OPINION OF ADVOCATE GENERAL ALBER

delivered on 4 July 2002 [1]

I — Introduction

1. In the present proceedings for failure to fulfil obligations, the Commission complains at the introduction and maintenance of national rules under which premiums for motor vehicle third-party liability insurance policies applicable in Italy are temporarily frozen. The rule applies without distinction between insurance companies having their head office in Italy and those conducting their business there through branch offices or under the freedom to provide services. The Commission believes that there is a breach of the principle of freedom to set premiums in the form of the prohibition of prior approval of premiums and systematic notification of insurance conditions and premiums. It considers that Articles 6, 29 and 39 of Council Directive 92/49/EEC 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) [2] have been infringed. Furthermore, the Commission complains at the requirement of systematic notification of claims and other data and the compulsory (joint) financing of the supervision system, which it considers to be an infringement of Article 44 of the directive. The measures temporarily introduced by Italy were intended to combat inflation and fraud.

II — Legal background

A — *Community law*

2. The single market in the insurance sector was completed by the 'third non-life insurance directive', which guarantees the freedom to market insurance products. That directive is Directive 92/49. In addition to provisions on the taking up of the business of insurance, the directive contains rules on the harmonisation of the conditions governing the business of insurance and thus contributes to the application to the fundamental freedoms of the right of establishment and freedom to provide services in the insurance sector.

1 — Original language: German.

2 — Council Directive of 18 June 1992, OJ 1992 L 228, p. 1.

3. The present case revolves around the provisions contained in Articles 6(3), 29, 39 and 44 of Directive 92/49. These contain, firstly, a prohibition of the prior approval and the systematic notification of general and special policy conditions, under which the power of intervention enjoyed by the Member States with regard to the approval of premium rates is restricted. Secondly, they govern the notification obligations on the part of insurance undertakings vis-à-vis the competent authority of the home State for business conducted under the right of establishment or freedom to provide services and notification obligations on the part of the authorities of the home State of the insurance undertaking vis-à-vis the competent authorities of the State in which the business is conducted. Individual terms that are of particular relevance to the decision in the case will be shown in italics for emphasis.

4. In Title II on 'The taking up of the business of insurance', Article 6(3) of Directive 92/49, which amends Article 8 of Directive 73/239, provides as follows:

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

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

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

...'

5. In Title III on 'Harmonisation of the conditions governing the business of insurance', Article 28 of the directive provides:

'The Member State in which a risk is situated shall not prevent a policyholder from concluding a contract with an insurance undertaking authorised under the conditions of Article 6 of Directive 73/239/EEC, as long as that does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated.'

6. Article 29 of Directive 92/49 states:

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

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

7. Article 30(2) of the directive states:

'Notwithstanding any provision to the contrary, a Member State which makes insurance compulsory may require that the general and special conditions of the compulsory insurance be communicated to its competent authority before being circulated.'

8. In Title IV on 'Provisions relating to the right of establishment and the freedom to provide services', Article 39(2) and (3) of Directive 92/49 provides as follows:

'2. The Member State of the branch or of the provision of services shall not adopt provisions requiring the *prior* approval or *systematic* notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an undertaking intends to use in its dealings with policyholders. It may only require an undertaking that proposes to carry on insurance business within its territory, under the right of establishment or the freedom to provide services, to effect *non-systematic* notification of those policy conditions and other documents for the purpose of verifying compliance with its national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

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

Article 44(2) of the directive states:

'2. Every insurance undertaking shall inform the competent authority of its home Member State, separately in respect of transactions carried out under the right of establishment and those carried out under the freedom to provide services, of the amount of the premiums, claims and commissions, without deduction of reinsurance, by Member State and by group of classes, and also as regards class 10 of point A of the Annex to Directive 73/239/EEC, not including carrier's liability, the frequency and average cost of claims.

The groups of classes are hereby defined as follows:

— ...

— motor (classes 3, 7 and 10, the figures for class 10, excluding carriers' liability, being given separately),

— ...

The competent authority of the home Member State shall forward that information within a reasonable time and in aggregate form to the competent authorities of each of the Member States concerned which so request.'

9. The directive does not make any provision concerning the financing of the notification and supervision system.

B — *National law*

10. Decree No 175 of 17 March 1995 implementing Directive 92/49 liberalised premium rates for motor vehicle third-party liability insurance policies, which had up to that point been subject to a price control system in Italy, as in most European countries. That liberalisation also applied to policy conditions.

11. By Decree No 70 of 28 March 2000 on urgent measures to limit the inflationary pressures [3] (hereinafter: Decree No 70), Italy adopted various measures in different sectors such as motor vehicle third-party liability insurance, petroleum tax and the public service, which were intended to combat inflation. As far as the motor

3 — GURI No 73 of 29 March 2000.

vehicle third-party liability insurance sector was concerned, Decree No 70, after amendment, was converted by the Parliament into Law No 137 of 26 May 2000.[4] By freezing insurance premiums and by providing that other elements of the conditions of certain motor vehicle third-party liability insurance policies could not be modified, and by other measures contained in Article 2(2) to (5)(d) of Decree No 70, it was intended to counter inflation, initially for the period of one year. Under Article 2(2) of Decree No 70, policies renewed in the year for which the Decree was valid and which provided for a modification of the premium in the event of a claim were subject to a prohibition on increasing the motor vehicle liability insurance premium if the policyholder had not caused any claims during the period under consideration.

12. Under the last sentence of Article 2(2), newly concluded policies were, for a period of one year, subject to a prohibition on modifying the premium that applied upon the entry into force of the Decree.

13. Article 2(3) of the Decree contained the prohibition on the modification of the conditions of the policy concerning the number of categories of premiums, the coefficients for calculation of premiums and the evolutionary clause for classes of premiums, which provided for a modification of the premium in the event of a claim; that prohibition applied for a period of one year from the entry into force of the provision.

14. Under Article 2(4) of Decree No 70, insurance undertakings are required, at the request of the policyholder, to introduce the possibility of taking out insurance policies in the bonus/supplementary premium class with an excess of at least ITL 500 000 and at most ITL 1 000 000. This is without prejudice to the injured third party. It is solely for the policyholder to choose the bonus/supplementary premium class with excess and to choose the amount of the excess.

15. Article 2(5) of Decree No 70 gives the policyholder the right, upon the expiry of the prohibition on increasing premiums, to terminate the policy without giving statutory notice, if the insurer demands an increase in the premium — not based on the mechanism of the individual premium classes — which is higher than the estimated inflation rate fixed by the Government.

16. Under Article 2(5)(a), the 'Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo' (hereinafter: 'ISVAP'), the competent authority in the national legal order, supervises compliance with the measures set out in Article 2(2) to (4) and, under Article 5(b), may impose administrative fines of between ITL 3 million and ITL 9 million in the event of non-compliance.

17. With a view to combating fraud, under Article 2(5)(c) a database was to be set up

4 — GURI No 122 of 27 May 2000.

in the motor vehicle third-party liability insurance sector. All insurance undertakings were to be required to provide information to ISVAP pursuant to rules laid down by that body on the claims made to the respective undertaking.

18. Furthermore, under that provision, the insurance undertakings were required to contribute to the financing of the database.

19. Article 2(5)(d) established the possibility, in the event of failure to fulfil, or belated fulfilment of, the notification requirement, of imposing administrative fines of between ITL 2 million and ITL 6 million or between ITL 1 million and ITL 3 million, which could be further increased in the event of repetition.

III — Subject-matter and proceedings

20. Since, in the view of the Commission, the abovementioned national provisions are not consistent with Articles 6(3), 29, 39 and 44 of Directive 92/49, it pointed out the grievances to the Italian Republic by letter of 14 April 2000. The Italian Government thereupon replied by letter of 5 June 2000. On 13 July 2000, the Commission drafted a letter of formal notice, requesting observations within three weeks of receipt of the letter. Since the observations made by the Italian Government on 3 August and 3 October 2000 did not satisfy the Commission, on 27 October 2000 the Commission issued a reasoned opinion, by which Italy was requested to remedy the grievances raised within three weeks of receipt. The letter of 20 November 2000 from the Italian Government did not allay the Commission's misgivings. Therefore, on 12 February 2001 the Commission brought an action.

21. The Commission claims that the Court should

— declare that the Italian Republic has failed to fulfil its obligations under Directive 92/49 in that it has introduced and maintained in force rules under which premiums for motor vehicle third-party liability policies covering risks situated within Italian territory were frozen, without distinction between insurance companies having their head office in Italy and those conducting their business through branch offices or under freedom to provide services, in breach of:

(a) the principle of freedom to set premiums and the abolition of prior or systematic controls over premiums and contracts within the

meaning of Articles 6, 29 and 39 of Directive 92/49 and

(b) the provisions of Article 44 of Directive 92/49 governing the gathering of information on the amount of premiums, claims and commissions, the frequency and average cost of claims, and the exchange of information between the competent authority of the home Member State and that of the host Member State;

— order the Italian Republic to pay the costs of the proceedings.

22. The Italian Republic claims that the Court should

— dismiss the action,

— order the Commission to pay the costs.

23. The proceedings included an oral procedure. Although the contested national provisions on the regulation of premiums had ceased to be in force in the meantime, the Commission expressly maintained its action in order to have a lever against similar provisions in Italy and in other Member States. The rules on the obligations relating to the notification of ISVAP were still in force at the time of the oral procedure.

IV — Submissions of the parties

A — *Infringement of, inter alia, the freedom to set premiums (Articles 6, 29 and 39 of the directive)*

24. The *Commission* states that Article 2(2) to (5) of Decree No 70, as amended, whose substance was intended to apply for a period of one year, pursues the following objectives:

(a) prohibition on increases in premiums for one year for policyholders whose policies had expired and provided for a modification of premiums in the event of a claim (Article 2(2), first part);

(b) freezing for one year of all premiums for new policies which provide for a modification of premiums in the event of a claim (Article 2(2), second part);

(c) freezing of certain elements of the contractual offer (Article 2(3));

(d) the obligation for all insurance undertakings operating in the motor vehicle third-party liability insurance sector to offer a bonus/supplementary premium with an excess, which could be no lower than ITL 500 000 and no higher than ITL 1 000 000 (Article 2(4));

(e) the possibility for the policyholder to terminate the policy without giving statutory notice in cases where the increase in the premium is higher than the estimated inflation rate (Article 2(5)).

25. Those measures were contrary to Articles 6(3), 29 and 39 of the directive, which, in the view of the Commission, establish the principle of freedom of contract and freedom to set premiums for undertakings operating in the insurance sector through the prohibition of prior or systematic approval of policy conditions and premium rates. A Member State could require prior notification of general and special conditions of an insurance policy only within the framework of Article 30(2) of the directive, in so far as insurance was compulsory, without, however, being permitted to verify whether the premiums were economically reasonable. The principle of freedom to set premiums recently recognised by the Court [5] may be subject to derogations and restrictions only in the context of a general price control system within the meaning of Articles 6, 29 and 39 or through legal provisions protecting the general good — within the meaning of Article 28 — which apply in the Member State in which a risk is situated.

26. The Commission takes the view that a 'general price control system' must satisfy certain criteria that are not fulfilled in the present case. Decree No 70, as amended, refers neither to a general procedure for price control nor to a procedure for the prior gathering of the necessary data and information. The rules on premiums at issue in the present case cannot be regarded as a general price control system for various reasons. First of all, only a limited number of goods and services are affected in comparison with the long list of products and services that are of economic or social interest and that were also subject to the price control prior to liberalisation. Secondly, the Commission points out the time difference between this measure and others. The only sector in which measures have been taken since 29 March 2000 is the motor vehicle third-party liability insurance sector. Thirdly, the Commission refers to the substantive difference between the measures taken and the proposed measures. Some are of a fiscal nature (fuels and fisheries), others concern payments for public services. Fourthly, the contested measures are justified primarily by the objective of countering agreements on premiums between insurance companies, which had led to a general and constant increase in insurance premiums in the motor vehicle third-party liability insurance sector.

5 — Case C-296/98 *Commission* v *France* [2000] ECR I-3025, paragraph 29.

27. The Commission also recalls that the only controls that are permissible under the legal provisions protecting the general good which apply in the country in which a risk is situated are not systematic controls and, moreover, may be conducted only subsequently.

28. As regards the objective of combating inflation, the contested measures are neither reasonable, since the significance of insurance premiums in the sector in question for the calculation of inflation is very low, nor are they proportionate, since they could lead to the insolvency of the undertakings. If protection against price increases constituted a sufficient ground, any kind of measure whatsoever could be justified by the requirement of consumer protection, which would appear to raise problems in any case.

29. With regard to the social grounds cited by the defendant government, the Commission points out that they cannot be regarded as grounds in the general interest which are capable of restricting a fundamental freedom laid down in the Treaty. [6] In the view of the Commission, it is unclear on which fraudulent practices the defendant government is relying, if it is seeking to prevent them. If it is alluding to the phenomenon of 'fictitious' claims, which affects the trend of premiums, it should be stated that these cannot be countered by seeking to influence the effects rather than the causes and in doing so restricting a fundamental freedom in an unreasonable and disproportionate manner. Lastly, the Commission takes the view that the measures are neither reasonable nor proportionate with reference to the rules on competition, in so far as they are intended to counter cartels and anti-competitive agreements, and certainly cannot justify the freezing of premiums in the sector.

30. The *Italian Government* takes the view that the contested measures may be regarded as a general system of price control. The price intervention is 'general', even though it is effected through different legal instruments and for different periods of time. The measures are conducted at different levels, such as through the adoption of guidelines relating to payments for public services and the reduction of levies on oil products. For State intervention to be regarded as general, it is perfectly permissible, moreover, to restrict its scope to sectors in which the rate of inflation is significantly higher. The significant factor is that it is a set of measures that is designed to counter inflationary pressure and includes an appropriate procedure in the light of the different dynamism of the price trend in the various sectors.

31. Furthermore, the Italian Government takes the view that the measures adopted

6 — See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41.

counter inflation in a reasonable and proportionate manner. With regard to consumer protection and social considerations, the government points out that a temporary prohibition on increasing premiums for certain policies was the only way to take immediate action against the enormous price increases in the sector. The Italian Government stresses that the measures were also the result of a consultation of the affected groups which had lasted for some time. It cannot see any incompatibility between a temporary freezing of premiums and the agreements negotiated between the affected undertakings. Those undertakings had allowed a series of measures to be taken in order to eliminate anomalies in the sector characterised by anti-competitive behaviour and fraudulent practices.

B — *Extension of the notification and information obligation (Article 44 of the directive)*

32. The *Commission* argues with regard to insurance undertakings operating in Italy under the right of establishment or freedom to provide services that they are required only to notify the competent authority of the home Member State, in particular in respect of the number of claims. The obligation to transmit information regarding the amount of the premiums, claims and commissions applies for each Member States and for each class. The Commission takes the view that the information necessary in order to combat fraud can and must be obtained in accordance with the directive, that is to say solely through transmission by the competent authority of the home State. The system introduced by the Italian authorities is detrimental to the mechanism of cooperation between Member States introduced by the directive. The Court has consistently held that administrative considerations cannot justify derogations by a Member State from the rules of Community law.

33. The obligation to contribute to the financing of the database is therefore also contrary to Community law.

34. With regard to the *Schindler*[7] judgment, on which the Italian Government has relied, the Commission argues that it relates to the area of lotteries, which has not yet been harmonised at Community level, unlike the insurance sector, which has been very extensively harmonised and covers practically all economically important aspects and establishes a common market in insurance based on the free marketing of products.

35. The *Italian Government* takes the view that crime prevention may justify deroga-

7 — Case C-275/92 [1994] ECR I-1039.

tions from the principle of freedom to provide services, relying on the judgment in *Schindler*. Obtaining information from the Member States is not likely to counter fraudulent practices in the same way as gathering information direct from undertakings. The setting-up of a database appears to be the only way to detect and track fraudulent conduct, in the interest of those undertakings operating on the Italian market (even where they have their head office in another Member State), which are the first victims of such fraudulent practices.

V — Assessment

A — *Infringement of, inter alia, the freedom to set premiums inter alia*

36. The point of law to be decided is whether the measures adopted by the Italian Government in Article 2 of Decree No 70, which were indisputably in force and applied at the time of the expiry of the period prescribed in the reasoned opinion, infringed the principle of the freedom to set premiums, as guaranteed under Directive 92/49.

37. Directive 92/49 represents the culmination of the liberalisation process for the insurance industry in the indemnity insurance sector. [8] Its purpose and objective is the achievement of the internal market in insurance on the basis of the right of establishment and freedom to provide services. An important element of the internal market is the removal and permanent prevention of restrictions on the economic activity of insurance undertakings operating outside internal borders.

38. In the view of the Commission, the Court has recognised the principle of freedom to set premiums as a characteristic of the freedom to provide services in insurance in Case C-296/98, [9] where it states in paragraph 29 of that judgment:

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

It is not possible to infer further arguments on the substance and scope of the freedom to set premiums from the Court's case-law.

8 — Together with Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance directive), OJ 1992 L 360, p. 1.

9 — Cited in footnote 5.

39. It does follow, however, from Article 6(3), second subparagraph, Article 29, first subparagraph, and Article 39(2) that prior approval or the requirement of systematic notification of premium rates as a prior condition for an insurance undertaking to carry on business under the right of establishment and freedom to provide services is prohibited. The requirement of prior notification or the approval of proposed *increases in premium rates* are permissible only as elements of a *general price control system*. The absolute prohibition on increases in premium rates in a certain sector for a certain period is therefore contrary to the wording of the provisions. The rules introduced by Article 2 of Decree No 70 on the freezing of insurance premiums appear to be measures that restrict the freedom to determine premiums enjoyed by undertakings operating in the insurance sector.

40. A restriction of the principle of freedom to set premiums, as guaranteed under Directive 92/49, is permissible only where it is justified. Since this is a harmonised sector, the grounds for justification must be laid down in the directive. This might be the case here firstly if the restrictive measures form part of a general price control system within the meaning of Articles 6(3), 29 and 39 of Directive 92/49. Secondly, a restrictive measure may be justified under Article 28 of Directive 92/49 where it is a provision of law protecting the general good and no such provision protecting the general good exists in the home State of the insurance undertaking. However, as the nineteenth recital makes clear, this applies only 'provided that such provisions must be applied without discrimination to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued'.

(1) Justification of the restrictive measures as part of a general price control system

41. The Italian Government claims that the measures laid down in Decree No 70 are to be regarded as part of a general price control system and are therefore lawful. The concept of a general price control system is not defined in the directive and therefore has to be interpreted. In doing that, regard must be had to the general harmonisation objective of the directive. Under the directive, the abolition or restriction of the freedom to provide services through measures that are part of a general price control system is an exception which must in principle be given a restrictive interpretation.

42. The Commission takes the view that a general price control system has to be characterised by an autonomous procedure which is conducted by a specifically competent authority. Even though the procedural law element does not need to be resolved in this case, it must nevertheless be an overall system. Even though that general system does not have to be structurally identical to the price control system applicable in Italy prior to liberalisation, it must, however, relate to different economic sec-

tors and also display a certain uniformity of approach.

43. However, the present case relates to selective measures which are temporary, but were adopted in order to regulate just one specific economic sector, namely motor vehicle third-party liability insurance.

44. The Italian Government is now attempting to demonstrate that the system was general in nature by claiming that other measures, such as fiscal measures for the oil industry and regulations for public services, were also adopted. However, it is characteristic of this approach that each of the measures is selective and influences prices at different levels. The measures are not sufficiently coherent in the present case for the price control system to be 'general'. It must therefore be assumed that the contested measures are not part of a general price control system within the meaning of Directive 92/49.

(2) Justification of the restriction under legal provisions protecting the general good

45. Under Article 28 of the directive, lawful restrictions on the freedom of insurance undertakings to carry on business are possible in the form of legal provisions protecting the general good in the Member State in which the risk is situated. In order to justify the contested measures, the Italian Government relies, on the one hand, on combating inflation and, on the other, on consumer protection.

46. The term 'general good' is not defined in the directive. The 19th and 20th recitals, which may be used as an aid to interpretation, do, however, contain a number of criteria that legal provisions protecting the general good must satisfy. Those criteria are based on the consistent case-law of the Court of Justice, which developed the concept of the general good in the field of the free movement of goods and later extended it to other fundamental freedoms.[10] Recitals 19 and 20 of Directive 92/49 read as follows:

'... it is for the Member State in which the risk is situated to ensure that there is nothing to prevent the marketing within its territory of all the insurance products offered for sale in the Community as long as they do not conflict with the legal provisions protecting the general good in force in the Member State in which the risk is situated, and in so far as the general good is not safeguarded by the rules of the home Member State, provided that such provisions must be applied without discrimi-

10 — See, for example, Case C-55/94 *Gebhard* [1995] ECR I-4165.

nation to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued.

... the Member States must be able to ensure that the insurance products and contract documents used, under the right of establishment or the freedom to provide services, to cover risks situated within their territories comply with such specific legal provisions protecting the general good as are applicable....'

47. A further aid to interpretation that may be used is the Commission Interpretative Communication on Freedom to provide services and the general good in the insurance sector.[11] For example, under Point II.2.a, it states:

'The Court requires that a national provision must satisfy the following requirements if it is validly to obstruct or limit exercise of the right of establishment and the freedom to provide services:

— it must come within a field which has not been harmonised,

— it must pursue an objective of the general good,

— it must be non-discriminatory,

— it must be objectively necessary,

— it must be proportionate to the objective pursued,

— it is also necessary for the general-good objective not to be safeguarded by rules to which the provider of services is already subject in the Member State where he is established.

These conditions are cumulative. A national measure which is claimed to be compatible with the principle of the freedom of movement must satisfy all the conditions. If a national measure does not meet one or other condition, it is not compatible with Community law.

The concept of general good is an exception to the fundamental principles of the Treaty with regard to free movement and

11 — Communication 2000/C-43/03, OJ 2000 C 43, p. 5.

must, therefore, be interpreted in a restrictive fashion so as to ensure that recourse is not had to it in an excessive or abusive manner. In the event of a dispute, the Member State imposing the restriction has anyway to show that the measure meets the aforementioned conditions.'

(a) Justification based on combating inflation

48. The Italian Government claims that it was necessary to freeze premiums in order to combat inflation. The objective was therefore to protect the general good.

49. It is first of all doubtful whether the freedom to set premiums guaranteed by harmonised provisions permits interference with the setting of premiums in order to combat inflation, i.e. whether such State influence lies outside the harmonised sector. The 'third insurance directives' [12] liberalised the insurance sector; the freedom to set premiums is an important element of that freedom. Ultimately, that freedom was also granted in the interest of the policyholders who, under conditions of free competition, were intended to have the option to decide in favour of a certain product. Against this background, it is to be regarded as a particularly unfortunate development that liberalisation in Italy has led to an increase of up to 400% in insurance premiums in the motor vehicle third-party liability sector.

50. Nevertheless, it must be assumed that the freedom to set premiums also applies in principle to the motor vehicle third-party liability sector. Article 30(2) merely allows the Member States, in the liability insurance sector, to require that the competent authorities be notified of the general and special conditions of the insurance policy before circulation. Unlike in Articles 6(3), 29 and 39 of the directive, premiums are not mentioned here.

51. Although combating inflation can certainly be regarded as protecting the general good at an abstract level, following the entry into force of Directive 92/49 the Italian Government no longer has the freedom unilaterally to influence the determination of insurance premiums.

52. In addition, one can raise the legitimate question, as the Commission has done, whether the temporary freezing of insurance premiums constitutes an appropriate and necessary means of combating inflation. However, it is no longer within the scope of this dispute to answer this question in so far as it can be assumed that the freedom to set premiums in the insurance sector could no longer be suspended by unilateral State measures.

12 — Directive 92/49 and Directive 92/96.

(b) Justification on consumer protection grounds

53. The Italian Government also claims that the measures were necessary in the interest of consumer protection. Policyholders had been faced with a sudden and quite considerable increase in insurance premiums. The government therefore had to take action in the form of urgent measures.

54. The Court has recognised consumer protection in principle as protecting the general good. [13] However, it must also be assumed with respect to consumer protection that the determination of tariffs — or rather the freedom to set premiums — is already a harmonised field.

55. The freedom to set premiums, as a fundamental element of the liberalisation of the insurance sector, likewise cannot be regarded as a minimum requirement in respect of which the Member State may provide for a higher level of protection, if necessary in compliance with all the conditions governing a permissible legal provision protecting the general good.

56. However, even if it is assumed that the Member State still had the opportunity to adopt unilateral measures to set premiums in the interest of consumer protection, the question arises whether those measures are in proportion to the objective pursued.

57. In view of the extent of the encroachment on freedom to set premiums, which itself constitutes an essential element of liberalisation, this appears extremely doubtful. A possible more moderate method would appear to be to influence the setting of premiums by way of negotiation, as has actually happened since then.

58. Consequently, it must also be assumed with regard to consumer protection that such an absolute, albeit temporary, prohibition on increases in premiums falling within the scope of Directive 92/49 is not justified.

B — *Infringement of Article 44 of the directive through the gathering of information in the State of activity*

59. In principle, under Article 6 of Directive 92/49 the home State of the insurance undertaking is competent for the authorisation and supervision of that undertaking. Under Article 6 of Directive 92/49 the receiving State has only limited supervisory powers with respect to compliance with the relevant national provisions. Under Article 35 of the directive, it is sufficient for the authorities in the State of activity to

13 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

be informed about the activity of the insurance undertaking and to be allowed access to certain documents. However, these do not include the general and special conditions of the policy. In this regard, the directive merely permits, in Articles 29 and 39(2), a non-systematic notification of those conditions and other documents and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

60. Under Article 44 of Directive 92/49 insurance undertakings have a notification obligation only vis-à-vis the competent authority of the home State. That authority must forward the necessary information to the State of activity which so requests. The insurance undertakings have no direct information obligations vis-à-vis the competent authorities of the State of activity under the directive. In fact, it prohibits a Member State from requiring systematic notification of the conditions and other documents that an undertaking wishes to use in commercial activity.

61. The insurance undertakings' notification obligations which exist on the basis of the contested Italian legal situation go beyond those permitted by the directive. In this respect there is an inconsistency between the requirements of the directive and the contested Italian legal provisions.

62. The Italian Government claims, however, that the provisions in question were adopted to protect the general good and served primarily to combat fraud. In this respect, the Italian Government refers expressly to the judgment in *Schindler*,[14] in which the Court recognised that 'protection of the recipients of the service and, more generally, of consumers'[15] figures among the considerations which can justify restrictions on freedom to provide services.

63. In *Schindler* the Court considered national provisions restricting freedom to provide services to be justified 'in view of the concerns of social policy and of the prevention of fraud'.[16] However, the *Schindler* case concerned legal provisions governing the organisation of lotteries. That field of law was not harmonised when the *Schindler* judgment was given, nor is it today. In this respect the circumstances of the *Schindler* judgment and those of the present case are completely different. It must therefore first be examined whether and to what extent the Member State may rely on consumer protection to justify its information requirement.

64. As has already been explained above, an insurance undertaking operating under the right of establishment or freedom to provide services is required to provide information to the competent authorities of the home State to an extent defined by the directive. The home State principle is an essential element of the exercise of the fundamental freedoms, since it means that it is not necessary to resubmit documen-

14 — Case C-275/92 (cited in footnote 7).

15 — *Schindler* (cited in footnote 7, paragraph 58).

16 — See the operative part of the judgment in *Schindler* (cited in footnote 7).

tation that has already been submitted. The mutual recognition of the authorisation of insurance undertakings and the notification of essential information on the activities of undertakings through official channels is intended to prevent potential restrictions hampering the exercise of the right of establishment and freedom to provide services.

65. The Italian Government could successfully rely on provisions adopted to protect the general good for purposes of consumer protection only if the information obligations governed in the directive were minimum standards in respect of which the Member State was free to guarantee a higher level of protection.

66. Article 44(2) requires every insurance undertaking to inform the competent authority of the Member State, separately in respect of transactions carried out under the right of establishment and those carried out under the freedom to provide services, of the amount of the premiums, claims and commissions by Member State and by group of classes. The competent authority of the home Member State then forwards that information within a reasonable time and in aggregate form to the competent authorities of each of the Member States concerned which so request. If the information has already been gathered in the home Member State and can be made available to the competent authority of the State of activity 'which so requests', [17] a new information requirement on the part of the national authorities of the State of activity appears to be a restraint on economic activity and not an increase in the level of consumer protection.

67. The additional compulsory financial participation in the establishment of a system whose function is to procure information on transactions which may already be demanded through official channels, at least with respect to undertakings operating under the right of establishment or freedom to provide services in that Member State, must therefore be regarded as a further unjustified restriction of those fundamental freedoms.

68. The Italian Government cannot therefore successfully rely on the grounds of justification which it has claimed.

VI — Costs

69. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, under the decision proposed here, the Italian Republic has been unsuccessful in its submissions, it must be ordered to pay the costs in accordance with the application by the Commission.

17 — The provision expressly states 'which so requests'.

VII — Conclusion

70. In the light of the foregoing, I propose that the Court should:

(1) declare that the Italian Republic has failed to fulfil its obligations under 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) in that it has introduced and maintained in force rules under which premiums for motor vehicle third-party liability policies covering risks situated within Italian territory were frozen, without distinction between insurance companies having their head office in Italy and those conducting their business through branch offices or under the freedom to provide services, in breach of:

(a) the principle of freedom to set premiums and the abolition of prior or systematic controls over premiums and contracts within the meaning of Articles 6, 29 and 39 of Directive 92/49 and

(b) the provisions of Article 44 of Directive 92/49 governing the gathering of information.

(2) order the Italian Republic to pay the costs of the proceedings.