

Case C-82/10:  
ECJ rules that  
Irish Government's  
exemption of VHI  
from EU insurance  
rules is unlawful

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## ▣ Case C-82/10: ECJ rules that Irish Government's exemption of VHI from EU insurance rules is unlawful

### Introduction

In its judgment in *European Commission v Ireland*<sup>1</sup>, the Court of Justice of the European Union (the “**ECJ**”) has ruled that, by failing to apply EU insurance directives to all insurance undertakings on a non-discriminatory basis, Ireland has failed to fulfil its obligations under those directives.

This decision is likely to have significant consequences for the Voluntary Health Insurance Board (the “**VHI**”) and, potentially, the Irish State.

We have set out below a number of key issues arising from this decision, together with a general overview of the case.

#### **Key points:**

- Ireland must now take all reasonable steps to ensure compliance with the EU insurance directives;
- If the VHI as an entity is to continue to operate in its current capacity it must comply with the authorisation and solvency requirements as set out under the EU insurance directives; and
- Ireland may be exposed to claims from competitors of the VHI who have suffered a loss due to Ireland's failure to apply the EU insurance directives on a non-discriminatory basis.

### Background:

The VHI was established under the Voluntary Health Insurance Act of 1957 (the “**1957 Act**”) with a view to providing voluntary health insurance on the Irish market. Unlike its competitors, the VHI was not subject to the authorisation and solvency requirements of EU insurance directives as it was granted a derogation from such regulation under Article 4 of the First Non-life Insurance Directive. This derogation was granted on the provision that VHI's capacity remain as it was at the time the derogation was granted.

Under Article 3 of the Third Non-life Insurance Directive, notwithstanding the derogation granted to certain bodies under Article 4 of the First Non-life Insurance Directive, Member

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<sup>1</sup> C-82/10

States were under an obligation to ensure that monopolies in the non-life insurance market within their territories were abolished by 1 July 1994.

Subsequent to the derogation being granted, various legislation was introduced which amended the 1957 Act. Through this amending legislation, the VHI obtained various powers and rights which extended beyond its capacity as at the time the derogation was granted. For example:

- the Voluntary Health Insurance (Amendment) Act of 1996 (the “**1996 Act**”) empowers the VHI to make and carry out ‘health-related’ insurance schemes;
- Section 1 of the Voluntary Health Insurance (Amendment) Act of 1998 (the “**1998 Act**”) empowers the VHI to act ‘as agent for an insurer in respect of the provision of insurance cover pursuant to an international healthcare plan’; and
- Section 14 of the Health Insurance (Amendment) Act 2001 (the “**2001 Act**”) permits the VHI to carry out ‘activities of an advisory or consultative nature’ under the ‘additional powers’ granted to it.

In November 2007, following a complaint, the European Commission issued a reasoned opinion to Ireland requesting that it take the measures necessary to ensure compliance with the EU non-life insurance directives. In response, Ireland informed the European Commission that it applied for Central Bank authorisation in respect of the VHI and that it had enacted national legislation which would ensure compliance with the EU non-life insurance directives. It transpired that this legislation was not implemented due to certain national issues (as outlined below).

## Legal Issues

### **The derogation:**

As mentioned above, Article 4 of the First Non-life Insurance Directive specifically provides that the derogation granted to the VHI is subject to the VHI’s capacity remaining unchanged from the date the derogation was granted.

During the course of the Commission’s investigation and subsequent ECJ case, the fact that the VHI’s capacity had changed was never denied by Ireland. Ireland argued, however, that any changes that occurred were immaterial for the following reasons: first, any new activities introduced by the amending legislation were related to the VHI’s original basic activity (that

is, the provision of voluntary health insurance) and second, these new activities accounted for an insignificant percentage of the VHI's total revenues (just 1.3% in 2009).

In response to this argument, the Commission maintained that the precise nature of the change to the VHI's capacity was irrelevant. Instead, any change to the VHI's capacity as at the time the derogation was granted, whether deemed by Ireland to be material or immaterial, would be contrary to the terms of the VHI's derogation which should therefore be dis-applied.

#### **National measures to attempt to comply with EU non-life insurance directives:**

Ireland argued that proposed changes to national legislation (under the Voluntary Health Insurance (Amendment) Act 2008) would have the desired affect of ensuring compliance with the EU non-life insurance directives. It was also submitted that an application had been made to the Central Bank in June of 2008 seeking authorisation of the VHI under the European Communities (Non-Life Insurance) Framework Regulations 1994. Ireland claimed the fact that these measures had not affected compliance with EU non-life insurance directives was due to circumstances prevailing in Ireland at the time, notably the collapse in financial markets and a judgment of the Irish Supreme Court concerning a proposed risk equalisation scheme.

### The ECJ's Judgment

The ECJ adopted a strict interpretation of the concept of 'capacity' in the derogation set out in Article 4. As such, if the essential functions or activities carried out by the VHI were deemed to have been altered by the addition of new activities or functions that did not come within its capacities at the time the derogation was granted, that derogation should cease to be applicable.

The ECJ noted, in particular, changes to the VHI's capacity under the 1996 Act, the 1998 Act and the 2001 Act (as outlined above). Consequently, the ECJ held that the derogation granted to the VHI under Article 4 of First Non-life Insurance Directive should be dis-applied.

With regard to Ireland's attempts to comply with EU non-life insurance directives, the ECJ held that it must determine a Member State's failure to comply with a reasoned opinion of the Commission at the end of the period laid down in that reasoned opinion (i.e. it cannot take into account any subsequent changes). The ECJ further held that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe that Member State's obligations arising under EU law.

The ECJ further held that Ireland had an obligation under Article 3 of the Third Non-life Insurance Directive to ensure that monopolies in the non-life insurance market within their territories were abolished by 1 July 1994 and that the VHI was not immune to this provision.

Finally, it was ordered that Ireland pay the costs in relation to the case.

## Conclusion

This decision is likely to have a significant effect on both the VHI as an entity and the Irish State.

### **Impact on the VHI:**

There would appear to be a question mark over the legal right of the VHI to sell private health insurance products on the Irish market until such time as it obtains the requisite authorisation from the Central Bank. It may be that the State will seek to undo any changes to the capacity of the VHI so that it may, once again, benefit from the derogation. Whether or not this approach is feasible remains to be seen (the language of Article 4 of the First Non-life Insurance Directive is not clear as to whether one of the listed entities may first lose its derogation and then re-qualify for it).

### **Impact on Ireland:**

Failure to comply with the ECJ's decision will be a breach of Ireland's duty of loyal cooperation between EU institutions and Member States. As such, should the necessary implementing measures in respect of the EU non-life insurance directives not be applied, Ireland may face financial sanction at EU-level.

Further, there would appear to be arguable grounds, based on the absence of a temporal restriction on the judgment of the ECJ, for any past or existing competitor of the VHI to pursue a case for damages against the Irish State/VHI in respect of losses incurred from the period of unlawful exemption of the VHI (i.e. from the commencement of the 1996 Act) to date in circumstances where there is evidence on the balance of probabilities of a causal link between the wrong of the State and the financial loss suffered by the VHI's competitor.

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