COMMISSION EUROPEENNE
SECRETARIAT GENERAL

SG.R.2

Bruxelles, , le 11/03/2008

BORDEREAU D'ENVOI DU COURRIER

Référence : SG/CDC/2008/A/1899.-- /2	
Date encodage : 29/02/2008	Date du document : 28/02/2008

En attribution: [redacted] (DG MARCHE INTERIEUR ET SERVICES ())

Pour information: [redacted] (SERVICE JURIDIQUE ())

Doc. scannés : 165 Fichiers attachés : 2 Statut : Normal Fiche nominative : Non

Expéditeur(s) [redacted]

Référence A DEJA ECRIT

Objet PLAINTE 2008/4268/SLOVAQUIE - VIOLATION DE PROVISIONS PRINCIPALES DU TRAITE CE

Destinataire(s)

Titre COMMISSION EUROPEENNE

Titre SG/R/2 CDC

Le SG se charge de l'accusé de réception.

POUR INFORMATION OU CHANGEMENT :

E-Mail : SG Courrier de la Commission
Fax : 64335

Bordereau émis pour le Secrétariat Général par : [redacted]

WHITE & CASE

White & Case LLP
Avocats-Advocaten
62 rue de la Loi
Wetstraat 62
1040 Brussels

Tel + 32 2 219 16 20
Fax + 32 2 219 16 26
www.whitecase.com

SG/CdC(2008) A/ 1898

29. 02. 2008

SG-R-2

28 February 2008

[redacted]
Secretary-General
Commission of the European Communities
B-1049 Brussels

Re: Complaint by [redacted] under Article 226 EC concerning Slovak restrictions in the health insurance sector

Dear Secretary-General,

Please find enclosed a complaint alleging a serious breach of Community law by the Slovak Republic in the health insurance sector. [redacted] request that this complaint be formally registered by the Commission in accordance with its internal procedures for the implementation of Article 226 EC.

The aim and effect of the relevant Slovak legislation (and the manner in which it is implemented) is to deny foreign investors such as [redacted] in the health insurance sector the benefit of fundamental EC law rights, especially those on the freedom of capital movements and the freedom of establishment, as well as related rights under the third non-life insurance directive. The attached complaint contains a full statement of the relevant facts, as well as the Community law principles applicable in this case.

[redacted] and its legal representatives in Brussels (White & Case) are ready to work with the Commission and its services in order to ensure a rapid and satisfactory outcome to this issue and would be grateful to be kept informed of action taken by the Commission in this matter. In this context, [redacted] expect that the prima facie infringement of Community law set out in this complaint will be communicated to and discussed with the Slovak authorities without delay, in the interests of all concerned.

[redacted]
Partner

MEMORANDUM

WHITE & CASE

Brussels

CONFIDENTIAL
CONTAINS BUSINESS SECRETS

Complaint by [redacted] and [redacted] under Article 226 EC concerning Slovak restrictions in the health insurance sector

I. Executive summary

1. The purpose of this paper is to submit to the Commission a complaint by [redacted] – a privately-owned European financial services group ([redacted]) – and its 100% owned Slovak subsidiary, [redacted], against the Slovak Republic. [redacted] request that this submission be considered as a formal complaint and that action be taken by the Commission under Article 226 EC. In requesting action by the Commission under Article 226, [redacted] wish to emphasise their desire for a rapid resolution of this matter in accordance with Community law, but in a way which allows [redacted] to develop their activities in the Slovak public healthcare sector, to the mutual benefit of the companies concerned, the Slovak state and patients in the Slovak Republic.

2. The fact that [redacted] are seeking to resolve their dispute with the Slovak authorities using all available legal avenues (obtaining the support of Slovak Members of Parliament to file a complaint with the Slovak constitutional court, arbitration under the Netherlands-the Slovak Republic Bilateral Investment Treaty ("BIT") and the complaint procedure under Article 226 EC) in no way affects the companies' willingness to work with the Slovak authorities and the Commission to find a practical solution in conformity with the fundamental principles of EC law. The action requested of the Commission is therefore intended to be in support of [redacted] own efforts and concentrates exclusively on breaches by the Slovak Republic of Community law.[1]

3. This paper sets outs in detail the relevant content both of Act No. 581/2004 (the "2004 Act") and of its amendment in 2007 by Act No. 530/2007 (the "2007 Act") which is at the heart of this complaint. The 2007 Act expressly seeks to restrict and discourage [redacted]'s investment activities in the health insurance sector in the Slovak Republic. In [redacted]'s submission, the content of the 2007 Act (which came into force on January 1, 2008 and is already causing serious economic harm to [redacted]) described in this memorandum is contrary to EC law.

4. The complaint arises out of [redacted] investment in the Slovak health insurance market in 2006 when it set up and incorporated [redacted] in the Slovak Republic. The Slovak Republic has been involved in health sector reform initiatives throughout the 1990s, aimed at improving the provision of healthcare to the Slovak people.[2] In particular, an ambitious reform strategy was drawn up in October 2002 and implemented by the 2004 Act. That Act placed emphasis on reforming the public health insurance system by creating an environment for both publicly and privately-owned health insurance companies to enter the Slovak public health

[1] [redacted]'s interest is in an early practical resolution of this matter in conformity with Community law. [redacted] expects, in submitting this complaint, that the Commission will – recognising that a prima facie case has been established under Community law – immediately engage in discussions with the Slovak authorities (associating [redacted] with these as appropriate) in order to reach a practical solution in accordance with the mutual interests of the Slovak Republic, the Slovak people and the companies involved.

[2] See [redacted] and [redacted], "The Slovak Health Insurance System and the Potential Role for Private Health Insurance: Policy Challenges", OECD Health Working Papers, http://www.oecd.org/dataoecd/4/3/33923102.pdf

insurance market and compete in providing public health insurance to individuals. It was against the backdrop of the liberalisation of the healthcare market effected by the 2004 Act that [redacted] chose to invest in and enter the Slovak health insurance market.

5. However, on October 25, 2007, the Slovak Parliament adopted the 2007 Act which amends the 2004 Act and, among other things:

   a) imposes a maximum limit of 3.5% of gross written premiums on the expenditure that health insurance companies may use to cover their administration costs. This measure is not only an unlawful interference with [redacted] establishment rights under Article 43, but it also imposes a serious constraint on privately-owned health insurance companies' ability to compete and attract new clients, in particular compared with the two state-owned health insurance companies;

   b) the 2007 Act also obliges providers of public health insurance in the Slovak Republic to return any profits resulting from the provision of public health insurance to the Slovak government, unless that profit is reinvested in the provision of public healthcare by the end of the following calendar year in which that profit has been made.

6. These measures are part of the Slovak government's long-term plan of making public health insurance unattractive to private companies, as publicly admitted by several government members, including Prime Minister Fico himself[3].

7. The aim and effect of the 2007 Act is therefore not only to reverse the previous government's policy of allowing privately-owned health insurance companies to compete against publicly-owned companies for the provision of public health insurance to the Slovak population, but also (as the present administration has explicitly confirmed) an attempt to deny health insurance companies and their shareholders the benefit of fundamental EC law rights, especially those on the freedom of capital movements and the freedom of establishment as provided in the Non-Life Insurance Directives. More specifically:

   a) the restriction on the repatriation of dividends constitutes a restriction on the freedom of capital movements (Article 56 EC);

   b) the artificial limit on administration costs constitute a restriction on the freedom of establishment (Article 43 EC) as elaborated by the Non-Life Insurance Directives, in particular Article 54 of the third Non-Life Insurance Directive.

8. It is of course true that Member States retain considerable discretion in the organisation of their social security systems, including in the mandatory health sector. The Court of First Instance ("CFI") made this clear most recently in its decision in a state aid case concerning a risk equalisation scheme introduced by Ireland on the

[3] The fact that statements by authorised representatives of the State (such as the Prime Minister) engage the responsibility of the State under EC law was made clear recently by the ECJ in *A.G.M. COS.METS SrL* v [redacted] *and* [redacted] case C-470/03 [2007] ECR I-2703 at paragraph 27.

private medical insurance market[4]. In its ruling, the CFI recognises that the Commission, in assessing the compatibility of the Irish health insurance scheme with EC law took account, in the context of Article 86(2) EC, of the impact of the risk equalisation scheme ("RES") on, inter alia, freedom to provide services and the freedom of establishment. The CFI added, in paragraph 317 that, in any event, the Commission's decision under the state aids provisions of the Treaty "cannot be interpreted as responding to all the complaints raised under [Articles 82, 43 and 49 EC] or the provisions of the third Non-Life Insurance Directive. The Commission was correct to state that the [state aids] assessment was without prejudice to the analysis, in the appropriate procedures, of the compatibility of the RES with other relevant rules of Community law and, in particular, with those of the third Non-Life Insurance Directive." This makes it abundantly clear that, even though health policy falls substantially under national competence, national law and policy in this area must nonetheless be exercised in accordance with Community law.

9. Thus, the European Courts have consistently held that Member States must comply with Community law when exercising their powers in areas such as health or tax policy, in particular as regards the application of the fundamental freedoms guaranteed, inter alia, in Articles 43, 49 and 56 EC[5]. In the present case, there can be little doubt that the two measures discussed in this complaint constitute "restrictions" on the freedom to repatriate capital guaranteed under Article 56 EC as interpreted by the ECJ and on the freedom of establishment under Article 43 EC.

10. In these circumstances, the issue is whether the Slovak Republic can justify the measures which it has taken under relevant Treaty provisions or under mandatory requirements recognised by the ECJ. In the first place, there is no evidence that the Slovak authorities have as yet even recognised that the 2007 Act may contain infringements of the fundamental freedoms guaranteed by Articles 43 and 56 EC and so have not advanced any justifications. As indicated above and as confirmed explicitly by the Prime Minster, the aim of the current administration appears to be quite simply to put mandatory public health care back exclusively in the public sector.

11. As regards restrictions on the freedom of capital movements, the Slovak Republic may only impose restrictions for reasons expressly mentioned in Article 58(1) and 58(2) EC or recognized by the ECJ as overriding requirements of general interest.

12. As regards restrictions on the freedom of establishment, because the provision of non–life insurance has been the subject of harmonisation by the Community legislature,[6] the Slovak Republic may only attempt to justify restrictions on the freedom of establishment rights by reference to the requirements of Article 54 of the Third Non-

[4] Case T-289/2003, [redacted] *et al v Commission*, judgment of 12 February 2008. See especially paragraphs 167 and 308.
[5] See Case C-158/96 [redacted] *v Union des caisses de maladie*, [1998] ECR I-1931.
[6] Case C-206/98 *Commission of the European Communities v Kingdom of Belgium*, [2000] ECR I-3509.

Life Insurance Directive[7] relating to the protection of the general good and not on the basis of public health grounds as set out in Article 46 EC.

13. Moreover, both of these restrictions must be objectively necessary and proportionate to the objective pursued and the burden of showing that these restrictions are justified rests with the Slovak Republic.

14. As a result, in this case, it seems unlikely that the Slovak authorities will be able to justify either of these restrictions as they are both unsuitable for ensuring the protection of the objective pursued (the protection of public health or the "general good" in the insurance sector) and are disproportionate, in the sense that they do not derogate from the freedom of capital movements and the non-life Insurance Directives only to the minimum extent necessary to achieve their purpose.[8]

15. On the contrary, both measures may well actually diminish the quality of health care in the Slovak Republic by reducing the incentive for privately-owned health insurance companies to make further investments in the public health insurance system and makes the public health insurance system less efficient because privately-owned health insurance companies are prevented from competing on equal terms with publicly-owned health insurance companies.

16. This blatant disregard for Community law by the Slovak Republic so soon after accession makes it imperative that the Commission urgently addresses the issues raised in this complaint with the Slovak authorities, within the usual framework of the Commission's actions under Article 226 EC, in particular by engaging discussions with the Slovak authorities prior to any formal decision to open Article 226 proceedings by a letter of formal notice.

II. Detailed statement of facts

A. Who are [redacted]

17. [redacted] is a privately-owned financial services group which offers a full range of insurance products – life and non-life insurance as well as pension products, health insurance and services, asset management and banking. In addition to its home base in the Netherlands, [redacted] has operations in 11 EU Member States and employs more than 20.000 people in the EU. As a pan-European financial organisation, [redacted] welcomes the Commission's policy of promoting the integration of financial markets[9]

[7] 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 L 228 , 11/08/1992 pp 1-23.

[8] In this respect, it must be noted that – in the absence of evidence provided by the Slovak authorities to the contrary – the purpose of the measures in the 2007 Act appears to be mainly political, rather than, for example, an improvement in the quality of healthcare provided to the Slovak people.

[9] It is of particular importance that financial markets in the new Member States be integrated with those of the old Member States, both in the interests of modernising and making more efficient these markets, but also in order to facilitate the regulation and supervision of financial institutions in these markets. The modernisation of health insurance services (including through increased inward investment) would appear to be of particular importance in the new Member States.

in the EU and would underline the importance of ensuring respect for Community law (especially fundamental Treaty principles) in this respect.

18. In the Slovak Republic, [redacted] operates two sister companies which are separate because of the specific requirements of Slovak law, which require companies providing health insurance to be incorporated separately. They are [redacted], which has, since 1992, offered life, non-life and supplementary health insurance products to individuals and corporate clients, and [redacted] which has, since March 9, 2006, been providing public health insurance to the Slovak population.

19. Being able to use the insurance knowledge and experience within the [redacted] Group and the supplementary health expertise of [redacted] the establishment of Union was a natural extension of [redacted]'s existing operations in the Slovak Republic. Moreover, strong sales and marketing activity in 2006 resulted in 462,000 confirmed applications from individual clients. This gave [redacted] a market share of 8.5% on January 1, 2007.

20. [redacted]'s vision is to bring to the Slovak market a new way of managing healthcare based on the professional health insurance experience of [redacted] resulting in high level services and quality healthcare for its clients. If the present Slovak legislation remains unchallenged, this vision will be unachievable and the Slovak health system will suffer.

B. <u>The 2007 Act against the backdrop of the 2004 reform of the Slovak public health insurance system</u>

21. There are two main types of health insurance in the Slovak Republic, public health insurance and supplementary (individual or private) health insurance. Public health insurance is, in principle, mandatory for everyone living and/or working in the Slovak Republic. In addition to this mandatory public health insurance, individuals can voluntarily decide to enroll for a supplementary (private) health insurance, primarily covering those risks not covered by the public health insurance. This complaint only concerns the provision of mandatory public health insurance.

22. The Slovak Republic has engaged in reform of its public health insurance system throughout the 1990s, aimed at improving the provision of healthcare to the Slovak people as a whole (especially the young, elderly and impoverished) by a mix of public and private investment, including (perhaps crucially) "importing" health insurance expertise from other Member States, where private health insurance has a longer successful track-record, such as the Netherlands. In particular, an ambitious reform strategy was designed in October 2002 and implemented by the 2004 Act (attached as <u>Annex 1</u>) to address these problems in the Slovak health system, including the large and growing debt of the health system, inefficiency and poor quality of health insurance delivery, and the lack of accountability, transparency and market incentives.

23. In order to achieve these aims, the 2004 Act sought to create an environment in which both public and privately-owned health insurance companies would compete for the efficient provision of public health insurance to the Slovak population. This was done

by, among other things, transforming the two previous public health insurers into publicly-owned joint-stock companies which were allowed to make profits and inviting privately-owned health insurance companies to compete against the publicly-owned joint-stock companies for customers and to maximise profits. Health insurers were therefore intended to be the main drivers of improvements in quality, cost control and efficiency.

24. In that regard, the 2004 Act did not impose any limitations on the level of administration costs of health insurances companies or on the use of any profits resulting from the provision of public health insurance by health insurance companies. Rather, section 2(2) of the 2004 Act provided (and still provides) that health insurance companies are regulated by the Commercial Code, unless otherwise stipulated in the 2004 Act.

25. However, following general elections in June 2006, the new government unexpectedly[10] adopted a series of amendments to the 2004 Act which have imposed various restrictions on the business activities of health insurance companies, in particular on those which are privately-owned.

26. In particular, on October 25, 2007, the Slovak Parliament adopted the 2007 Act (attached as Annex 2) which both prohibits health insurance companies from spending more than 3.5% of gross written premiums on administrative costs[11] and introduces new sections 15(5) and 15(6) into the 2004 Act, obliging providers of public health insurance to return any profits resulting from the provision of public health insurance in the Slovak Republic to the public health insurance system, unless that profit is reinvested in the provision of public healthcare by the end of the following calendar year in which that profit has been made:

> "*A health insurance company shall maintain separate sub-ledger books in respect of public health insurance and operational activities (Section 6a) in such a manner as to record total costs and revenues separately for public health insurance and separately for operational activities (Section 6a) and to allow for determining separately the profit/loss from each of them; this is without prejudice to obligation under paragraph 2(b).*
>
> *If* (...) *transactions related to public health insurance result in profit, the profits may only be applied to payments to the extent set out in a separate law* [Law 577/2004 Coll. on the scope of healthcare covered on the base of public health insurance and payments for services connected with healthcare provision], *and no later than by the end of the calendar year following after the calendar year when profit was generated and in the manner not threatening a lasting and efficient performance of health insurer's obligations to ensure to its beneficiaries access to*

[10] The new government explicitly stated in its Government programme in June 2006 that it would protect domestic and foreign investments in the public health insurance sector and ensure equal treatment between all public health insurer providers.

[11] Amended version of Section 6a of the 2004 Act: "a health insurance company can spend in the relevant calendar year for operational activities of a health insurance company expenses at most up to 3.5% from the sum of premium before redistribution for the relevant calendar year."

healthcare under this Act and not contradicting the health insurer's obligation to pay duly and timely for the healthcare provided."

27. These amendments entered into force on January 1, 2008 and are part of the Slovak government's long-term plan of making the provision of public health insurance by privately-owned health insurance companies unattractive. Indeed, the Slovak government has not sought to disguise the fact that its objective is to create a situation where it will no longer be attractive for privately-owned health insurance companies to continue to supply public health insurance in the Slovak Republic. On the contrary, many politicians, including in particular Prime Minister Fico, have been open in admitting this. For example, in a radio interview given on 26 May 2007, the Prime Minister stated that he:

> "*would like to gradually achieve a situation with one health insurance company in such a way that we will create such conditions in public health insurance which will not be interesting for private health insurance companies.*"[12]

28. The Prime Minister and other ministers have also made similar comments on several other occasions.[13] In the recent case of *A.G.M.-COS.MET SrL*, the ECJ found that, in certain circumstances, statements by public officials could engage the legal responsibility of the State. The Court said (at paragraph 66):

> "... *statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions take by the State, not personal opinions of the official, are attributable to the State. The decisive factor for the statements of an official to be attributed to the State is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. To the extent that they are attributable to the State, statements by an official describing machinery certified as conforming to the Directive as contrary to the relevant harmonised standard and dangerous thus constitute a breach of Article 4(1) of the Directive.*" (emphasis added)

29. There is no doubt that Prime Minister Fico's public statements on the need – in effect - to re-nationalise Slovakia's health insurance system are "*positions taken ... with the authority of his office*". There is also no doubt that such statements tend to deter or make less attractive the possibility of foreign investments in the Slovak Republic, including by [redacted] and especially when such statements are seen together with provisions such as those in the 2007 Act[14].

[12] Radio the Slovak Republic, "Healthcare: Different views", 26 May 2007, 18.00 (Annex 3).

[13] See the article published on June 25, 2007 in Hospodarske Noviny, "Public sources should be in the state's hands according to Fico" (Annex 4); the transcript of the press conference held by the Minister of Health of the Slovak Republic Ivan Valentovič after the 45th session of the Government of the Slovak Republic on 23 May 2007 (Annex 5).

[14] On the illegality of measures (including statements by public officials or politicians) under Article 56, see, inter alia, *Commission v Belgium*, case C-436/00 at paragraph 70.

C. Impact of the prohibitions contained in the 2007 Act on [redacted][15]

30. The combined effect of both these prohibitions has had several knock-on effects on both [redacted]s short and long-term activity in the Slovak Republic:

a) [redacted] has scaled down its activities relating to the acquisition of new clients, resulting in it only having 340,000 clients by January 1, 2008;

b) instead of the 1 million clients which [redacted] planned to attract by 2015, that estimate has now been more than halved to only 416,000;

c) [redacted] has also been forced to review and reduce the range of services which it offers to its clients in the Slovak Republic, both now and in the future. Not only does this have the effect of reducing the possibility for it to acquire new clients, it will inevitably lead to a lowering of the service levels afforded to existing clients, with the corresponding risk that they may decide to leave [redacted] for another public health insurance provider.

d) finally, [redacted] has been forced to cut its yearly marketing budget from SKK 40 million (€ 1.2 million) to SKK 25 million (€ 0.75 million), thereby even further reducing the possibility for it to acquire new clients.

D. Impact of the prohibitions contained in the 2007 Act on [redacted]

31. The combined effect of both these prohibitions has also had a clear negative impact on the value of [redacted] investment in [redacted]

32. First, by locking the capital invested by [redacted] into [redacted] without any possibility for [redacted] to receive dividends on the profits that [redacted] may make, the 2007 Act significantly reduces both the current and future value of [redacted] to [redacted] and indeed to any potential acquirer of (or investor in) [redacted] What value is a company to a shareholder if that company is effectively obliged to reinvest almost all the profits it makes into the public health system? Arguably, this is a disguised form of confiscation by the Slovak Republic of [redacted] property and constitutes a *de facto* expropriation.

33. Second, it is not possible for [redacted] to recuperate the capital invested in [redacted] simply by withdrawing it. On the one hand, part of that capital has already been invested by [redacted] in establishing [redacted] (sunk costs) and in acquiring clients (acquisition costs) while on the other, [redacted] must also maintain sufficient solvency capital in [redacted] otherwise the company will lose its licence and no longer be able to provide public health insurance in the Slovak Republic.

34. Finally, the 2007 Act and the uncertainty that it has created regarding the long-term future of private sector involvement in the provision of public health insurance in the Slovak Republic, also has the effect of deterring [redacted] from increasing or even

[15] Reference to [redacted] in this complaint generally include a reference also to [redacted] in its capacity as a 100% shareholder in [redacted]

maintaining the current level of its current investment in [redacted]. As has been made clear by the Slovak government, the 2007 Act is only one of many steps aimed at deterring private investments in health insurance companies in the Slovak Republic. As a result, [redacted] has necessarily had to revise its long-term strategy regarding the provision of public health insurance in the Slovak Republic.

35. In that regard, [redacted] is currently seeking to quantify the losses it will sustain if the new measures are maintained, in preparation for proceedings which it intends to bring against the Slovak Republic under the Dutch-Slovak BIT. While at the end of 2006, [redacted] estimated the value of [redacted] at € 132 million, [redacted] now currently values its investment in [redacted] at minus € 98 million. As a result, should the measures contained in the 2007 Act be maintained, [redacted] will suffer damages of at least € 132 million, which do not take into account any future costs and damages which [redacted] may incur, for example either as a result of [redacted] sustaining [redacted] as a loss-making business or because of the damage to [redacted]'s and [redacted]'s brand names.

III. The restriction on the repatriation of dividends is in breach of Article 56 EC and is not justified under any Treaty provisions or mandatory requirements recognised by the ECJ

A. The restriction on the repatriation of dividends infringes Article 56 EC

36. The freedom of capital movements, enshrined in Article 56(1) EC, prohibits all "*restrictions on the movement of capital*" between Member States. The EC Treaty does not contain an exhaustive definition of "capital". However, the ECJ has derived useful and extensive indications from annex 1 to Directive 88/361/EEC (the "1988 Directive") which contains an illustrative list of different types of capital.

37. Moreover, even where a transaction is not listed in the annex of the 1988 Directive, the ECJ has found that it can still constitute a capital movement within the meaning of Article 56(1) EC. For example, in the case of the payment of dividends to shareholders, the ECJ found in [redacted] that although the payment of dividends to shareholders was not listed in annex 1 to the 1988 Directive, it did constitute a capital movement as it was considered to be "*indissociable from a capital movement.*"[16] Consequently, the payment of dividends to and receipt by shareholders clearly constitutes a capital movement falling within the scope of Article 56(1) EC.

38. Article 56(1) EC prohibits all restrictions on the movement of capital. This prohibition goes beyond measures which discriminate on grounds of nationality and also prohibits conduct (either legislative or administrative) by the national authorities which in practice makes foreign investment more difficult or less attractive.

39. For example, in *Commission v Portugal*[17], the ECJ found that

> "*Article [56(1)] of the Treaty lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond*

[16] Case C-35/98, *Staatssecretaris van Financiën v B.G.M.* [redacted] [2000] ECR I-4071, at paragraph 29.
[17] Case C-367/98 [2002] ECR I-4731, paragraphs 44 and 45.

the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.

Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the freedom of capital movements illusory."

40. In the light of the ECJ's ruling in *Commission v Portugal*, there can therefore be no doubt that the Slovak prohibition on the repatriation of dividends constitutes a restriction on the freedom of capital movements. This prohibition dissuades [redacted] and/or other investors from investing in the capital of privately-owned health insurance companies as it prevents them from being able to receive any profit out of their investment. This is a flagrant violation of Article 56 EC, which the Slovak authorities have made no attempt to justify under any of the exceptions recognised in Community law.

41. In particular, no attempt has been made by the Slovak authorities to demonstrate that this derogation from a fundamental Treaty principle meets the tests of proportionality, that it is the least restrictive measure which could be taken to improve the health insurance system in the Slovak Republic or indeed that it is non-discriminatory.

B. The absence of justification under Community law

42. Any derogations from the freedom of capital movements (which is a fundamental principle of EC law) must be construed restrictively. In particular, purely economic grounds can in no way justify restriction of the fundamental freedoms.[18]

43. Moreover, Member States may only impose restrictions on the freedom of capital movements for reasons:

a) expressly mentioned in Article 58(1) and 58(2) EC i.e. which can be justified by the need for Member States

   a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; or

   b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security; or

b) recognized by the ECJ[19] as overriding requirements of general interest.

[18] Case C-398/95 *SETTG v* [redacted] [1997] ECR I-3091, paragraph 23.

44. The Slovak government may seek to argue that the restriction on the freedom of capital movements imposed by the 2007 Act can be justified by the need to reinforce the Slovak infrastructure for the protection of public health by ensuring that profits made by health insurance companies are reinvested in the Slovak public health insurance system.

45. The ECJ has not yet had the opportunity to rule on whether a restriction on the freedom of capital movements can be justified by such broadly-formed public health concerns, although the ECJ has often considered (and usually dismissed) Member States' arguments on the need to protect the "integrity" of national health systems, in the "health" tourism cases (see below).

46. On the one hand, it is true that, under Community law, responsibility for health policy (in its broadest sense) and the provision of public health insurance, remain the primary responsibility of the Member States and Article 152 EC provides clear limitations to the extent to which the Community may legislate in this field. Furthermore, as the "health tourism" cases make clear,[20] Community law recognises that, due to the special nature of public health insurance and the existence of different national public health insurance systems, Member States enjoy a certain measure of discretion in designing their legislation in this field, provided that fundamental principles are respected. In the [redacted] case, the ECJ stated that

> "*it is possible for the risk of seriously undermining the financial balance of a social security system to constitute an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services*" and
>
> "*the objective of maintaining a balanced medical and hospital service open to all may also fall within the derogations on grounds of public health under Article 46 EC in so far as it contributes to the attainment of a high level of health protection.*"[21]

47. On the other hand, the "health tourism" cases also make clear that the mere fact that health policy is involved, does not remove the obligation for Member States to exercise their national sovereignty in full respect of fundamental principles of Community law. As Advocate General [redacted] said in his opinion in [redacted] and [redacted], the provision of public health insurance by the Member States is not "*an island beyond the reach of Community law.*"[22]

48. Consequently, even if the need to protect public health were accepted by the ECJ as an overriding requirement of general interest in the field of capital movements, that

[19] Cases C-367/98, *Commission v Portugal*, paragraph 49, C-483/99, *Commission v France*, [2002] ECR I-4781, paragraph 45, C-503/99, *Commission v Belgium*, [2002] ECR I-4809 paragraph 45 and C-463/00, *Commission v Spain*, [2003] ECR I-4581, paragraph 68.

[20] Cases C-120/95, [redacted] [1998] ECR I-1831, C-158/96, [redacted] C-157/99, [redacted] [2001] ECR I-5473, C-368/98, [redacted] [2001] ECR I-5363, C-385/99, [redacted] and [redacted], [2003] ECR I-4509, C-56/01, [redacted] [2003] ECR I-12403 and C-8/02, [redacted], [2004] ECR I-2641, C-372/04 [redacted] [2006] ECR I-4325 and C-466/04 [redacted] [2006] ECR I-5341.

[21] Case C-372/04, paragraphs 103 and 104.

[22] Joined Opinion delivered on 16 September 1997 in the [redacted] and [redacted] cases, paragraph 34.

justification would still have to fulfil a further five conditions in order to constitute a valid restriction:[23]

a) it must be applied in a non-discriminatory manner;

b) it must be justified by imperative requirements in the general interest;

c) it must be suitable for securing the attainment of the objective which they pursue;

d) it must not go beyond what is necessary in order to attain that objective; and

e) it must be subject to the principle of legal certainty i.e. the persons concerned must able to ascertain the specific circumstances in which a restriction on the freedom of capital movements can be applied by a Member State.

49. A Member State also bears the burden of proof of showing that such restrictive measures must be "suitable for achieving the objective or objectives invoked by the Member State concerned and (...) do not go beyond what is necessary in order to achieve those objectives."[24]

50. Against this background, even if it is accepted that the 2007 Act legitimately seeks to enhance the protection of public health in the Slovak Republic (which, in [redacted]'s and [redacted]'s submission, is not the case), the prohibition on the repatriation of dividends will still constitute an unjustified restriction on the freedom of capital movements as the restriction is neither suitable for securing the public health objective pursued, nor is it limited to what is necessary in order to attain that objective. It does not appear from either the legislation or the relevant explanatory memorandum that the Slovak authorities have attempted to provide any empirical justification for this measure. Rather, the restriction on the payment of dividends seems as much a political choice, as a policy driven by the need to improve the quality of Slovak health care for Slovak patients.

C. Conclusion

51. By imposing an absolute prohibition on privately-owned public health insurance providers such as [redacted] from using their profits other than for the provision of public health care in the Slovak Republic, constitutes a restriction on the freedom of capital movements which cannot be justified by reference to the protection of public health or any other overriding requirement of general interest.

[23] Case C-54/99, *Association Eglise de Scientologie de Paris v The Prime Minister*, [2000] ECR I-1335, paragraphs 17-18 and 22.

[24] Joined Cases C-338/04, C-359/04 and C-360/04 [redacted] *and others*, [2007] ECR I-1891, at paragraph 49.

IV. The maximum limit of 3.5% of gross written premiums on the expenditure that health insurance companies may use to cover their administration costs is in breach of Article 43 EC and the Non-Life Insurance Directives

A. Illegality under the Non-Life Insurance Directives

52. The Non-Life Insurance Directives do not affect a Member State's freedom to design its social security system and how it will be organised. Indeed, Article 2(2)(d) of the first non-life Insurance Directive[25] clearly excludes from the application of the Non-Life Insurance Directives "*insurance forming part of a statutory system of social security.*"

53. However, this exclusion is subject to the exception laid out in Article 54 of the Third Non-Life Insurance Directive which provides that where a Member State decides to open up coverage of a risk belonging to the statutory social security regime to private insurers, it has to accept that any Community insurance undertaking authorised in its home Member State may cover that risk on the basis of the freedom of establishment and the freedom to provide services.[26]

54. As a result, and to the extent that the Slovak Republic chose in 2004 to open up its health insurance sector to competition and allowed private companies to provide mandatory health insurance as a partial or complete alternative to health cover provided by the statutory social security system, then the provision of health insurance falls with the scope of the Non-Life Insurance Directives.

B. Incompatibility with Article 54 of the Third Non-Life Insurance Directive

55. As the provision of non–life insurance has been the subject of exhaustive harmonisation by the Community legislature, Member State may not impose additional restrictions on the provision of non-life insurance, over and above the restrictions provided for in the Non-Life Insurance Directives.[27]

56. In the case of health insurance, the Slovak government can therefore only attempt to justify the restriction of [redacted]s freedom of establishment rights by reference to Article 54 of the Third Non-Life Insurance Directive. That article provides that, because of the nature and social consequences of the private health insurance contracts which serve as a partial or complete alternative to health cover provided by the statutory social security regime, Member States are entitled to adopt specific legal provisions aiming at protecting the general good. However, to the extent that such

---

[25] 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

[26] Opinion of Advocate General [redacted] delivered on 20 January 2000 in Case C-206/98 *Commission v Belgium*, [2000] ECR I-3509, paragraph 12.

[27] Judgment of the ECJ in Case C-206/98 at paragraph 45: "*as to the argument based on Articles [45] and [86(2)] of the Treaty, it is sufficient to state that those provisions cannot be relied on in a field which, as in the present case, is the subject of harmonisation, in the context of which the Community legislature has taken account of the general interests referred to by the Belgian Government, in contradiction to the rules of that harmonisation.*"

requirements may restrict the freedom of establishment, they must be objectively necessary and proportionate to the objective pursued.[28] Moreover, as the general good is an exception to the fundamental principles of the Treaty with regard to the free movement of establishment, that concept must be interpreted strictly. Finally, the burden of showing that these conditions are met, rests with the Member States.

57. Against this background, the Slovak government may therefore seek to argue that the maximum limit of 3.5% of gross written premiums on the expenditure that health insurance companies may use to cover their administration can be justified by the need to protect the general good. If no limits are placed on the level of expenditure that health insurance companies may use to cover their administration costs, there is a risk that residents in the Slovak Republic will no longer have access to mandatory health insurance at an acceptable premium.

58. However, even if it is accepted that the maximum limit of 3.5% of gross written premiums on the expenditure that health insurance companies may use to cover their administration costs legitimately seeks to protect the general good - instead of merely reorganising the infrastructure for health insurance as a matter of political or economic preference – that restriction on the "general good" will still be incompatible with Community law. It is both unsuitable for securing the attainment of the general good as it reduces the incentive for privately-owned health insurance companies to make further investments in the public health insurance system and is disproportionate to the aim pursued as it limits the ability of privately-owned health insurance companies to effectively compete and attract new clients, in particular compared with the two state-owned health insurance companies;

C. Conclusion

59. By imposing a maximum limit of 3.5% of gross written premiums on the expenditure that health insurance companies may use to cover their administration costs, the 2007 Act constitutes a restriction on [redacted]'s freedom of establishment rights in the Slovak Republic under Article 43 EC and, more specifically, is incompatible with Article 54 of the Third Non-Life Insurance Directive, and cannot be justified by reference to the protection of the general good.

V. General conclusion

60. The adoption of legislation such as the 2007 Act, in breach of fundamental principles of Community law, would be serious in any Member State. The fact that, so soon after its accession, the Slovak Republic has sought to restrict the rights of economic operators and shareholders in the public health insurance sector, must be a matter of profound concern to the Commission, both in terms of ensuring respect for fundamental principles of EC law, as well as of the conditions on which the Slovak Republic acceded to the EU a little more than three years ago. As the Commission and the ECJ have separately and recently confirmed, conduct by Member States which dissuades or makes more difficult the process of investing and doing business in

[28] See the Commission's 2000 Communication on the freedom to provide services and the general good in the insurance sector, OJ C 43/5 of 16.2.2000, at page 16.

another Member State is incompatible with the Treaty. It is difficult to imagine a clearer example of such conduct than the 2007 Act and the statements in support of these measures by leading Slovak politicians.

61. [redacted] and [redacted] purpose in submitting this complaint is to request the Commission to engage the procedure under Article 226 EC with the Slovak authorities. As is made clear in this submission, [redacted] are seeking other remedies to the difficulties raised by the 2007 Act. The gravity of the current situation – both in terms of its financial consequences for [redacted] and [redacted] and the message which it sends to other actual or potential investors in the Slovak public health insurance market – means that the Commission should address these issues as a matter of urgency with the Slovak authorities even prior to formally engaging proceedings under Article 226 EC.

62. Moreover, due to the fact that the Slovak government has openly admitted that the 2007 Act is only one of several steps it intends to take in order to achieve its long-term aim of making the provision of public health insurance by privately-owned health insurance companies unattractive, there is a risk that if the 2007 Act is allowed to go unchallenged, the Slovak authorities will adopt more measures which will impose further unjustified restrictions on [redacted] and [redacted] fundamental rights guaranteed by the EC Treaty and the Non-Life Insurance Directives.

63. [redacted] and [redacted] are of course prepared to assist the Commission in any way possible, in order to achieve a rapid and positive outcome to this matter, which will allow [redacted] and [redacted] to develop their business activities in the public health insurance sector in the Slovak Republic, in accordance with their legitimate expectations. ⊕

28 February 2008