JUDGMENT OF THE COURT (Grand Chamber)

28 April 2009 *

In Case C-518/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 December 2006,

Commission of the European Communities, represented by E. Traversa and N. Yerrell, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

supported by:

Republic of Finland, represented by J. Himmanen, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and M. Ilešič (Rapporteur), Presidents of Chambers, A. Tizzano, A. Borg Barthet, J. Malenovský, J. Klučka, U. Lõhmus, E. Levits and J.-J. Kasel, Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 May 2008,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2008,

gives the following

Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that:

— by implementing and maintaining legislation pursuant to which premiums for insurance against civil liability in respect of the use of motor vehicles (third-party liability motor insurance) must be calculated on the basis of specific parameters, and by making such premiums subject to controls *ex post facto*, the Italian 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) (OJ 1992 L 228, p. 1);

— by controlling the detailed rules in accordance with which insurance undertakings which have their head office in another Member State, but which pursue their business in Italy by virtue of the freedom of establishment or the freedom to provide services, calculate their insurance premiums, and by imposing in particular on such undertakings penalties for breach of the national rules concerning the calculation of insurance premiums, the Italian Republic has failed to fulfil its obligations under Article 9 of Directive 92/49, and

— by maintaining an obligation to provide coverage for third-party motor vehicle liability insurance, incumbent on insurance undertakings, including those which have their head office in another Member State, but which pursue their business in

Italy by virtue of the freedom of establishment or the freedom to provide services, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

Legal context

Community legislation

Directives 72/166/EEC, 84/5/EEC and 2005/14/EC

2 In order to facilitate the movement of travellers between Member States, Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972 (II), p. 360) established a system based, first, on the abolition of checks on insurance green cards on the crossing of internal borders in the European Community and, second, on the obligation on each of the Member States to ensure that third-party liability in respect of the use of motor vehicles is covered by insurance.

3 The second recital in the preamble to Directive 72/166 states:

'… the only purpose of frontier controls of compulsory insurance cover against civil liability in respect of the use of motor vehicles is to safeguard the interests of persons who may be the victims of accidents caused by such vehicles …'

4 The seventh recital in the preamble to that directive states:

'… the abolition of checks on green cards for vehicles normally based in a Member State entering the territory of another Member State can be effected by means of an agreement between the … national insurers' bureaux, whereby each national bureau would guarantee compensation in accordance with the provisions of national law in respect of any loss or injury giving entitlement to compensation caused in its territory by one of those vehicles, whether or not insured.'

5 In addition, the fifth and sixth recitals in the preamble to that directive point out that the liberalisation of the rules regarding the movement of motor vehicles travelling between Member States contributes to the opening of the markets of those Member States.

6 Article 3(1) of Directive 72/166 provides:

'Each Member State shall … take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. …'

7 The fifth and sixth recitals in the preamble to Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to

insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17) state:

'… the amounts in respect of which insurance is compulsory must in any event guarantee victims adequate compensation irrespective of the Member State in which the accident occurred;

… it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified; …'

8 Under Article 1(4) of Directive 84/5, the Member States are obliged to set up or authorise a guarantee fund to compensate the victims of accidents caused by vehicles in respect of which the third-party liability insurance obligation has not been satisfied.

9 It is stated, in the same provision, that that obligation is to be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary.

10 Directives 72/166 and 84/5 were amended most recently by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles (OJ 2005 L 149, p. 14). Transposition of Directive 2005/14 did not have to be completed by the date on which the time-limit laid down in the last reasoned opinion issued in the present case expired.

11 As emphasised in recital 1 in the preamble to Directive 2005/14, the reinforcement and consolidation of the single insurance market as regards motor insurance constitute a fundamental objective in the field of financial services, given the special importance of third-party liability motor insurance for European citizens, whether they are policyholders or victims of an accident, on the one hand, or insurance undertakings, on the other.

12 Furthermore, recital 21 in the preamble to Directive 2005/14 states that the right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents.

Directive 92/49

13 Recitals 1, 5, 6, 7 and 18 in the preamble to Directive 92/49 state:

'(1) … it is necessary to complete the internal market in direct insurance other than life assurance from the point of view both of the right of establishment and of the freedom to provide services, to make it easier for insurance undertakings with head offices in the Community to cover risks situated within the Community;

…

(5) … the approach adopted consists in bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State;

(6) …, as a result, the taking up and the pursuit of the business of insurance are henceforth to be subject to the grant of a single official authorisation issued by the competent authorities of the Member State in which an insurance undertaking has its head office; … such authorisation enables an undertaking to carry on business throughout the Community, under the right of establishment or the freedom to provide services; …

(7) … the competent authorities of home Member States will henceforth be responsible for monitoring the financial health of insurance undertakings, including their state of solvency, the establishment of adequate technical provisions and the covering of those provisions by matching assets;

…

(18) … the harmonisation of insurance contract law is not a prior condition for the achievement of the internal market in insurance; …, therefore, the opportunity afforded to the Member States of imposing the application of their law to insurance contracts covering risks situated within their territories is likely to provide adequate safeguards for policyholders who require special protection.'

14 Under Title II of Directive 92/49, entitled 'The taking up of the business of insurance', Article 6 provides:

'Article 8 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)] shall be replaced by the following:

"…

… Member States shall not … 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.

…"'

15 Under Title III which is entitled 'Harmonisation of the conditions governing the business of insurance', Article 9 of that directive states:

'Article 13 of Directive 73/239/EEC shall be replaced by the following:

"…

1. The financial supervision of an insurance undertaking, including that of the business it carries on either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State.

2. That financial supervision shall include verification, with respect to the insurance undertaking's entire business, of its state of solvency, of the establishment of technical provisions and of the assets covering them in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level.

…"'

16 Article 11 of that directive provides:

'Article 19(2) and (3) of Directive 73/239/EEC shall be replaced by the following:

"…

3. Every Member State shall take all steps necessary to ensure that the competent authorities have the powers and means necessary for the supervision of the business of insurance undertakings with head offices within their territories, including business carried on outwith those territories, in accordance with the Council Directives governing such business and for the purpose of seeing that they are implemented.

These powers and means must, in particular, enable the competent authorities to:

…

(b) take any measures with regard to an undertaking, its directors or managers or the persons who control it, that are appropriate and necessary to ensure that that undertaking's business continues to comply with the laws, regulations and administrative provisions with which the undertaking must comply in each Member State …

…’’

17 Article 29 of Directive 92/49 provides:

‘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 policy-holders. 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.’

18 Under Title IV of that directive, entitled ‘Provisions relating to right of establishment and the freedom to provide services’, Article 39(2) and (3) of Directive 92/49 states:

‘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.'

19 Article 40 of that directive provides:

'…

3. If the competent authorities of a Member State establish that an undertaking with a branch or carrying on business under the freedom to provide services within its territory is not complying with the legal provisions applicable to it in that State, they shall require the undertaking concerned to remedy that irregular situation.

4. If the undertaking in question fails to take the necessary action, the competent authorities of the Member State concerned shall inform the competent authorities of the home Member State accordingly. The latter authorities shall, at the earliest opportunity, take all appropriate measures to ensure that the undertaking concerned remedies that irregular situation. The nature of those measures shall be communicated to the competent authorities of the Member State concerned.

5. If, despite the measures taken by the home Member State or because those measures prove inadequate or are lacking in that State, the undertaking persists in infringing the legal provisions in force in the Member State concerned, the latter may, after informing

the competent authorities of the home Member State, take appropriate measures to prevent or penalise further infringements, including, in so far as is strictly necessary, preventing that undertaking from continuing to conclude new insurance contracts within its territory. Member States shall ensure that within their territories it is possible to serve the legal documents necessary for such measures on insurance undertakings.

6. Paragraphs 3, 4 and 5 shall not affect the emergency power of the Member States concerned to take appropriate measures to prevent irregularities within their territories. This shall include the possibility of preventing insurance undertakings from continuing to conclude new insurance contracts within their territories.

7. Paragraphs 3, 4 and 5 shall not affect the powers of the Member States to penalise infringements within their territories.

…'

National legislation

20 Article 11(1) of Law No 990 relating to compulsory insurance against civil liability in respect of the use of motor vehicles and craft (assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti) of 24 December 1969 (GURI No 2 of 3 January 1970), in the version in force at the time of

the pre-litigation procedure ('Law No 990/69'), imposes on insurance undertakings the obligation to provide third-party liability motor insurance at the request of any potential customer. It provides:

'Insurance undertakings shall be required, on the basis of the contract terms and insurance rates which they must establish in advance for any risk in respect of the use of motor vehicles and craft, to accept the proposals regarding compulsory insurance which are submitted to them.'

21 That obligation to contract was, in the main, retained in Article 132 of the Code of Private Insurance (codice delle assicurazioni private), established by Legislative Decree No 209 of 7 September 2005, which entered into force on 1 January 2006 (GURI, ordinary supplement, No 239 of 13 October 2005,'the Code of Private Insurance'). That article provides:

'1. Insurance undertakings shall be required, on the basis of the contract terms and insurance rates they must establish in advance for any risk in respect of the use of motor vehicles and craft, to accept the proposals regarding compulsory insurance which are submitted to them, without prejudice to the necessary assessment of the correctness of the data shown in the claims history certificate, and the identification of the policyholder and the vehicle's owner, if other than the policyholder.

2. Insurance undertakings may request that the authorisation be limited to fleet business for the purposes of compliance with the obligations arising from paragraph 1.'

22 Article 11(1a) of Law No 990/69 provides:

‘In compliance with the obligations envisaged under paragraph 1, undertakings, when calculating their premium rates, shall calculate pure premiums and loadings separately, according to their technical bases that must be sufficiently broad and refer to at least five years. If these bases are not available undertakings can use market statistics. If [the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (ISVAP)] ascertains that there is a circumvention of the obligation to contract in respect of specific territorial areas or specific categories of policyholders, a penalty is applied of 3% of the premium relating to motor liability insurance as shown in the last balance sheet approved, with a minimum of one million euros up to a maximum of five million euros. In case of repeated circumvention of the obligation to contract, the authorisation to pursue an activity in the field of civil liability insurance in respect of the use of motor vehicles may be withdrawn.’

23 The key elements of that provision were repeated in Articles 35(1) and 314(2) of the Code of Private Insurance.

24 Article 12a of Law No 990/69 provides:

‘1. To guarantee transparency and competition in the supply of insurance services as well as adequate information for users, undertakings which operate in the field of compulsory insurance against civil liability in respect of the use of motor vehicles and craft shall make available to the public the premiums and the general and special contract terms applied in the territory of the Italian Republic.

2. The premiums applied, as fixed by each insurance undertaking, to policyholders which are in the category with the maximum bonus over the previous two years, must be uniform for the whole of the national territory.

3. Advertising of premiums and contract terms pursuant to paragraph 1 shall be undertaken at each point of sale of the insurance undertaking and through Internet sites thereby enabling users to calculate premiums and obtain information on the terms of insurance contracts ….

…

5. Each incorrect or incomplete execution of the obligations contained in paragraphs 1 and 3 shall be subject to an administrative penalty ranging from EUR 2 600 to EUR 10 300. In the event of an omission or delay which exceeds 30 days, the penalty shall be doubled.'

25 Those rules were, in the main, repeated in Articles 131 and 313 in the Code of Private Insurance.

26 Lastly, Article 12d of Law No 990/69 provides:

'1. Breach or circumvention by insurance undertakings of the obligation to accept the proposals of potential policyholders in accordance with Article 11 in relation to

compulsory insurance against civil liability in respect of the use of motor vehicles and craft shall be subject to a financial penalty … ’

27 By analogy, Article 314(1) of the Code of Private Insurance provides:

‘1. Breach or circumvention of the obligation to contract referred to in Article 132(1) shall be punished with an administrative fine ranging from EUR 1 500 to EUR 4 500.’

Pre-litigation procedure

28 By letter of 22 March 2004, the Commission drew to the attention of the Italian Republic difficulties relating to the compatibility of Law No 990/69, and the application of that law by the ISVAP, with Articles 6, 29 and 39 of Directive 92/49. In that regard, the Commission indicated that it had received complaints from insurance undertakings in regard to penalties imposed by the ISVAP, on the ground that the obligation to contract set out in Article 11(1) of that law had been circumvented by the charging of excessive premiums.

29 By letter of 8 June 2004, the Italian Republic replied that Law No 990/69 and its application by ISVAP complied with Community law. It explained that Law No 990/69 required neither prior approval of premium rates nor systematic notification of them to the ISVAP. That law left insurance undertakings free to decide their premium rates, while ensuring that consumers could obtain compulsory third-party liability motor insurance. In that latter regard, it emphasised the social nature of civil liability for injury caused by road traffic.

30 By letter of formal notice of 9 July 2004, the Commission asked the Italian Republic to send to the Commission its observations on the compatibility with Directive 92/49 of Articles 11(1), 11(1a), 12a and 12d of Law No 990/69, as interpreted and applied by the ISVAP.

31 By letter of 31 August 2004, the Italian Republic sent its observations, which were, in essence, the same as those communicated in its letter of 8 June 2004.

32 On 22 December 2004, the Commission sent a supplementary letter of formal notice in which it maintained that, following the principles set out by the Court in Case C-442/02 *CaixaBank France* [2004] ECR I-8961, the obligation to contract was also contrary to Articles 43 EC and 49 EC. The Italian Republic was granted a period of one month to reply to that supplementary letter of formal notice.

33 In the absence of any reply to the supplementary letter of formal notice, on 18 October 2005 the Commission sent to the Italian Republic a reasoned opinion confirming the complaints set out in the two letters of formal notice and requesting that Member State to comply with the reasoned opinion within two months of its receipt.

34 By letter of 3 November 2005, the Italian Republic notified the Commission of the publication of the Code of Private Insurance.

35 By letter of 30 December 2005, the Italian Republic replied to the reasoned opinion, insisting that the national legislation was in compliance with Community law.

36 In the light of the Italian Republic's reply, the Commission considered it necessary to make clear its grounds for complaint and thus issued, on 10 April 2006, an additional reasoned opinion. The Italian Republic was requested to comply with it within two months of its receipt.

37 By letter of 16 May 2006, the Italian Republic replied to the additional reasoned opinion. It reaffirmed that its legislation was in compliance with Community law.

38 As the Commission was not satisfied with the Italian Republic's reply, it brought the present action.

Procedure before the Court

39 By application filed at the Registry of the Court on 20 December 2006, the Commission brought this action, asking the Court to make the declarations set out in paragraph 1 of this judgment and to order the Italian Republic to pay the costs.

40 The Italian Republic requests the Court to dismiss the action.

41 By order of 21 June 2007, the President of the Court granted the Republic of Finland leave to intervene in support of the form of order sought by the Italian Republic.

The action

42 In its reply, the Commission indicated that the principal infringement of Community law alleged against the Italian Republic is the incompatibility of the obligation to contract with Articles 43 EC and 49 EC. That complaint, therefore, falls to be examined first of all.

The complaint alleging infringement of Articles 43 EC and 49 EC by reason of the obligation to contract

Arguments of the parties

43 The Commission claims that the obligation to contract, which is imposed on all insurance undertakings operating in the field of third-party liability motor insurance and in relation to all vehicle owners, and, likewise, the possibility offered to the ISVAP of imposing penalties in the event of infringement of that obligation, are incompatible with Articles 43 EC and 49 EC.

44 That obligation dissuades insurance undertakings established in other Member States from establishing themselves or offering services in Italy, thus hindering access to the Italian market. In particular, those undertakings are prevented from freely determining the insurance services they offer and the recipients of those services. Thus, they are required to bear costs that are excessive in relation to their commercial strategy. Those costs are even more significant for undertakings which intend solely to operate in Italy occasionally.

45 The restrictive effect of the obligation to contract is comparable to the restrictive effect found by the Court in *CaixaBank France*.

46 The Commission argues, next, that the obligation to contract is unjustified and disproportionate to the objective pursued.

47 As regards the objective, cited by the Italian Republic, of protecting vehicle owners, the Commission acknowledges that the obligation to contract contributes to guaranteeing that a vehicle owner will find an insurance undertaking prepared to issue a third-party liability motor insurance policy. However, the obligation to contract goes beyond what is necessary to attain the objective of consumer protection, since it is imposed on insurance undertakings in respect of all vehicle owners throughout Italian territory, whereas the Italian Republic has referred to difficulties in finding an insurance undertaking prepared to issue a third-party liability motor insurance policy for a specific geographical area and category of persons, that is to say, the south of Italy and new drivers.

48 In relation to the other objective cited by the Italian Republic, which consists of guaranteeing appropriate compensation for victims of road traffic accidents, the Commission takes the view that that is already achieved by the obligation imposed on vehicle owners — following transposition of Article 3 of Directive 72/166 — to take out a third-party liability motor insurance policy, and the existence in each Member State of a guarantee fund pursuant to Directive 84/5.

49 Lastly, the Commission notes that other Member States have less restrictive systems for obtaining the same results as the Italian legislation is claimed to be pursuing. It refers, in that regard, to the Bureau central de tarification (Central Rates Office) established both in Belgium and in France, the Consorcio de Compensación de Seguros (Insurance Compensation Consortium) established in Spain, the consortium of major insurance undertakings established in the Netherlands, and the mutual insurance system established in Portugal.

50 The Italian Republic points out that third-party liability motor insurance, while being a private form of insurance, has a social purpose, in particular the need to ensure that victims of road traffic accidents receive compensation. That is the reason why an obligation was introduced for vehicle owners to take out insurance in order to compensate third parties.

51 By choosing to impose that obligation to contract both on insurance undertakings and motor vehicle users, the Italian Republic wished to offer maximum protection to, on the one hand, policyholders, in their capacity as consumers, against discrimination in relation to access to insurance and use of public highways and, on the other, the victims of road traffic accidents.

52 According to the Italian Republic, those objectives should not be frustrated by the commercial freedom of undertakings. It considers that, if the Court were to accept the Commission's reasoning, third-party liability motor insurance would become insurance based solely on market logic and would lose, to a large extent, its social character.

53 The Italian Republic points out, next, that the obligation to contract has no dissuasive effect on insurance undertakings established in a Member State other than the Italian Republic which wish to penetrate the Italian market.

54 In the event that the Court were, nevertheless, to hold that the obligation to contract restricts the freedom of establishment and the freedom to provide services, the Italian Republic contends that that obligation is appropriate to achieve the abovementioned objectives of consumer protection and protection for victims of road traffic accidents.

55 The obligation to contract is, furthermore, compatible with the principle of proportionality. Contrary to what the Commission claims, it would be neither practical nor lawful to limit the obligation to contract to certain areas of Italian territory or to certain types of consumer. To limit the obligation to certain categories of consumers would raise discrimination issues, while a geographical limitation of that obligation would encourage insurance undertakings not to operate in those areas subject to the obligation to insure.

56 As regards, lastly, alternative mechanisms established in other Member States, the Italian Republic points out that, in the absence of harmonised rules on the means of implementing the obligation to insure motor vehicles in respect of third-party liability, each Member State remains free to choose the solution which best suits the national social situation. It is, moreover, precisely because of the differences between the various national situations that the Community legislature was not able to lay down rules on harmonisation in that regard.

57 The Republic of Finland argues that, irrespective of whether the obligation to contract restricts the freedom of establishment and the freedom to provide services, it is in any event justified.

58 In that regard, it contends that there is a close link between third-party liability motor insurance and social security, on account of the reimbursement of hospital and recuperation costs for victims of road traffic accidents and costs relating to loss of earnings suffered by those victims.

59 According to the Republic of Finland, the obligation to contract is necessary for and proportionate to the attainment of the objectives pursued. It is, for consumers, the most straightforward means of fulfilling their legal obligation.

Findings of the Court

— The existence of a restriction on the freedom of establishment and the freedom to provide services

60 It is not in dispute that the obligation to contract applies without distinction to all undertakings providing third-party liability motor insurance on Italian territory.

61 The Commission takes the view, nevertheless, that that obligation, in so far as it reduces the ability of insurance undertakings to implement their strategic market choices independently, hinders, in Italy, the establishment of and provision of services by undertakings having their head office in another Member State.

62 It is settled case-law that the term 'restriction' within the meaning of Articles 43 EC and 49 EC covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services (*CaixaBank France*, paragraph 11; Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 17; and Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 52).

63 As regards the question of the circumstances in which a measure applicable without distinction, such as the obligation to contract at issue in the present case, may come within that concept, it should be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory (see, to that effect, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 27, and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45).

64 By contrast, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade (see, to that effect, *Alpine Investments*, paragraphs 35 and 38, and *CaixaBank France*, paragraph 12).

65 In the present case, it is common ground that the obligation to contract does not have any repercussions for the acceptance by the Italian authorities of the administrative authorisation, referred to in paragraph 13 of this judgment, which insurance undertakings having their head office in a Member State other than the Italian Republic obtain in the Member State in which they have their head office. It therefore leaves intact the right of access to the Italian market as regards third-party liability motor insurance resulting from that authorisation.

66 Nevertheless, the imposition by a Member State of an obligation to contract such as that at issue constitutes a substantial interference in the freedom to contract which economic operators, in principle, enjoy.

67 In a sector like that of insurance, such a measure affects the relevant operators' access to the market, in particular where it subjects insurance undertakings not only to an obligation to cover any risks which are proposed to them, but also to requirements to moderate premium rates.

68 Inasmuch as it obliges insurance undertakings which enter the Italian market to accept every potential customer, that obligation to contract is likely to lead, in terms of organisation and investment, to significant additional costs for such undertakings.

69 If they wish to enter the Italian market under conditions which comply with Italian legislation, such undertakings will be required to re-think their business policy and strategy, inter alia, by considerably expanding the range of insurance services offered.

70 Inasmuch as it involves changes and costs on such a scale for those undertakings, the obligation to contract renders access to the Italian market less attractive and, if they obtain access to that market, reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established in Italy (see, to that effect, *CaixaBank France*, paragraphs 13 and 14).

71 Therefore, the obligation to contract restricts the freedom of establishment and the freedom to provide services.

— Justification for the restriction

72 A restriction on the freedom of establishment and the freedom to provide services may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go

beyond what is necessary in order to attain it (see, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 61; Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 39; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 55).

73 In order to justify the obligation to contract, the Italian Republic has cited a number of objectives, including the social protection for victims of road traffic accidents.

74 That social protection objective, which amounts, essentially, to ensuring that such victims will be adequately compensated, can be taken into account as an overriding requirement relating to the public interest.

75 As is clear from the Community legislation cited in paragraphs 3 to 12 of this judgment, and as the Italian Republic and the Republic of Finland have pointed out, the very purpose of compulsory third-party liability motor insurance is to guarantee compensation for victims of road traffic accidents.

76 Under that same legislation, such compensation is to be principally financed on the basis of contracts underwritten by insurance undertakings, while the guarantee fund set up in each Member State has only a subsidiary role in compensating victims of road traffic accidents, namely in cases where the accident was caused by a vehicle in respect of which the insurance requirement has not been met.

77 Article 3 of Directive 72/166 accordingly requires the Member States to take all appropriate measures to ensure that their citizens comply with the obligation to take out third-party liability motor insurance.

78 Clearly, one of the ways in which Member States may fulfil that obligation imposed by Article 3 of Directive 72/166 is to ensure that every owner of a vehicle is able to take out such insurance for a premium which is not excessive.

79 In that regard, the Commission's argument that the objective of social protection for victims of road traffic accidents is, in any event, achieved by the existence in each Member State of a guarantee fund cannot be accepted.

80 Admittedly, the existence of the guarantee fund ensures that the victims of accidents caused by vehicles in respect of which the insurance requirement has not been met will be compensated. It is therefore not in dispute that, even in the absence of an obligation to contract such as that introduced by the Italian Republic, every victim of a road traffic accident will receive compensation.

81 However, as has been pointed out in paragraph 76 of this judgment, it is also apparent from the Community legislation that the existence of an individual contract for third-party liability motor insurance, and the possibility of invoking that insurance contract directly against the insurance undertaking, constitutes the principal basis for the protection of victims of road traffic accidents. In those circumstances, Member States cannot be criticised for taking initiatives aimed at preventing the owners of vehicles from being unable to meet the requirement to take out third-party liability motor insurance.

82 It follows from the foregoing that the obligation to contract at issue in the present case is apt to contribute to implementing the Community legislation relating to the obligation, for every vehicle owner, to take out third-party liability motor insurance and, therefore, to the attainment of the objective of that legislation, which is to guarantee adequate compensation for victims of road traffic accidents.

83 As regards whether the obligation to contract as it is in force in the Italian Republic goes beyond what is necessary to achieve the objective of social protection for victims of road traffic accidents, it must be borne in mind, first of all, that it is not essential, with regard to the proportionality criterion, that a restrictive measure laid down by the authorities of a Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue.

84 The situation relating to road traffic, and to the relevant public interest objectives in that area, varies from one Member State to another. Consequently, Member States must be recognised as having some discretion in that area. Whilst it is true that it is for a Member State which relies on an imperative requirement to justify a restriction within the meaning of the EC Treaty to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraphs 65 and 66).

85 Therefore, the fact that some Member States have chosen to establish a system different from that introduced by the Italian Republic to ensure that every vehicle owner is able to take out third-party liability motor insurance for a premium that is not excessive does not indicate that the obligation to contract goes beyond what is necessary to attain the objectives pursued. The explanations given by the Commission concerning the systems in place in a number of Member States other than the Italian Republic do not, moreover, enable the conclusion to be drawn that those systems are, ultimately, less restrictive and more advantageous for insurance undertakings than the obligation to contract introduced by the Italian legislature.

86 It is appropriate, next, to consider the Commission's argument that it is disproportionate to impose on insurance undertakings an obligation to contract vis-à-vis all potential customers and throughout Italian territory.

87 On that point, the Italian Republic contended, without being challenged by the Commission, that, in the southern part of its territory, there are difficult circumstances which require corrective measures on the part of the public authorities in order that third-party liability motor insurance can be provided under conditions which are acceptable both for policyholders and insurance undertakings.

88 It appears, inter alia, that the number of road traffic accidents declared to insurance undertakings is particularly high in certain areas in the south of Italy. That situation has led to a considerable increase in the financial risks incurred by those undertakings in that region.

89 In those circumstances, the Italian Republic could consider that it was appropriate to impose on all undertakings operating in its territory an obligation to contract vis-à-vis all vehicle owners domiciled in Italy, in order to avoid those undertakings withdrawing from the southern part of Italian territory and thereby depriving vehicle owners domiciled there of the possibility of taking out third-party liability motor insurance, which is nevertheless compulsory.

90 It follows, moreover, from Article 11(1a) of Law No 990/69 and from Article 35(1) of the Code of Private Insurance that in taking that measure the Italian Republic did not prohibit insurance undertakings from applying premium rates differentiated on the basis of past statistics on the average cost of the risk within categories of insured that have been sufficiently broadly defined.

91 In particular, it is not in dispute that the obligation to insure does not prevent insurance undertakings from calculating a higher premium for a policyholder domiciled in an area characterised by a significant number of accidents than for a policyholder domiciled in an area where the risk is not so high.

92 Furthermore, it is not inconceivable that an obligation to contract limited to only the southern part of Italian territory would give rise, as the Italian Republic has claimed, to a questionable legal situation, inasmuch as vehicle owners domiciled in other regions of Italy could complain of unequal treatment if, in a region in which there was no such obligation to contract, they experienced difficulties in finding an insurance undertaking prepared to enter into a contract for third-party liability motor insurance with them.

93 It follows from all of the foregoing that the obligation to contract is appropriate to ensure the achievement of the objective which it pursues and does not go beyond what it necessary to attain it.

94 It follows that the complaint alleging breach of Articles 43 EC and 49 EC must be rejected.

The complaint alleging infringement of Articles 6, 29 and 39 of Directive 92/49 by reason of the criteria to be used in calculating insurance premiums and by reason of the control ex post facto to which such premiums are subjected

Arguments of the parties

95 According to the Commission, once it has been established that the obligation to contract imposed by Article 11(1) of Law No 990/69 is incompatible with Community law, it inevitably follows that Article 11(1a) of that law is incompatible with Articles 6, 29 and 39 of Directive 92/49. As the Italian Republic itself asserted, the criteria fixed for the calculation of insurance premiums are aimed at ensuring compliance with the obligation to contract.

96 In particular, the obligation on insurance undertakings to fix their insurance premiums in accordance with their 'technical bases that must be sufficiently broad and refer to at least five years' and to make them correspond to a specific market average, and the fact that those premiums are subject to control *ex post facto*, with the ISVAP able to impose significant fines, constitute an infringement of the freedom to set premium rates laid down in those articles of Directive 92/49.

97 The Italian Republic observes that the sole objective of the premium rate-setting principles laid down in Law No 990/69 is to contain the phenomenon of consumers being discouraged by some insurance undertakings from taking out a policy of insurance with them by means of the exorbitant premium rate they calculate for those consumers. Those principles correspond to the ordinary technical rules for determining premium rates, and to the actuarial principles followed by insurance undertakings.

98 According to the Italian Republic, those provisions in no way oblige insurance undertakings to offer prices similar to the market average or not to deviate substantially from the premium rates applied during the previous five years. It explains that undertakings fix their premium rates on the basis of past trends, and they have the right to raise, even substantially, the level of insurance premiums if the situation worsens in terms of the number of accidents.

99 As regards the ISVAP, the Italian Republic notes that that authority intervenes only against undertakings which apply insurance premiums lacking any valid technical justification, reflecting manifestly improper rates and discriminatory conduct against some policy holders. It contends that those cases in which the ISVAP intervenes do not concern premium rates that are simply high but rather genuinely abnormal rates, where the intention is to deny insurance cover. For example, annual premiums of more than EUR 7 000 have been proposed to some consumers.

Findings of the Court

100 Articles 6, 29 and 39 of Directive 92/49 prohibit Member States from introducing a system of prior approval or systematic notification of scales of premiums that an insurance undertaking intends to use in their territory in its dealings with policyholders.

101 As the Court has already stated, the Community legislature thus meant to secure the principle of freedom to set rates in the non-life insurance sector, including third-party liability motor insurance (Case C-59/01 *Commission* v *Italy* [2003] ECR I-1759, paragraph 29, and Case C-346/02 *Commission* v *Luxembourg* [2004] ECR I-7517, paragraph 21).

102 In the present case, Article 11(1a) of Law No 990/69 and Article 35(1) of the Code of Private Insurance oblige undertakings providing third-party liability motor insurance to calculate pure premiums and loadings separately, according to their technical bases that must be sufficiently broad and refer to at least five years.

103 On the question whether that rule is compatible with the principle of freedom to set rates as set out previously, it must first be noted that it does not introduce a system of prior approval or systematic notification of premium rates.

104 Second, contrary to the Commission's assertion, that rule does not oblige insurance undertakings to base their premium rates on the market average. Quite to the contrary, Article 11(1a) of Law No 990/69 and Article 35(1) of the Code of Private Insurance provide that insurance undertakings are to calculate their premium rates according to their technical bases, while stating that, if those bases are not available, the insurance undertakings can use market statistics.

105 Third, to the extent that Article 11(1a) of Law No 990/69 and Article 35(1) of the Code of Private Insurance are likely to have repercussions on premium rates in that they outline a technical framework within which insurance undertakings must calculate their premiums, it is clear that such a restriction on the freedom to set rates is not prohibited by Directive 92/49.

106 It should be recalled, in that regard, that full harmonisation in the field of non-life insurance rates precluding any national measure liable to have effects on rates cannot be presumed in the absence of a clearly expressed intention to this effect on the part of the Community legislature (*Commission* v *Luxembourg*, paragraph 24).

107 The Commission has not, moreover, proved or even alleged, that the rule for calculation imposed by the Italian legislature is incompatible with the technical rules for determination of premium rates, or the actuarial principles which are followed in the insurance sector.

108 It follows from the foregoing that the complaint alleging infringement of Articles 6, 29 and 39 of Directive 92/49 must be rejected.

The complaint alleging infringement of Article 9 of Directive 92/49 by reason of the controlling of the detailed rules on calculating insurance premiums and the imposition of penalties

Arguments of the parties

109 According to the Commission, the control, exercised by the ISVAP, pursuant to Article 11(1a) of Law No 990/69 and, most recently, pursuant to Articles 35(1) and 314(2) of the Code of Private Insurance, of the detailed rules according to which insurance undertakings operating in Italy under the freedom of establishment or the freedom to provide services calculate their insurance premiums, together with the imposition of penalties, constitute an infringement of the division of competences between the home Member State and the host Member State set out in Article 9 of Directive 92/49.

110 It follows from recital 5 in the preamble to Directive 92/49 that the principal of supervision by the home Member State constitutes one of the essential objectives of that directive. Any derogation from that principle should be construed narrowly.

111 There is no provision which legitimises the interventions of the ISVAP at issue. On the contrary, certain provisions of Directive 92/49, such as Articles 11 and 40, confer on the principle of supervision by the home Member State a very broad scope.

112 It follows from those provisions that, when the ISVAP intends to intervene in connection with premiums for third-party liability motor insurance set by insurance undertakings having their head office in a Member State other than the Italian Republic, it must notify the supervision authorities in the home Member State of the alleged irregularities and ask those authorities to take appropriate measures to bring the infringements to an end.

113 The Italian Republic observes that interventions in connection with premium rates the purpose of which is to protect consumers do not fall under the financial supervision of insurance undertakings within the meaning of Article 9 of Directive 92/49. The instruments for the protection of financial stability the use of which is reserved to the authorities of the home Member State comprise the solvency margins and the coverage of technical reserves. Such instruments have nothing to do with the protection of consumer rights.

Findings of the Court

114 As the Commission has pointed out, Directive 92/49 establishes, in recital 5 in its preamble and in Article 9, a principle of home Member State supervision.

115 However, as is entirely clear from recital 7 in the preamble to, and Article 9 of, that directive, that principle extends only to the financial supervision of insurance undertakings.

116 It is of course true that Article 9 of Directive 92/49 defines, in a non-exhaustive way, the scope of the principle of home Member State supervision, stating that financial supervision is to 'include' the state of solvency and the establishment of technical provisions. Nevertheless, that provision cannot be interpreted as meaning that the Community legislature intended that the home Member State should have exclusive supervisory competence extending to the commercial conduct of insurance undertakings.

117 It follows that Article 9 does preclude the possibility of controls such as those exercised by the ISVAP.

118 The foregoing considerations are not inconsistent with Articles 11 and 40 of Directive 92/49 on which the Commission relies in its reply.

119 As regards Article 11 of Directive 92/49, that provision amends a provision of Directive 73/239 which, like all the other provisions in that same section of Directive 73/239, concerns the financial soundness of insurance undertakings. The Commission cannot therefore rely on Article 11 to claim that the supervisory competence set out in that provision goes beyond the question of financial soundness.

120 As regards Article 40 of Directive 92/49, suffice it to state, first, that the Commission has not criticised the Italian Republic for having disregarded the obligations laid down in paragraphs 3 to 5 of that article and, second, Article 40(7) of that directive confirms the power of the host Member State to penalise infringements committed on its territory.

121 It follows from all of the foregoing considerations that that complaint must be rejected.

Costs

122 Under the first subparagraph of 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. In this case the Commission has failed in its claims. As the Italian Republic omitted, however, to ask that the Commission be ordered to pay the costs, the Italian Republic and the Commission must each be ordered to bear their own costs.

123 Under the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Republic of Finland, as intervener, must therefore bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities, the Italian Republic and the Republic of Finland to bear their own costs.**

[Signatures]