the factual premises of the submissions of the IIB and ABTA, but submits that, in any event, the issue of whether GISC should be a sole regulator is essentially a regulatory, rather than a competition, issue. Regulatory issues, including the issue of competition between regulators, fall outside the scope of the Chapter I prohibition, because they do not involve "economic activities" and GISC is not "an undertaking" (see e.g. paragraphs 142, 149-150, 156 above).

The issues raised by the IIB

223. It is convenient to deal first with the arguments advanced by the IIB which, in our view, raise three questions: (i) does GISC exclude the creation of alternative regulatory or certification schemes in the general insurance sector?; (ii) if so, does that at first sight restrict or distort competition to an extent which merited investigation by the Director?; (iii) if so, do the legal arguments advanced by the Director justify the absence of such an investigation?

– Does GISC exclude alternative regulatory schemes?

224. In addressing this question, we have taken "regulatory" systems to mean organised schemes in the general insurance sector covering the development and enforcement of standards on such matters as professional competence, training, obligations towards the client, protection of clients' monies, preparation of accounts, professional indemnity insurance, complaint handling procedures, provision of a compensation fund, and so on. Schemes of this nature aim to ensure the quality of the product offered, from the point of view both of professional standards and of consumer protection. Such schemes are in many respects equivalent to certification schemes in which suppliers offering products to a particular standard or quality are entitled to promote themselves as fulfilling the requirements for certification and to use a particular designation or quality mark. That is illustrated in the present case by the promotion by GISC of the GISC logo as a quality mark or brand (see paragraph 68 and 165 above) and the attempts of the IIB to promote the designation "Institute Registered Broker" under IBRC Mk II.

225. In considering whether GISC has the object or effect of excluding any alternative schemes of this kind, we observe, first, that the object of GISC is to establish "a single regulatory scheme to monitor and enforce standards" in the general insurance sector (see Rule A2). That has always been the object of GISC, as shown by the documents relating to the "empowerment" of GISC to which we have already referred, and is one of the principal underlying objectives of Rule F42.

226. That objective is further reinforced by GISC's policy on waivers, from which it emerges that GISC does not wish to grant any waivers which might have the effect of allowing any other body to undertake regulation in this sector. As GISC said in its letter to the IIB of 15 March 2001 "The waiver which the IIB requests would effectively provide certain intermediaries (whose main business activity is insurance) with a complete "opt-out" from GISC and would therefore fragment and completely undermine the single regulatory structure. This would be contrary to the core objective of GISC set out in … Rule 2" (see paragraph 86 above).

227. Secondly, and contrary to the finding of the Director, at paragraph 24 of the IIB Decision, to the effect that it is still open to undertakings such as independent brokers to agree to subject themselves to higher regulatory standards, the evidence before us is that it is unlikely that it would be possible to establish another regulatory scheme for the independent broking sector *in addition* to GISC. There is, in effect, nothing to challenge the evidence of the independent brokers filed by the IIB (e.g. Messrs Kirsch, Greenaway, Fry, Foster Taylor and Harris) that, once independent broking firms had been required to join GISC, it would be difficult to establish an additional regulatory body for the independent broking sector. Quite apart from the fact that such brokers would then be paying regulatory fees to two organisations, any second regulator for the independent broking sector would have to have its own monitoring system and its own compliance procedures geared to its own higher regulatory standards. In those circumstances such brokers would face two sets of compliance costs and two monitoring systems, in addition to two sets of fees. We think it unlikely, in those circumstances, that an additional regulator for the broking sector would be a feasible proposition; at the least, the establishment of such a regulator is made much more difficult by the GISC Rules. That conclusion is confirmed by the fact that the effect of the establishment of GISC has already been to cause the IIB to close its own regulatory division, making the staff redundant, and not to launch IBRC Mk II. Competition to GISC from a rival regulatory scheme has thus already been eliminated.

228. On that basis we conclude that the GISC Rules, and notably Rule F42, have both the object and the effect of excluding, or at the least making much more difficult, the establishment of alternative forms of self regulation or certification in the independent broker sector, or indeed any other sector, of the general insurance industry in the United Kingdom. Indeed, it seems to us that, in approving the GISC Rules as falling outside section 2 of the Act, the Director must have approved, or at least not have objected, to GISC's core objective of establishing itself as the sole provider of a regulatory scheme for the general insurance sector.

– Does the exclusion of alternative regulatory schemes at first sight restrict or distort competition to an extent that merited investigation by the Director?

229. We next address the question whether the de facto exclusion, by GISC, of an alternative scheme of regulation for the independent broking sector gives rise, at first sight, to restrictions or distortions of competition which merited investigation by the Director.

230. In their article Kay & Vickers express the view that self regulatory organisations tend to act in the interests of their members, and may be inefficient in enforcing or promoting higher standards if they are under no competitive pressure to do so. For these reasons, Kay and Vickers suggest that competition between self regulatory organisations may be desirable (see pp. 239 to 241). In particular, situations in which persons cannot trade unless they are members of a particular self regulatory body "should normally be resisted except where the service provided is a public rather than a private one" (see p. 238).

231. The GISC Rules give rise to a situation very close to that which Kay & Vickers suggest, at p. 238 of their article, "should normally be resisted", in that intermediaries in the general insurance sector cannot in practice trade unless they are members of GISC. However, it is unnecessary for us in this case to enter into a theoretical debate. We are confronted by a specific factual situation, which is that the setting up of GISC has caused the collapse of a proposed alternative regulatory or certification scheme, namely IBRC Mk II, which was supported by some 1,000 broker firms, representing, we are told, half the independent broking sector, who did not wish to be regulated or certified by GISC. It seems to us, at first sight, that that situation in itself gives rise to a restriction or distortion of competition within the meaning of section 2(1)(b) of the Act.

232. In effect the evidence before us suggests that one way in which independent brokers are able to compete with insurers' direct selling operations and other intermediaries is by promoting themselves as offering higher 'quality' standards of professional competence and consumer protection. One potentially important means of competing in this way is for independent brokers to establish their own regulatory or "quality assurance" scheme (such as IBRC Mk II) by means of which they may collectively promote themselves as meeting the quality standards of their own scheme. The evidence of the IIB with regards to its attempts to launch IBRC Mk II indicates the importance which a substantial part of the independent broking sector attaches to the establishment of its own regulatory or certification scheme as a means of competing with insurers and other intermediaries. We conclude that there is plainly a market for the provision of regulatory or certification services to independent brokers as an alternative to, and in

competition with, GISC. To the extent that the Director found to the contrary at paragraph 18 of the IIB Decision, we reject that finding on the basis of the evidence before us.

233. It seems to us, therefore, at first sight, that the position of GISC as "sole regulator" restricts or distorts competition in the provision of competing regulatory or certification services for which there is a demand from independent brokers in the general insurance sector. That, on the evidence before us, is potentially a restriction or distortion of competition in the market for regulatory or certification services in the general insurance sector which merited investigation by the Director.

234. We are reinforced in that view by the fact, already mentioned, that once compelled to join, an intermediary faces practical difficulties in leaving GISC, except by discontinuing its business altogether or ceding its business to another member (Rule F34). It follows that, however high the GISC fees were to become, however inappropriate were to be the standards it develops, or however inefficiently it were to conduct its business, the option of leaving to join an alternative regulatory scheme is not in practice open. Even if GISC does not misconduct itself, the option of belonging to an alternative regulatory scheme, for example one that does not exclude its own liability, as GISC does, or which promotes higher standards or, for example, offers a compensation fund, is not in practical terms an option for any intermediary in the general insurance industry. In preventing, apparently in perpetuity, the emergence of an alternative to GISC, it does seem to us that competition from alternative regulatory schemes is potentially eliminated altogether.

235. Moreover, in our view, at first sight, the elimination of an alternative regulatory or quality assurance scheme for the independent broking sector also tends to restrict or distort competition in the separate market in which independent brokers are competing against the direct sales organisations of insurance companies, and other intermediaries, in selling or advising on general insurance products.

236. As we have already indicated, a potentially important element of competition in this, as in most other markets, is the ability to differentiate the product offered, notably by establishing a particular brand or image. GISC itself places considerable emphasis on establishing the GISC logo as a brand (paragraphs 68 and 165 above). The evidence before us is, however, that the inability to launch schemes such as IBRC Mk II is likely to make it more difficult for the independent broking sector to differentiate itself from the generality of suppliers of insurance by promoting its own distinctive image, based (as the IIB sees it) on higher regulatory standards, through the medium of an alternative regulatory scheme. In the absence of GISC, the members

of the IIB would have the competitive freedom to promote themselves distinctively on the basis of their membership of such an independent scheme. The effective exclusion of that possibility, by the establishment of GISC seems to us, at first sight, to be a potential restriction or distortion of competition in the market for the selling, advising or broking of general insurance services.

237. It seems to us that that potential restriction or distortion of competition is re-enforced in the present case by the fact that GISC itself comprises of a number of constituencies with different and opposing interests. It is a particular (and unusual) feature of this case that GISC, a body partly composed of suppliers (the insurers), seeks to exercise regulatory and disciplinary powers over the customers of those suppliers (the intermediaries). In addition, the insurer members of GISC sell insurance direct, in competition with intermediaries. In some sectors, particularly the consumer sector, insurers may have a substantial interest at gaining market share at the expense of independent intermediaries, or in promoting sales through tied outlets through agency agreements. Independent brokers, for their part, have an overriding interest in preserving their independence from insurers, since the essence of the service they provide is that of offering impartial advice in the best interests of the client.

238. In such circumstances it seems to us, at first sight, that the independent broking sector has a particular competitive need to differentiate, even to distance, itself from other Members of GISC. That sector depends very largely on the public perception that there are advantages in seeking impartial advice from a broker, whose duty it is to act in the client's best interest independently of the insurers, whether it is in placing the business or in handling any subsequent claims. It seems to us possible that that perception could be weakened if independent intermediaries are forced to belong to, and be disciplined by, a body in which insurers' interests are very strong.

239. The IIB also submits that GISC will have the effect of preventing higher standards emerging in the general insurance sector and has already had the effect of lowering standards. In this regard, there is some evidence before us that the GISC regime contemplates lower standards as compared with those of the previous IBRC regime or IBRC Mk II. For example, under the GISC Rules the liability of GISC is excluded, only firms rather than individuals are regulated, audit requirements may be waived by a procedure of "self-certification", breach of the Commercial Code does not appear in itself to be a disciplinary matter and no compensation fund is provided. Since GISC seeks to bring within its net all kinds of intermediaries, it seems to us not implausible that the general standard of regulation may settle at a lower level than that desirable for certain specific sectors such as independent brokers. Again, without expressing any view on the relative advantages and disadvantages of the GISC Rules and IBRC Mk II, it

seems to us that the question whether the establishment of GISC would tend to militate against the independent broking sector maintaining higher standards, and thus restrict or distort competition, was a question meriting investigation by the Director.

240. In the IIB Decision, the Director takes the view that it was unnecessary for him to take into account the possibility of the lowering of regulatory standards, and in particular, that "it was not necessary and would not have been appropriate for the Director to carry out a comparative analysis of the different types of regulation that may currently or in the future exist in the industry" (paragraph 23).

241. We find ourselves unable to agree with that approach. It seems to us that, once it was appreciated that the GISC Rules created a monopoly, in this instance a monopoly in the regulation of the general insurance industry, it was incumbent on the Director to examine potential effects on competition of the creation of that regulatory monopoly. It having been submitted to him on credible evidence that one of the effects of that monopoly was to make more difficult the maintenance of higher regulatory standards, and thus to diminish competition on product quality, which is one of the essential aspects of competition, the Director should, in our view, have investigated whether that evidence did in fact support the conclusion that GISC's regulatory monopoly did tend to restrict or distort competition in the respect alleged.

242. We are unpersuaded that the restrictions of competition identified above are materially affected by GISC's submission that the threat of statutory regulation under the FSMA will suffice to ensure that GISC acts solely in the public interest. That is a quite different issue. In any event, the possibility that the present or any future Government might, at some unknown future date, wish to replace GISC with statutory regulation under the FSMA, and if so in what circumstances, is far too uncertain a consideration for us to take into account when analysing restrictions or distortions of competition under section 2(1)(b) of the Act.

243. We also observe that a number of the possible consequences of the exclusion of alternative regulatory or certification regimes would be avoided if there were a realistic possibility for a waiver of the GISC Rules where such an alternative scheme was in place. Any such waivers would have to be granted on the basis of objective and transparent criteria, and any refusals of waiver would have to be open to challenge by some appropriate and independent procedure. Since, however, that is not the case at present, it does not seem to us that the waiver provisions of the GISC Rules, as presently applied, affect the analysis set out above.

244. For the foregoing reasons, it seems to us that the position of GISC as "sole regulator" in itself may give rise to restrictions or distortions of competition of the kind we have indicated in paragraphs 229 to 243. Taken cumulatively, such restrictions seem to us to be likely to have an appreciable effect, given that at least 1,000 independent broking firms are potentially affected. For present purposes we do not need to find as a fact that there are such restrictions or distortions of competition; it is enough for us to find on the evidence that the likelihood of such appreciable restrictions or distortions of competition is sufficiently significant to have merited further investigation by the Director. We so find.

The Director's arguments in law

245. It is, however, common ground that the Director did not in fact investigate any of the above matters. He did not do so on the ground set out in paragraph 18 of the IIB Decision that "in light of European case law" GISC's regulatory function "does not constitute an economic activity", and that "for the purposes of the Act", GISC is not "an undertaking". In the Director's view, matters pertaining to "regulatory functions" are as a matter of law outside the scope of the Chapter I prohibition.

246. We have difficulty in accepting the Director's starting point that a clear and precise line can be drawn between "regulatory policy", on the one hand, and the sphere of competition law on the other. We have already noted that in certain sectors the promotion of regulatory, certification or quality assurance schemes for the protection of the consumer forms an intrinsic part of the competitive process, particularly where consumers themselves are ill placed to judge the quality or suitability of the products in question. As Kay and Vickers state "the connections between competition and regulation, and the ways of combining them are numerous and complex" (p. 222 of their article). Similarly the recent Oftel publication *The benefits of self regulation and co-regulation to consumers and industry* of July 2001, deals, among other things, with the many ways in which competition and regulation interact.

247. We do not, however, need to pursue any theoretical debate as to what are the proper spheres of competition policy and regulatory policy respectively, since, in our respectful view, the ground on which the Director declined to investigate any issues arising out of GISC's position as "sole regulator" was erroneous in law.

248. In the first place, the Director's argument that GISC itself carries on no economic activities and is thus not an undertaking, even if correct, does not take the restrictions on competition we have just identified outside section 2(1)(b) of the Act. That is because the restrictions in question derive from a "decision by an association of undertakings" or, alternatively, because the Rules

of GISC constitute an agreement or concerted practice between the members of GISC, as the Director found at paragraph 24 of the GISC Decision.

249. It is well established that, irrespective of the precise legal nature of an association, Article 81(1) "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" Cases 209/78 etc *Heintz van Landewyck v Commission* [1980] ECR 3125, paragraph 88, Joined Cases 96/82 etc *NAVEWA v Commission* [1983] ECR 3369, paragraph 20, see also Case 123/83 *BNIC v Clair* [1985] ECR 391. In the present case, the restrictions on competition identified above are all consequences of the decision to set up and implement the GISC Rules, made by what is conceded to be "an association of undertakings", or the consequences of an underlying agreement or concerted practice between the members of GISC (particularly the insurer members) to observe those Rules and in particular Rule F42. Accordingly, the restrictions or distortions of competition resulting from the GISC Rules fall within the scope of the Chapter I prohibition.

250. This analysis is confirmed, in our view, by the approach of Advocate General Léger in his opinion in *Wouters* at paragraphs 56 to 86. There Advocate General Léger concluded that the Dutch Bar Association was an "association of undertakings" for the purposes of Article 81(1), with the consequence that its regulatory rules fell within the scope of that Article. Advocate General Léger said, at paragraph 83 of his opinion:

> "if a body is composed, as it is in this case, exclusively of private economic operators, the competition authorities must necessarily be allowed to scrutinise all its actions in the light of the Treaty. The reasons which must underpin a broad interpretation of the field of competition law have been clearly set forth by Advocate General Jacobs in his Opinion in *Albany*. According to Mr Jacobs: 'It can be presumed that private economic actors normally act in their own and not in the public interest when they conclude agreements between themselves. Thus, the consequences of their agreements are not necessarily in the public interest. Competition authorities should therefore be able to scrutinise private actors' agreements even in special areas of the economy such as banking, insurance or even the social field'".

251. It is thus unnecessary for us to consider whether GISC itself is an undertaking. Since, however, the matter has been argued, we add the brief comments set out below.

252. It is common ground that Article 81 of the Treaty applies to the carrying on of "economic activities" by "undertakings". As appears from the opinion of Advocate General Jacobs of 17 May 2001 in Case C-475/99 *Ambulanz Glöckner*, the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it

is financed. The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make a profit (paragraph 67). By contrast, while public bodies carrying on economic activities may be regarded as undertakings, "activities in the exercise of official authority" are sheltered from the application of the competition rules (paragraph 72 of that opinion). The test is whether the activity in question is to be analysed as "the exercise of public powers" or as "economic activities": Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7. One test for whether the activity in question constitutes the exercise of public powers, or of official authority, is whether the activity in question "is connected by its nature, its aim and the rules to which it is subject with the exercise of powers which are typically those of a public authority" (see paragraph 76 of the opinion of Advocate General Jacobs in *Ambulanz Glöckner*, citing Case 364/92 *Eurocontrol* [1994] ECR I-43, paragraph 30).

253. To illustrate the difference between the exercise of "public powers" or "official authority" on the one hand and "economic activity" on the other hand, in *Ambulanz Glöckner* itself Advocate General Jacobs concluded that the provision of ambulance services, including emergency services, was an "economic activity" and thus within the rules on competition, since those were not services that must *necessarily* be carried out by public entities (paragraph 68 of his opinion). On the other hand, the grant or refusal by a public authority under statute of an authorisation to provide ambulance services fell outside the rules on competition, since it was "a typical administrative decision taken in the exercise of prerogatives conferred by law which are usually reserved for public authorities" (paragraph 76). Other illustrative examples of the exercise of public authority falling outside Articles 81 and 82 of the Treaty include the arrangements for international air traffic control made by the European Organisation for the Safety of Air Navigation, an international organisation set up and run by 14 Contracting States in pursuance of an international Convention (see *Eurocontrol*, cited above); the fixing by public authorities under statute of tariffs for the use of German waterways (Case C-153/93 *Germany v Delta Schiffahrts* [1994] ECR I-2517); and anti-pollution surveillance carried out by virtue of a public authorisation which was held to be "a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in sensitive areas" and thus "connected by its nature, its aim and the rules to which it is subject with the exercise of powers … which are typically those of a public authority…" Case 343/95 *Cali & Figli v SEPG* [1997] ECR I-1547, at paragraphs 22 to 23).

254. Applying those principles to the present case, we note first that GISC is a private company that has been set up by the industry itself without any statutory basis. It exists solely by contract.

GISC is not accountable to Parliament, nor to Ministers, nor indeed to anyone other than those in the industry who belong to GISC. As far as the constitution of GISC is concerned, GISC is run by a Board of Directors most of whom are, or have been, active in the industry. At present only two out of the Board of some 16 members are "public interest" directors recruited, so we are told, through head-hunters and not appointed by a public authority. It is true that it is currently proposed that there should be five "public interest directors", but that still leaves the "outside" directors in a substantial minority vis-à-vis the ten "industry" directors (see paragraphs 53 to 55 above). There is no independent chairman (without industry connections). It is also proposed that in future the directors will be elected by the Members of GISC, who will become shareholders in the company, six directors being elected by intermediaries and four directors elected by insurers. This change is proposed, notably, in order that "the Board would be directly accountable to regulated businesses" and in order to give "the regulated businesses a greater say in the running of the company". There is to be weighted voting, on the basis that "a large business in the industry should, in principle, have a greater number of votes than a small business". A number of these changes are proposed on the basis of the principles of the Combined Code, which is a publicly available document dealing with the principles of corporate governance relevant to listed public companies in the United Kingdom (see paragraphs 55 to 58 above).

255. On this basis GISC appears to us to have the features normally to be found in a private sector organisation or company accountable to its members, rather than a publicly constituted body exercising "public powers". We note also that, in the cases cited to us where the exercise of official or public authority was held to fall outside the competition rules, the activity in question had been exercised on some statutory basis of one kind or another. In the present case, GISC lacks any such statutory foundation.

256. We doubt whether, as a matter of Community law, the notion of the exercise of "official authority" or "public powers" can extend to cases where the legal basis of the activity in question is not to be found in the public law of the Member State but relies entirely on contract between private parties. Even if the Government is supportive of the principle of self regulation in the general insurance sector - which may not be quite the same thing as supporting a monopoly regulator for the whole sector, as shown by the Treasury paper of April 1998 cited at paragraph 38 above – the Government is not, constitutionally speaking, the legislature. Statements by Government ministers are not the same thing as a legal basis founded in public law. Again, as a matter of statutory interpretation, we would not expect to find that an activity could be taken outside section 2 of the Act on the basis of ministerial statements made in

Parliament rather than on the basis of the various exclusions and order making powers to be found in section 3 and schedules 1 to 4 of the Act.

257. Lastly, while it is true that the assumption of regulatory powers in respect of general insurance could properly be an activity of the State, for example under the FSMA, the setting up of a framework for promoting professional standards and consumer protection in general insurance is not an activity which, by reason of its intrinsic nature, can *necessarily* only be carried out by public authorities, as the case law appears to require. Self evidently GISC, the IIB and ABTA are all private sector bodies who have sought to establish self-regulatory or quality assurance schemes of one kind or another in the industries in which they operate. While we do not doubt the good intentions of those concerned, it seems to us clear that each of those bodies is acting not solely in the public interest but also in the commercial interests of their members in promoting the various schemes in question. In the case of GISC, emphasis has been placed on developing the GISC brand, creating what GISC sees as a "level playing field", and avoiding the threat of statutory intervention. Although GISC itself is not run for profit, the particular structure set up under the GISC Rules would hardly have been adopted if the industry did not see real commercial advantages in proceeding in the way it has. It seems to us that Advocate General Léger, at paragraphs 144 to 154 of his opinion in *Wouters*, was considering a different factual situation, namely regulatory powers conferred by statute (see paragraphs 154 and 258(3) of that opinion). Similarly, the two domestic cases cited to us, *Institute of Chartered Accountants v Customs & Excise* [1999] 1WLR 701 and *R v Panel on Takeovers and Mergers ex p Datafin* [1987] 1 QB 815, were each decided in a different factual and legal context.

258. In all those circumstances we can see no compelling reason why GISC should not be regarded as itself an undertaking although, as we have said, we do not need to decide that point for the purposes of this judgment, nor make any reference to the Court of Justice under Article 234 of the Treaty.

Conclusion on GISC as a "sole regulator"

259. For the foregoing reasons we conclude that the Director erred in declining to investigate the potential restrictions or distortions of competition identified in paragraphs 229 to 243 above.

GISC's submission based on the 'rule of reason'

260. GISC, but not the Director, submits that the GISC Decision can be supported on a 'rule of reason' analysis, by analogy with Case C-250/92 *Gøttrup-Klim* [1994] ECR I-5641. The essence of the argument, supported by Mr Woodburn's statement, is that the GISC Rules are the

least restrictive way of achieving a pro-competitive aim, namely a proper system of consumer protection, which avoids fragmented and ineffective regulation, while providing a level playing field without the distortions caused by having different standards of regulation (see paragraphs 156, 162 and 165 above).

261. We leave open the question of whether there is any real scope for a 'rule of reason' approach to the construction of section 2(1)(b) of the Act. Even if there was, a rule of reason analysis, in our view, could not apply in the present case in the light of our findings at paragraph 214 above and the judgment of the Court of First Instance in *European Night Services* at paragraph 136. On those grounds alone, we reject GISC's submissions. In our view any justification for the GISC Rules must take place in the context of section 4, not section 2(1)(b), of the Act.

262. Moreover, even if it could be applied, in our view *Gøttrup-Klim* could not support the contested Decisions in the present case.

263. *Gøttrup-Klim* concerned an agricultural co-operative, DLG, whose object was to provide its members with farm supplies (such as fertilizers) at the lowest obtainable prices. When some of DLG's members set up a rival co-operative to purchase farm supplies in competition with DLG, the latter amended its statutes to prohibit its members from belonging to two agricultural co-operatives simultaneously, while providing that a member could withdraw from DLG on five years notice instead of the previous ten years. On the question whether DLG's statutes fell within Article 81(1), the Court of Justice held at paragraphs 33 to 36:

> "33. Where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves cooperative associations with a large number of individual members.
>
> 34. It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 81(1) of the Treaty and may even have beneficial effects on competition.
>
> 35. Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article 81(1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

> 36. The particular features of the case at issue in the main proceedings, which are referred to in the questions submitted by the national court, must be assessed in the light of the foregoing considerations. In addition, it is necessary to establish whether the penalties for non-compliance with the statutes are disproportionate to the objective they pursue and whether the minimum period of membership is unreasonable."

264. The Court, examining the whole factual circumstances, went on to hold that the restrictions in question did not go beyond what was necessary to maintain DLG's bargaining power vis-à-vis producers and that the minimum period of notice was not unreasonable.

265. The facts of *Gøttrup-Klim*, which deals with the somewhat special situation of agricultural co-operatives, are very far from those of the present case. In particular, whereas in *Gøttrup-Klim* the rule at issue merely prohibited dual membership and envisaged the possibility of leaving the co-operative after a reasonable period, in the present case intermediaries are obliged to belong to GISC and, it appears, have no real possibility of leaving. *Gøttrup-Klim*, therefore, does not assist GISC on the facts of that case.

266. In any event, as Advocate General Léger points out in *Wouters*, putting it at its highest, any rule of reason analysis is limited to a strictly "competition balance sheet" and cannot take into account any matters of wider public interest. Putting on one side the various public interest arguments advanced by the Director and GISC, in our view the remaining material before us does not demonstrate, at first sight, that the restrictions of competition we have identified in Rule F42 and in the regulatory monopoly conferred on GISC are, or might be, outweighed by purely competition-related advantages. The Director does not contend to the contrary.

267. We therefore reject GISC's submissions based on the "rule of reason".

Other issues

268. In the light of the conclusions we have reached, there is no need for us to rule on the arguments put to us by the IIB and ABTA on the issue of discrimination in membership fees, or the argument of the IIB concerning the GISC Rules on segregation of monies. Similarly, we do not need to deal with ABTA's arguments relating to duplication of costs or the possible distortions caused by insurers or intermediaries operating offshore in order to avoid the GISC Rules. We are confident, however, that the Director will have regard to the arguments presented by the parties on these points in the course of his further examination of the GISC Rules.

269. Similarly, it is not appropriate for us to accede to the IIB's request that we should ourselves consider the question of an exemption under section 4. That is a matter for the Director. Since

the effect of our judgment is that the GISC Rules now fall to be examined by the Director under section 4 of the Act, we need make no specific order in that regard. We do not consider it appropriate to set a deadline for the Director's decision.

Procedure

270. Although not entirely relevant to the substance, this case has perhaps highlighted the somewhat cumbersome nature of the procedure under section 47 of the Act, which does not confer on an interested person, who is not a party to an agreement, the right to appeal directly to this Tribunal against an adverse decision of the Director, without going through the section 47 procedure. In this particular case, it is unfortunate that, for whatever reason, nearly six months passed before the IIB, in particular, was able to bring its complaint against the GISC Decision before this Tribunal. That delay was detrimental to the IIB, who in the meantime had to close its regulatory division, and damaging to GISC because it has delayed for a substantial period the final resolution of its notification to the Director. We hope that this issue can be addressed in future, both from the administrative point of view and from the perspective of a possible modification to the Act. More generally, from the point of view of transparency in the procedure, we can see advantages in the Director adopting the administrative practice, in decisions such as the GISC Decision, of indicating briefly the substance of any adverse comments he has received and his response to them.

Conclusion

271. In the result, we find that Rule F42 of the GISC Rules falls within section 2(1)(b) of the Act for the reasons given in paragraphs 179 to 218 above. Since it is conceded that all the other requirements of section 2 are satisfied, the consequence is that Rule F42 falls within the Chapter I prohibition. We further find that certain other restrictions or distortions of competition, identified in paragraphs 223 to 244 above, potentially bring Rule F42, together with other aspects of the GISC Rules, within the ambit of section 2(1)(b). Those matters are therefore remitted to the Director for further investigation pursuant to paragraph 3(2)(a) of Schedule 8 of the Act, together with the matters set out in paragraphs 202 to 204 above. In consequence of those conclusions, we also set aside the IIB and ABTA Decisions under paragraph 3(2) of Schedule 8 of the Act. Acting under paragraph 3(2)(d) and (e) of Schedule 8 of the Act, we further withdraw the GISC Decision under section 47 of the Act, and find that the Chapter I prohibition is infringed, for the reasons we have given in paragraphs 179 to 218. We propose to hear further argument on the question of costs.

IX ORDERS

272. On those grounds the Tribunal:

1. Sets aside the decisions of the Director dated 11 May 2001 concerning the Rules of the General Insurance Standards Council addressed to the Institute of Independent Insurance Brokers, and to the Association of British Travel Agents Limited, respectively

2. Withdraws the decision of the Director dated 24 January 2001 entitled Notification of the Rules of the General Insurance Standards Council

3. Decides that the Rules of the General Insurance Standards Council fall within the prohibition imposed by Chapter I of the Competition Act 1998, by virtue of Rule F42

4. Remits to the Director the issues referred to in paragraphs 202 to 204 and 223 to 244 of this judgment

5. Reserves the question of costs for further argument

Christopher Bellamy Ann Kelly Adam Scott

Delivered in open court 17 September 2001

Charles Dhanowa
Registrar