JUDGMENT OF THE COURT (Fifth Chamber)

11 May 2000 *

In Case C-296/98,

Commission of the European Communities, represented by C. Tufvesson, Legal Adviser, and B. Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, by maintaining in force Article L. 310-8 of the Insurance Code, which provides that, when marketing a standard form

* Language of the case: French.

contract of insurance for the first time in France, insurance and capitalisation undertakings must notify it to the Minister for Economic and Financial Affairs in accordance with the conditions laid down by order of that minister, and Article A. 310-1 of the same code, which provides that the information referred to in the first paragraph of Article L. 310-8 is to be provided in the form of a information sheet drawn up in French containing the information mentioned in the annex to Article A. 310-1, the French Republic has failed to fulfil its obligations under the EC Treaty and under Articles 6, 29 and 39 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance directive) (OJ 1992 L 228, p. 1) and Articles 5, 29 and 39 of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance directive) (OJ 1992 L 360, p. 1),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida (Rapporteur), President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 October 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by maintaining in force Article L. 310-8 of the Insurance Code, which provides that, when marketing a standard form contract of insurance for the first time in France, insurance and capitalisation undertakings must notify it to the Minister for Economic and Financial Affairs in accordance with the conditions laid down by order of that minister, and Article A. 310-1 of the same code, which provides that the information referred to in the first paragraph of Article L. 310-8 is to be provided in the form of an information sheet drawn up in French containing the information mentioned in the annex to Article A. 310-1, the French Republic has failed to fulfil its obligations under the EC Treaty and under Articles 6, 29 and 39 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance directive) (OJ 1992 L 228, p. 1) and Articles 5, 29 and 39 of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance directive) (OJ 1992 L 360, p. 1),

The relevant legislation

The Community legislation

2 Article 6 of Directive 92/49, which appears in Title II under the heading 'The taking up of the business of insurance', provides as follows:

'Article 8 of Directive 73/239/EEC shall be replaced by the following:

"Article 8

...

3. Nothing in this Directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and communication of any other documents necessary for the normal exercise of supervision.

Member States shall not, however, adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms and other printed documents which an undertaking intends to use in its dealings with policyholders.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.

...'''

3 Article 29 of Directive 92/49, which appears in Title III of the directive, under the heading 'Harmonisation of the conditions governing the business of insurance', provides that:

'Member States shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an insurance undertaking intends to use in its dealings with policyholders. They may only require non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.'

4 Article 35 of Directive 92/49, which appears in Title IV of the directive, under the heading 'Provisions relating to right of establishment and the freedom to provide services', provides as follows:

'Article 16 of Directive 88/357/EEC shall be replaced by the following:

"Article 16

1. Within one month of the notification provided for in Article 14, the competent authorities of the home Member State shall communicate to the Member State or Member States within the territories of which an undertaking intends to carry on business under the freedom to provide services:

(a) a certificate attesting that the undertaking has the minimum solvency margin calculated in accordance with Articles 16 and 17 of Directive 73/239/EEC;

(b) the classes of insurance which the undertaking has been authorised to offer;

(c) the nature of the risks which the undertaking proposes to cover in the Member State of the provision of services.

At the same time, they shall inform the undertaking concerned accordingly.

Each Member State within the territory of which an undertaking intends, under the freedom to provide services, to cover risks in class 10 of point A of the Annex

to Directive 73/239/EEC other than carrier's liability may require that the undertaking:

— communicate the name and address of the representative referred to in Article 12a(4) of this directive,

— produce a declaration that the undertaking has become a member of the national bureau and national guarantee fund of the Member State of the provision of services.

2. Where the competent authorities of the home Member State do not communicate the information referred to in paragraph 1 within the period laid down, they shall give the reasons for their refusal to the undertaking within that same period. That refusal shall be subject to a right to apply to the courts in the home Member State.

3. The undertaking may start business on the certified date on which it is informed of the communication provided for in the first subparagraph of paragraph 1."'

5 Appearing in the same title of Directive 92/49, Article 39(2) and (3) provides as follows:

'2. The Member State of the branch or of the provision of services shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an undertaking intends to use in its dealings with policyholders. It may only require an undertaking that proposes to carry on insurance business

within its territory, under the right of establishment or the freedom to provide services, to effect non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with its national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

3. The Member State of the branch or of the provision of services may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.'

6 Article 5 of Directive 92/96, which appears in Title II of the directive, headed 'The taking-up of the business of life assurance', provides as follows:

'Article 8 of Directive 79/267/EEC shall be replaced by the following:

"Article 8

...

3. Member States shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, of scales of premiums, of the technical bases used in particular for calculating scales of premiums and technical provisions or of forms and other printed documents which an assurance undertaking intends to use in its dealings with policyholders.

Notwithstanding the first subparagraph, for the sole purpose of verifying compliance with national provisions concerning actuarial principles, the home Member State may require systematic notification of the technical bases used for calculating scales of premiums and technical provisions, without that requirement constituting a prior condition for an undertaking to carry on its business.

Nothing in this Directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and ... communication of any other documents necessary for the normal exercise of supervision.

..."'

7 Article 29 of Directive 92/96, which appears in Title III of the directive, entitled 'Harmonisation of conditions governing pursuit of business', provides as follows:

'Member States shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, technical bases used in particular for calculating scales of premiums and technical provisions or forms and other printed documents which an assurance undertaking intends to use in its dealings with policyholders.

Notwithstanding the first subparagraph, for the sole purpose of verifying compliance with national provisions concerning actuarial principles, the Member State of origin may require systematic communication of the technical bases used

in particular for calculating scales of premiums and technical provisions, without that requirement constituting a prior condition for an undertaking to carry on its business.

...'

8 Article 35, which appears in Title IV of Directive 92/96, headed 'Provisions relating to right of establishment and freedom to provide services', provides as follows:

'Article 14 of Directive 90/619/EEC shall be replaced by the following:

"Article 14

1. Within one month of the notification provided for in Article 11, the competent authorities of the home Member State shall communicate to the Member State or Member States within the territory of which the undertaking intends to carry on business by way of the freedom to provide services:

(a) a certificate attesting that the undertaking has the minimum solvency margin calculated in accordance with Articles 19 and 20 of Directive 79/267/EEC;

(b) the classes which the undertaking has been authorised to offer;

(c) the nature of the commitments which the undertaking proposes to cover in the Member State of the provision of services.

At the same time, they shall inform the undertaking concerned accordingly.

2. Where the competent authorities of the home Member State do not communicate the information referred to in paragraph 1 within the period laid down, they shall give the reasons for their refusal to the undertaking within that same period. The refusal shall be subject to a right to apply to the courts in the home Member State.

3. The undertaking may start business on the certified date on which it is informed of the communication provided for in the first subparagraph of paragraph 1."'

9 Article 39(2), which appears in the same title of Directive 92/96, provides that:

'The Member State of the branch or of provision of services shall not lay down provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, technical bases used in particular for calculating scales of premiums and technical provisions, forms and other printed documents which an undertaking intends to use in its dealings with policyholders. For the purpose of verifying compliance with national provisions concerning assurance contracts, it may require an undertaking that proposes to carry on assurance business within its territory, under the right of establishment or the freedom to provide services, to effect only non-systematic notification of

those policy conditions and other printed documents without that requirement constituting a prior condition for an undertaking to carry on its business.'

The national legislation

10 Article L. 310-8 of the French Insurance Code provides that:

'Insurance and capitalisation undertakings are required, when marketing a standard form contract of insurance for the first time in France, to notify it to the Minister for Economic and Financial Affairs in accordance with the conditions laid down by order of that minister.

The Minister may demand copies of contractual or marketing documents relating to insurance or capitalisation transactions.

The Minister may, after taking the opinion of the insurance consultative committee, require any document that appears to be inconsistent with applicable laws and regulations to be amended or withdrawn. In urgent cases, the opinion of the consultative committee may be dispensed with.'

11 Article A. 310-1 of the code provides that:

'The information referred to in the first subparagraph of Article L. 310-8 is to be provided in the form of an information sheet drawn up in French containing the information mentioned in the annex to this article.'

12 The annex to Article A. 310-1 of the code provides that the information sheets that are to be provided by the undertakings are to be drafted as follows:

'I. — *Marketing information sheet for a new standard form contract of life assurance*

1. Name and address of the contracting insurance undertaking.

2. Commercial name of the contract.

3. Features of the contract:

(a) Contractual definition of the cover provided;

(b) Duration of the contract;

(c) Payment of premiums;

(d) Surrender: time-limit and procedure;

(e) Making a claim;

(f) Additional information relating to certain classes of contract:

— life and capitalisation contracts: fees and penalties charged by the insurance undertaking on surrender of a policy;

— other contracts with a surrender value: surrender fees;

— variable capital: list of reference values and types of assets included;

— group contracts: termination and transfer formalities;

(g) Premium information relating to the principal and supplementary items of cover.

4. Minimum guaranteed return and profit sharing:

(a) Guaranteed interest rate and guarantee period;

(b) Guaranteed minimum surrender values, fidelity bonuses and discounts;

(c) Calculation of profit share.

5. Date of first marketing.

II. — *Marketing information sheet for a new standard form contract of non-life insurance*

1. Name and address of the contracting insurance undertaking.

2. Commercial name of the contract.

3. Contractual definition of cover provided stating the numbers of the classes of events covered (Article R. 321-1 of the Insurance Code).

4. Is this a group contract (1)?

Yes
No

If so, what are the formalities for terminating or transferring the contract?

5. Is the contract intended to cover major risks (as defined in Article L. 111-6 of the Insurance Code) only (1)?

Yes
No

6. Does the contract cover risks in France only (1)?

Yes
No

7. Is the contract governed solely by French law (1)?

Yes
No

8. Intended client base (1):

Private individuals
Others

9. Date of first marketing.

(1) Tick the appropriate box.'

Precontentious procedure

13 By letter of 17 January 1997, having taken the view that Articles L. 310-8 and A. 310-1 of the French Insurance Code were inconsistent with the Member States' obligations under Articles 6, 29 and 39 of Directive 92/49 and Articles 5, 29 and 39 of Directive 92/96, because those national provisions require systematic notification of the general conditions of contracts which insurance undertakings propose to market for the first time within French territory, the Commission gave the French Government formal notice to send, within two months, its observations concerning that alleged infringement of those Community directives.

14 By letter of 25 March 1997, the French authorities submitted that Directives 92/49 and 92/96 allow the Member States to supervise contracts, by means of *post hoc* sampling, in order to ensure that they comply with national provisions relating to insurance contracts and to actuarial principles. Article L. 310-8 of the French Insurance Code is designed to make such supervision possible and

effective, which is necessary both from the prudential point of view and for the protection of policyholders. The obligation imposed by Article L. 310-8 is not inconsistent with Community law. First, the information solicited is different from the information and documents the advance or systematic notification of which is prohibited by Directives 92/94 and 92/96. Secondly, the notification of marketing information sheets provided for by the Insurance Code does not give rise to the prior approval of insurance contracts, as the sheets may be notified after marketing of the contracts has begun. The French authorities nevertheless admitted in their letter that it would be necessary to review the wording of the articles of the Insurance Code at issue so as to remove any ambiguities.

15 That explanation did not change the Commission's view that Directives 92/49 and 92/96 had been infringed. On 30 December 1997, it therefore addressed a reasoned opinion to the French Republic in which it reiterated all the complaints set out in the letter of formal notice and requested the French Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its notification.

16 In the absence of any reply from the French authorities to that reasoned opinion, the Commission, taking the view that the French authorities had not amended Articles L. 310-8 and A. 310-1 of the Insurance Code, or had at least failed to inform it of any such amendment, decided to bring the present action.

Substance

17 During the oral hearing, the French Government stated that, in order to remove any ambiguity as to whether or not the notification of marketing information sheets amounted to a precondition of the marketing of new insurance contracts, the wording of Article L. 310-8 of the Insurance Code had been amended by

Article 91(1) of Law No 99-532 of 25 June 1999 on savings and financial security (JORF, 29 June 1999, p. 9487). Article L. 310-8, as amended, provides as follows:

'Within three months of the first marketing of a new standard form contract of insurance, insurance or capitalisation undertakings shall notify the Minister for the Economy of such standard form contracts, in the form laid down by order of that minister.'

18 The French Government does not dispute that Directives 92/49 and 92/96 prohibit the Member States from requiring systematic notification of the general conditions of contracts which insurance undertakings propose to market for the first time within their territory and merely authorise checking of those conditions by means of *post hoc* sampling.

19 Nevertheless, it argues that the Community legislation contains no definition of 'the general conditions of insurance policies'. It states that, according to legal theory, the general conditions are those clauses which are common to a class of contracts concluded by the same insurer. The marketing information sheets, however, do not require notification of any information which could be regarded as forming the general conditions of insurance policies in that sense. They merely require brief information without going into the detail of the general conditions of the insurance policies.

20 On this point, the French Government maintains that the definition of the general conditions of insurance policies proposed by the Commission would render without effect the first subparagraph of Article 8(3) of First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3), as amended by

Article 6 of Directive 92/49, and the third subparagraph of Article 8(3) of First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (OJ 1979 L 63, p. 1), as amended by Article 5 of Directive 92/96. Those provisions, which are in identical terms, provide as follows: 'Nothing in this directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and communication of any other documents necessary for the normal exercise of supervision'.

21 If the concept of the general conditions of insurance policies were to include, as the Commission maintains, every detailed aspect of the contractual relationship between insurer and insured, the words 'documents necessary for the normal exercise of supervision' would be meaningless.

22 According to the French Government, the marketing information sheets are documents necessary for the normal exercise of such supervision by means of *post hoc* sampling. That supervision cannot be carried out without the classification and identification of insurance contracts which is made possible by the information obtained from the marketing information sheets.

23 In this connection, the French Government argues that the information obtained from the home Member State is insufficient, given that the contracts marketed in the Member State where the freedom to provide services is exercised are not the same as those marketed in the home Member State.

24 The Commission reiterates the arguments it set out in its reasoned opinion, adding that the new wording of Article L. 310-8 of the French Insurance Code,

whilst admittedly providing for *post hoc* supervision of the general conditions of insurance contracts, has not changed the fact that that supervision is systematic, with the result that it is inconsistent with the requirements of Directives 92/49 and 92/96. In any event, the amendment, which was adopted after the two-month time-limit laid down in the reasoned opinion had expired, cannot be regarded as having brought to an end the infringement alleged against the French Republic in the present proceedings.

25 The Court observes that, in the case of life assurance contracts, insurance undertakings are asked, in the marketing information sheet, for information on the features of the contract, including the contractual definition of the cover provided, the duration of the contract, the method of paying the premiums, the time-limit and procedure for surrendering the contract, the formalities to be completed in the event of a claim, the premiums relating to the principal and supplementary items of cover, the date of first marketing and the minimum guaranteed profit, including the guaranteed interest rate.

26 In the case of non-life insurance contracts, the information asked of insurance undertakings relates to the contractual definition of the cover provided, the formalities for termination or transfer, the type of risks covered, whether or not those risks are covered in France alone, whether the contract is governed solely by French law, the intended client base, and the date of first marketing.

27 It should be remembered in this connection that Articles 6, 29 and 39 of Directive 92/49 and Articles 5, 29 and 39 of Directive 92/96 prohibit a Member State from requiring systematic notification of the general and special conditions of insurance policies which an undertaking proposes to use within that Member State in its dealings with insurance purchasers.

28 It must, however, be concluded that, through the marketing information sheets, insurance undertakings are being asked systematically to notify to the authorities

of the Member State concerned a set of information, including those items mentioned in paragraphs 25 and 26 above, which may be regarded as forming part of the general conditions of the contracts of insurance.

29 Any obligation systematically to notify such information is contrary to the freedom to market insurance products within the Community, which Directives 92/94 and 92/96 are designed to achieve.

30 Admittedly, the Member State in whose territory the freedom to provide services is exercised has, under Article 6 of Directive 92/49 and Article 5 of Directive 92/96, power to supervise insurance contracts marketed within its territory.

31 In this connection, it must be observed that that Member State is already in possession of information relating to the branches of insurance that the undertaking is authorised to deal in and the nature of the risks it proposes to cover, and a certificate stating that the undertaking has the minimum margin of solvency. These it will have received from the competent authorities of the other Member States by virtue of Article 16 of the Second Council Directive (88/357/EEC) of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239 (OJ 1988 L 172, p. 1), and Article 14 of Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267 (OJ 1990 L 330, p. 50), as amended by Article 35 of Directive 92/49 and Article 35 of Directive 92/96 respectively.

32 Article 6 of Directive 92/49 and Article 5 of Directive 92/96 also permit the Member State within whose territory the freedom to provide services is exercised to seek, by way of *post hoc* sampling, information relating to the general conditions of insurance policies marketed in that State. Nevertheless, those provisions do not allow any such request for information to be systematic.

33 The systematic notification by means of marketing information sheets of some of the general conditions of insurance policies cannot therefore be regarded as a procedure necessary for enabling the normal exercise of supervision under Article 6 of Directive 92/49 and Article 5 of Directive 92/96 by Member States within whose territory the freedom to provide services is exercised.

34 That being so, the action brought by the Commission must be regarded as well founded.

35 Consequently, it must be held that, by maintaining in force the combined provisions of Article L. 310-8 and Article A. 310-1 of the Insurance Code, which provide that insurance or capitalisation undertakings which market for the first time in France a standard form contract of insurance must systematically send the Minister for Economic and Financial Affairs an information sheet containing information on the general conditions of insurance policies, the French Republic has failed to fulfil its obligations under Articles 6, 29 and 39 of Directive 92/49 and Articles 5, 29 and 39 of Directive 92/96.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the French Republic to be ordered to pay the costs and the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by maintaining in force the combined provisions of Article L. 310-8 and Article A. 310-1 of the Insurance Code, which provide that insurance or capitalisation undertakings which market for the first time in France a standard form contract of insurance must systematically send the Minister for Economic and Financial Affairs an information sheet containing information on the general conditions of insurance policies, the French Republic has failed to fulfil its obligations under Articles 6, 29 and 39 of

Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance directive) and Articles 5, 29 and 39 of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance directive);

2. **Orders the French Republic to pay the costs.**

Moitinho de Almeida Sevón Gulmann

Puissochet Wathelet

Delivered in open court in Luxembourg on 11 May 2000.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber