



COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

Brussels,

SG-Greffe (2009)D/

STÁLE ZASTÚPENIE SR PRI EÚ BRUSEL
Avenue de Cortenbergh 79,
1000 Bruxelles

LN 226 EC/cases other than failure to notify measures

Subject: Letter of formal notice
Infringement No 2008/4268

The Secretariat-General should be obliged if you would forward to the Minister for Foreign Affairs the enclosed letter from the Commission.

For the Secretary-General,

Karl VON KEMPIS

Encl. C(2009)

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
2008/4268
C(2009)

Your Excellency,

With this letter of formal notice, I wish to draw to your attention a complaint submitted to the Commission and registered under reference number 2008/4268, regarding the compatibility of certain provisions of the Act of the National Council of the Slovak Republic No. 581/2004 Coll of 21 October 2004 on Health Insurance Companies and Healthcare Supervision, as amended by a number of Acts such as Act No. 530/2007 Coll of 25 October 2007 and, most recently, by Act No. 192/2009, with Community law.

The Slovak Republic has been involved in health sector reform initiatives throughout the 1990s, aimed at improving the provision of healthcare to its people. In particular, an ambitious reform strategy was implemented by Acts No. 580/2004 Coll and No. 581/2004 Coll. Those Acts 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 insurance market and compete in providing public health insurance to individuals. This was done by, among other things, transforming the five public health insurance funds into publicly and privately-owned joint-stock companies which were allowed to make profits and encouraging further privately-owned health insurance companies to compete with the existing joint stock companies by offering healthcare cover over and above the statutory minimum and superior customer service. Competition was intended to be the main driver of improvements in quality, access to health care, cost control and efficiency.

Act No. 581/2004 Coll, as initially adopted, did not contain any limitations on the level of expenditure that health insurance companies may use to cover their operating expenses and only minor, technical limitations on the use of any profits resulting from the provision of public health insurance by private health insurance companies and on the transfer of insurance portfolios. Indeed, section 2(2) of the Act No. 581/2004 Coll provided (and still provides) that health insurance companies are regulated by the Commercial Code, unless otherwise stipulated in the Act. Accordingly, for several years, health insurance companies freely decided on the level of their operating expenses and on the use of any profits resulting from the provision of public health insurance, the latter subject only to fulfilment of certain minor technical conditions.

However, since 2006, a series of amendments to Acts No. 580/2004 Coll and No. 581/2004 Coll, have been adopted which have imposed a number of restrictions on the business activities of health insurance companies, especially affecting those which are

privately-owned. In particular, on 25 October 2007, the Slovak Parliament adopted Act No. 530/2007 Coll which, among other things:

- a) precludes health insurance companies from freely disposing of any profits resulting from the provision of public health insurance in the Slovak Republic;
- b) further reduces the maximum limit of gross written premiums that health insurance companies may use to cover their operating expenses, first introduced by Act No. 522/2006 Coll, from 4% to 3,5%.

Most recently, a further amendment to Act No. 581/2004 Coll was adopted on 29 May 2009 (Act No. 192/2009 Coll) which provides that the transfer of the portfolio of a health insurance company has to take place without payment and to either a State-owned health insurance company in case of liquidation or to a State-owned or privately-owned health insurance company in other, undefined, circumstances.

1. Relevant EC and Slovak law

A. Primary Treaty law

The free movement of capital

Article 56 (1) EC stipulates that:

“Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”

The free movement of capital, as a fundamental principle of EC law, can only be restricted by national rules which are justified by reasons referred to in Article 58(1) EC or by overriding requirements in the general interest recognised by the ECJ.

The freedom of establishment

Article 43 EC stipulates that

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

The freedom of establishment, as a fundamental principle of EC law, may only be restricted by national rules which are justified by reasons referred to in Article 46 EC or by overriding requirements in the general interest recognised by the ECJ.

B. Secondary EU legislation

The First Non-Life Insurance Directive

Article 2(1)(d) 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 (the First Non-Life Insurance Directive) states that “[t]his Directive does not apply to the following kinds of insurance (...) insurance forming part of a statutory system of social security.”

The Third Non-Life Insurance Directive

Article 54 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 (the Third Non-Life Insurance Directive) states as follows:

“1. Notwithstanding any provision to the contrary, a Member State in which contracts covering the risks in class 2 of point A of the Annex to Directive 73/239/EEC may serve as a partial or complete alternative to health cover provided by the statutory social security system may require that those contracts comply with the specific legal provisions adopted by that Member State to protect the general good in that class of insurance, and that the general and special conditions of that insurance be communicated to the competent authorities of that Member State before use.

C. Slovak legislation

Section 6a(1) of Act No. 581/2004 Coll, as amended by Acts No. 522/2006 Coll and No. 530/2007 Coll, provides as follows:

“A health insurance company may spend, in the relevant calendar year, for the operational activities of the health insurance company no more than 3.5% of the sum of premium prior to premium redistribution for the relevant calendar year.”

Second, section 15(6) of Act No. 581/2004 Coll, as inserted by Act No. 530/2007 Coll, provides as follows:

“If, after fulfilment of the legal requirements set out in special regulations and the requirement set out in paragraph 1 letter (b), the result of the public health insurance operations is positive, such result may be used only for payments to the extent set out in a special regulation and by no later than the end of the calendar year following the calendar year for which the positive result of the operations was reported, and in a manner not posing a risk for the systematic and effective fulfilment of obligations owed by the health insurance company to ensure available healthcare under this Act (paragraph 1(a)) and not contradicting the obligation of the health insurance company to make proper and timely payments for the healthcare provided.”

The scope of section 15(6) is clarified by section 86d of Act No. 581/2004 Coll, which states that

“a health insurance company shall meet its obligation to use the positive economic result generated from public health insurance to pay for healthcare under § 15 paragraph 6 for the first time in 2009, and in respect of the financial year 2008.”

Section 15(6) of Act No. 581/2004 Coll, when read in conjunction with section 86d of Act No. 581/2004 Coll, therefore precludes health insurance companies from using any profit they make other than for the provision of healthcare in the Slovak Republic.

Finally, section 61(1) of Act No. 581/2004 Coll, as amended by Act 192/2009 Coll, provides as follows:

“The [Healthcare Surveillance] Office may order a health insurance company to transfer all or a part of the accepted applications for public health insurance (the “insurance portfolio”) to another health insurance company if the health insurance company does not perform the measures imposed by the Office in connection with a threat to its ability to perform the liabilities resulting from received and accepted applications for public health insurance and agreements on provision of health care and in other cases set out by this Act. The Office shall order the transfer of the insurance portfolio of a health insurance company which was wound up through liquidation to a health insurance company in which the State has a 100% interest, as at the date of the former health insurance company’s entry into liquidation; in other cases the Office shall order a transfer of insurance portfolio always as at the 1st day of the calendar month. Each transfer of an insurance portfolio shall be free of any charge.”

2. Contacts with the Slovak Authorities

In order to allow the Commission to verify whether Act No. 581/2004 Coll as amended is compatible with Community law, the competent services of the Commission sent an administrative letter to the Slovak Republic on 3 September 2008, requesting explanations in relation to two main issues:

- a) how the prohibition on health insurance companies freely disposing of any profits resulting from the provision of public health insurance in the Slovak Republic is compatible with Article 56 EC and with the exceptions contained expressly in the Treaty and/or overriding requirements of the general interest;
- b) how the maximum limit of gross written premiums on the expenditure that health insurance companies may use to cover their operating expenses is compatible with the Third Non-Life Insurance Directive and the freedom of establishment.

The Slovak Republic replied by letters dated 21 October 2008, 7 January 2009 and 9 March 2009.

In relation to point (a) above, the Slovak authorities argue that the prohibition on the free use of profits (including repatriation) does not constitute a breach of Article 56 EC because the health insurance premiums that are collected by a health insurance company cannot be said to constitute “capital” for the purposes of Article 56 EC. Moreover, it is

argued that, even if the health insurance premiums that each insured person in the Slovak Republic pays could be said to constitute “capital”, any restriction on the free movement of that capital could be justified under Article 58(1)(b) EC.

In relation to point (b) above, the Slovak authorities contend that in light of the case law of the ECJ, public health insurance companies in the Slovak Republic do not engage in any economic activity and that therefore the Slovak Republic is entitled to limit the percentage of expenditure that health insurance companies may use to cover their operating expenses. Finally, it is argued that because the Slovak health insurance sector is based on the principle of “solidarity”, the Treaty’s competition rules do not apply to the activities of public health insurance companies in the Slovak Republic.

3. Legal Assessment

A. The restrictions on the use of profits resulting from the provision of public health insurance in the Slovak Republic under section 15(6) of Act No. 581/2004 Coll may constitute an unjustified restriction on the freedom of capital movements

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 I to Directive 88/361/EEC of 24 June 1988 for the implementation of ex-Article 67 of the Treaty (Directive 88/361/EEC) which contains an illustrative list of different types of capital.

Moreover, even where a transaction is not listed in the annex of Directive 88/361/EEC, 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 I to Directive 88/361/EEC, it was considered to be “indissociable from a capital movement” and therefore covered by Directive 88/361:

“Although the Treaty does not define the term capital movements, Annex I to Directive 88/361 contains a non-exhaustive list of the operations which constitute capital movements within the meaning of Article 1 of the directive.

Although receipt of dividends is not expressly mentioned in the nomenclature annexed to Directive 88/361 as ‘capital movements’, it necessarily presupposes participation in new or existing undertakings referred to in Heading I(2) of the nomenclature.

Moreover, since, in the main proceedings, the company distributing dividends has its seat in a Member State other than the Kingdom of the Netherlands and is quoted on the stock exchange, receipt of dividends on shares in that company by a Netherlands national may also be linked to ‘Acquisition by residents of foreign securities dealt in on a stock exchange’ as referred to in Heading III.A(2) of the nomenclature annexed to Directive 88/361, as [REDACTED] the United Kingdom Government and the Commission contend. Such an operation is thus indissociable from a capital movement.

Consequently, the receipt by a national of a Member State residing in that Member State of dividends on shares in a company whose seat is in another Member State is covered by Directive 88/361.”¹²

Against that background, and regardless of whether health insurance premiums constitute capital owned by health insurance companies,¹³ following [REDACTED] the receipt, by shareholders in other Member States, of profits which public health insurance companies retain (once they have collected premiums and covered all the costs associated with the provision of healthcare to their customers) is covered by Directive 88/361 and comes within the notion of capital movements.

Moreover, this can also be seen from the fact that when a health insurance company incurs a loss in a given financial year either because it has been unable to collect sufficient premiums or because the healthcare costs incurred by their customers exceeds the level of the collected premiums, that loss reduces the shareholders' equity in the health insurance company. If cumulated losses are of such magnitude that solvency requirements are no longer met, the Slovak regulatory authority will demand that a health insurance company's shareholders contribute additional capital, failing which its licence may ultimately be revoked on solvency grounds.

Consequently, since shareholders are forced to cover losses from their capital, equally, any profit retained once they have collected premiums and covered all the costs associated with the provision of healthcare constitutes capital, which health insurance companies should be entitled to dispose of freely, including by repatriating such funds to shareholders or a related company in another Member State under the provisions of Article 56(1) EC.

As for the question of whether the movement of such capital may lawfully be restricted under section 15(6) of Act No. 581/2004 Coll, the prohibition introduced by Article 56(1) EC 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.

In *Commission v Portugal*,¹⁴ 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 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.”

¹² Case C-35/98, *Staatssecretaris van Financiën v B.G.M.* [REDACTED], [2000] ECR I-4071, at paragraphs 27 to 30.

¹³ This will be considered further in section 3C.

¹⁴ Case C-367/98 [2002] ECR I-4731, paragraphs 44 and 45.

On that basis, it seems to the Commission that section 15(6) of Act No. 530/2007 Coll constitutes a restriction to the extent that it precludes health insurance companies from transferring profits to shareholders (or other recipients) located in other Member States, once they have collected premiums and covered all the costs associated with the provision of public healthcare. In addition, this measure tends to dissuade investors in other Member States from investing in the capital of health insurance companies in the Slovak Republic, which constitutes a breach of Article 56 EC.

Moreover, it does not seem to the Commission that these restrictions can be justified under Article 58(1)(b) EC as they appear neither suitable for securing the public health objective pursued, nor limited to what is necessary in order to attain that objective.

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,¹⁵ 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. 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.”¹⁶

However, 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 for 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”¹⁷ and that restrictions on the fundamental freedoms must be suitable for securing the public health objective pursued and limited to what is necessary in order to attain that objective.

Even if it is accepted that section 15(6) of Act No. 530/2007 Coll seeks to enhance the protection of public health in the Slovak Republic, the restrictions it imposes on the use by health insurance companies and their shareholders of the profits they retain, are neither suitable for securing the public health objective pursued i.e. improvements in terms of

¹⁵ 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] [2003] ECR I-4509, C-56/01, [redacted], [2003] ECR I-12403 and C-8/02, [redacted] [2004] ECR I-2641, C-372/04 *Watts* [2006] ECR I-4325 and C-466/04, [redacted] [2006] ECR I-5341.

¹⁶ Case C-372/04, paragraphs 103 and 104.

¹⁷ Joined Opinion delivered on 16 September 1997 in the [redacted] and [redacted] cases, paragraph 34.

quality, access to healthcare, cost control and efficiency, nor limited to what is necessary in order to attain such an objective.

The restriction on the use of profits generated by health insurance companies does not seem necessary as it actually harms, rather than improves the quality of, and access to, healthcare in the Slovak Republic as it reduces the incentives for privately-owned health insurance companies and their shareholders to make further investments in the Slovak public health insurance system in terms of capital and know-how and may even encourage those companies which are already present in the Slovak Republic to reduce and/or withdraw their investments. Moreover, the restriction seems disproportionate as there are other less restrictive means which could be taken in order to improve the quality of, and access to, healthcare in the Slovak Republic.

The Commission is also not aware of any other overriding requirement in the general interest which may justify the provision in question.

As a result, the restrictions contained in section 15(6) of Act No. 530/2007 Coll on the use of profits resulting from the provision of public health insurance in the Slovak Republic may constitute an unjustified restriction on the freedom of capital movements.

B. The maximum limit of gross written premiums on the expenditure that health insurance companies may use to cover their operating expenses under section 6a(1) of Act No. 581/2004 Coll may constitute a breach of the Third Non-Life Insurance Directive

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(1)(d) of the First Non-Life Insurance Directive excludes from the scope of application of the Non-Life Insurance Directives "*insurance forming part of a statutory system of social security.*"

In accordance with Article 54 of the Third Non-Life Insurance Directive, if a Member State decides to open up coverage belonging to the statutory social security system, it may adopt specific general good provisions in that field. In that regard, as the conditions under which private health insurers may provide coverage of a risk belonging to the statutory social security regime have been the subject of exhaustive harmonization by the Community legislature, the Slovak Republic can only attempt to justify the restriction on the freedom of establishment contained in section 6a(1) of Act No. 581/2004 Coll by reference to the exceptions set out in that harmonising legislation i.e. Article 54 of the Third Non-Life Insurance Directive and not those contained in Article 46 EC or which qualify as overriding requirements in the general interest recognised by the ECJ.¹⁸

Article 54 of the Third Non-Life Insurance Directive provides that, because of the nature and social consequences of private health insurers being able to provide coverage of a risk belonging to 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 requirements restrict the freedom of establishment, they must be objectively

¹⁸ 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.*"

necessary and proportionate to the objective pursued.¹⁹ Moreover, as the general good is an exception to the fundamental principles of the Treaty with regard to the freedom of establishment, that concept must be interpreted strictly. Finally, the burden of showing that these conditions are met rests with the Member States.

In this context, it is legitimate for the Slovak Republic to seek to ensure that all its residents have access to a basic package of essential care at a reasonable cost. To achieve that aim, the Slovak system is based on *inter alia* the following principles:

- open enrolment;
- the state pays insurance premiums for certain residents (children, pensioners etc);
- a basic minimum level of health care cover as defined by law and which must be provided by all public health insurance companies; and
- a premium redistribution system to reduce health insurance companies' profits and losses caused by differences in the risk profile of their client portfolios.

These principles appear justified under Article 54 of the Third Non-Life Insurance Directive as they appear objectively necessary to achieve the objectives pursued by the Slovak Government.

By contrast, the imposition of a maximum percentage limit of gross written premiums on the expenditure that health insurance companies may use to cover their operating expenses appears to the Commission to be incompatible with Community law. This is because such a limit is both unsuitable for securing the attainment of the general good and disproportionate to the aim pursued, as it reduces the incentives for privately-owned health insurance companies to make further investments in the Slovak public health insurance system.

Furthermore, the Slovak Republic's argument that public health insurance companies in the Slovak Republic are not engaged in any economic activity, with the result that it is entitled to limit the percentage of expenditure that health insurance companies may use to cover their operating expenses, cannot be accepted. As the ECJ made clear in the "health tourism" cases, health services offered by social security systems do constitute an economic activity within the meaning of Article 50 of the EC Treaty.²⁰

Finally, the claim that the Slovak health insurance sector is based on the principle of "solidarity", so the Treaty's competition rules do not apply, is irrelevant. Rather, once a Member State has opened up (either in full or partially) coverage of a risk belonging to the statutory social security regime to private insurers, it has to accept that any Community insurance undertaking may cover that risk on the basis of the freedom of establishment and the freedom to provide services. In any case, the Commission has not challenged the compatibility of section 6a(1) of Act No. 581/2004 Coll with the EC competition law rules.

¹⁹ 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.

²⁰ See among others, C-157/99, [redacted] paragraphs 55-58.

By imposing a maximum percentage limit on the expenditure that health insurance companies can use to cover their operating expenses, section 6a(1) Act No. 530/2007 Coll may constitute a breach of the Third Non-Life Insurance Directive.

C. The fact that the transfer of the portfolio of a health insurance company has to take place without payment and to either a State-owned health insurance company in case of liquidation or to a State-owned or privately-owned health insurance company in other circumstances, may constitute an unjustified restriction on the freedom of establishment under Article 43 EC²¹.

The amended version of section 61(1) of Act No. 581/2004 Coll, which entered in force on 1 June 2009, provides that the transfer of the portfolio of a health insurance company has to take place without payment to either a State-owned health insurance company in case of liquidation or to either a State-owned or privately-owned health insurance company in other, undefined, circumstances.

Before the enactment of this amending legislation, it was lawful for client portfolios to be transferred to any health insurance company and for the payment (or “reward”) to be notified to - and approved by - the Slovak Healthcare Surveillance Office. The new legislation (the revised Article 61(1)) provides for:

- a) a direct intervention by the Slovak Healthcare Surveillance Office to transfer the client portfolio to another (State-owned) insurance company – without payment – in case of the insolvency of the health insurance company; and
- b) the transfer of the client portfolio of a health insurance company which has not become insolvent (in circumstances which are not specified), to another (State-owned or privately-owned) health insurance company also without payment.

The background to this new legislation is set out in the proposal put forward by the Slovak Member of Parliament who proposed the amendment. In essence, the reasoning provided is to the effect that public health insurance cannot be left to the free market, but must be exclusively under public control. Furthermore, it is argued that insurance policies in the public health area cannot be classified as individual contracts between the health insurance company and the insured and such contracts do not create a normal “portfolio” for the health insurance company carrying out the health insurance. According to the documentation accompanying this proposed legislation, this explains why the transfer of the portfolio of a health insurance company can take place without payment whether or not a situation of insolvency exists.

The Commission questions whether, as the proposer of the new Slovak legislation suggests, it is correct that there is no contractual relationship between a health insurance company and insured persons. The fact that a health insurance company receives premiums in return for insuring persons and is under an obligation to satisfy claims made under the relevant insurance policy, suggests that a contractual relationship exists. Even in the absence of a signed contract, a contractual relationship would appear to exist, which endows a health insurer with property rights in the premiums. It seems

²¹ This legislation was of course not addressed in the letter sent by the Commission to the Slovak Republic on 3 September 2008. Nonetheless, in accordance with Article 226 EC, the Commission now provides the Slovak authorities, in this letter of formal notice, with an opportunity to comment on the Commission’s views of the compatibility of this amending legislation with Community law.

misconceived to claim that premiums paid to a private provider of public health insurance, when a Member State has allowed such companies to provide coverage of a risk belonging to the statutory social security regime, constitute public funds and not private property rights. This is confirmed by the 2004 explanatory notes to the original version of Act No. 581/2004 Coll, which considered that a commercial transfer of an insurance portfolio was perfectly acceptable:

“[g]iven that health insurance companies are players in the insurance market, it is possible that insurance portfolio, as a set of executed and valid insurance contracts/policies will be the subject of trading between health insurance companies.”

In that regard, such an interference with the property rights of health insurance companies legally established in the Slovak Republic may constitute a restriction on the freedom of establishment as *“according to settled case-law, Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the Treaty.”*²²

As for whether such restrictions could be justified, the amended version of section 61(1) of Act No. 581/2004 Coll fails to take into account the fact that, when a Member State allows private companies to provide coverage of a risk belonging to the statutory social security regime, Community law becomes applicable. Thus, although health care is a sector which falls principally within national sovereignty, to the extent that they open their national health or social security systems to foreign investment, Member States must respect Community law and any restrictions on the fundamental freedoms must be suitable for securing the public health objective pursued and limited to what is necessary in order to attain that objective.

Consequently, even if it is accepted that the amended version of section 61(1) of Act No. 581/2004 Coll seeks to enhance the protection of public health in the Slovak Republic, the restrictions that provision imposes on the exercise of the rights granted to undertakings by Article 43 EC are neither suitable for securing the public health objective pursued i.e. improvements in terms quality, access to health care, cost control and efficiency, nor limited to what is necessary in order to attain that objective. In fact, they may actually harm, rather than protect, the integrity of the Slovak public health insurance system, as they reduce the incentives for privately-owned health insurance companies and their shareholders to make further investments in the Slovak public health insurance system in terms of capital and know-how and may even encourage those companies which are already present in the Slovak Republic to reduce and/or withdraw their investments.

The fact that the transfer of the portfolio of a health insurance company has to take place without payment and to either a State-owned health insurance company in case of liquidation or to a State-owned or privately-owned health insurance company in other circumstances, may therefore be incompatible with the freedom of establishment, as interpreted by the European Court of Justice.

²² See most recently Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and others*, judgment of 19 May 2009, not yet reported, paragraph 22.

4. Conclusion

On the basis of the considerations set out above, it appears to the Commission that

- a) the prohibition on health insurance companies freely disposing of any profits resulting from the provision of public health insurance in the Slovak Republic under section 15(6) of Act No 581/2004 Coll constitutes an unjustified restriction on the freedom of capital movements guaranteed by Article 56 EC;
- b) section 6a(1) of Act No. 581/2004 Coll, as amended, constitutes a breach of the Third Non-Life Insurance Directive as it imposes a maximum percentage limit on the gross written premiums on the expenditure that health insurance companies may use to cover their operating expenses; and
- c) section 61(1) of Act No. 581/2004 Coll, as amended on 1 June 2009, constitutes a breach of the freedom of establishment guaranteed by Article 43 EC.

Consequently, the Commission is of the opinion that the Slovak Republic has failed to fulfil its obligations under the EC Treaty.

The Commission invites your Government, in accordance with Article 226 of the Treaty establishing the European Community, to submit its observations on the foregoing within two months of receipt of this letter.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission



Member of the Commission