JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

12 February 2008 *

In Case T-289/03,

British United Provident Association Ltd (BUPA), established in London (United Kingdom),

BUPA Insurance Ltd, established in London,

BUPA Ireland Ltd, established in Dublin (Ireland),

represented by N. Green QC, K. Bacon and J. Burke, Barristers, and B. Amory, lawyer,

applicants,

v

Commission of the European Communities, represented initially by N. Khan and J. Flett, then by N. Kahn and T. Scharf, acting as Agents,

defendant,

* Language of the case: English.

supported by

Kingdom of the Netherlands, represented by N. Bel, acting as Agent,

by

Ireland, represented by D. O'Hagan, acting as Agent, with G. Hogan SC and E. Regan, Barrister,

and by

Voluntary Health Insurance Board, established in Dublin, represented by D. Collins, G. FitzGerald and D. Clarke, Solicitors, and P. Gallagher SC,

interveners,

APPLICATION by, inter alia, BUPA Ireland Ltd, a provider of private medical insurance services in Ireland, for annulment of the Commission's Decision C(2003) 1322 final of 13 May 2003 not to raise objections, under Article 4(2) and (3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), concerning the establishment of a risk equalisation scheme (RES) in the Irish health insurance market (State aid N 46/2003 — Ireland),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of M. Jaeger, President, V. Tiili, J. Azizi, E. Cremona and O. Czúcz, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 March 2007,

gives the following

Judgment

Legal background

I — *Treaty provisions*

1 Article 16 EC provides:

'Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this

Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.'

2 Under the first paragraph of Article 43 EC: '[R]estrictions on the freedom of establishment of nationals of a Member States 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.'

3 Pursuant to the first paragraph of Article 49 EC, 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

4 Article 86 EC provides:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the

performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.'

5 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

6 Article 88(2) and (3) EC provides:

'2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

…

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the proceedings provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

7 Article 152(1) and (5) EC provides:

'1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. …

…

5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. …'

II — *Regulation (EC) No 659/1999*

8 Article 4(3) and (4) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides:

'3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) [EC], it shall decide that the measure is compatible with the common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) [EC] (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

III — *Directive 92/49/EEC*

9 Article 54(1) 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 (OJ 1992 L 228, p. 1; 'the third non-life insurance directive') provides:

'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.'

IV — *Communication from the Commission on services of general interest in Europe*

10 According to point 14 of the communication from the Commission on services of general interest in Europe (OJ 2001 C 17, p. 4, 'the communication on services of general interest'):

'Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. … [I]f the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations. … The classical case is the universal service obligation … [that is to say] the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations.'

11 Point 15 of the communication on services of general interest states:

'Public authorities may decide to apply general interest obligations on all operators in a market or, in some cases, to designate one or a limited number of operators with specific obligations, without granting special or exclusive rights. In this way, the greatest competition is allowed and users retain maximum freedom with regard to choice of service provider. …'

12 Point 22 of the communication on services of general interest is worded as follows:

'Member States' freedom to define [services of general economic interest] means that Member States are primarily responsible for defining what they regard as [such] services … on the basis of the specific features of the activities. This definition can only be subject to control for manifest error. They may grant special or exclusive rights that are necessary to the undertakings entrusted with their operation, regulate their activities and, where appropriate, fund them. In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally. The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article 86(2) [EC] to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts). … This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment.'

13 Point 23 of the communication on services of general interest states:

'Proportionality under Article 86(2) [EC] implies that the means used to fulfil the general interest mission shall not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions to the rules of the EC Treaty, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission. The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to carry the specific burden and the net extra costs of the particular task assigned to them. The Commission exercises this control of proportionality, subject to the judicial review of the Court …, in a way that is reasonable and realistic, as illustrated by the use it actually makes of the decision-making powers conferred to it by Article 86(3) [EC].'

Facts

I — *Creation of a risk equalisation scheme in the Irish private medical insurance market*

14 Private medical insurance ('PMI') was formally introduced in Ireland in 1957 with the establishment of the Voluntary Health Insurance Board ('the VHI'), which had the essential purpose of enabling persons not eligible under the public sickness insurance scheme to obtain cover for the costs of hospitalisation. At the time the VHI was the only operator licensed by the Minister for Health to provide private medical insurance services ('PMI services'). Since 1987 the VHI, at the request of the Minister for Health, has offered an insurance policy called 'Plan P', which provides cover for hospital charges incurred in public hospitals and to which approximately 1% of the Irish population subscribe.

15 Since 1991 the public health insurance system, which is essentially financed through general taxation, has provided cover for the entire Irish population irrespective of the income of the persons concerned. Thus, the principal role of insurers active on the Irish PMI market ('PMI insurers') now consists in providing alternative cover to that provided by the public health insurance system.

16 The Irish PMI market was liberalised following the enactment in 1994 of the Health Insurance Act, 1994 and in 1996 of the Voluntary Health Insurance (Amendment) Act, 1996 and also the adoption of the implementing provisions contained in the 1996 Health Insurance Regulations. Those regulations can be subdivided into a number of regulations, namely the Health Insurance Act 1994 (Open Enrolment) Regulations 1996, the Health Insurance Act 1994 (Lifetime Cover) Regulations 1996 and the Health Insurance Act, 1994 (Minimum Benefit) Regulations, 1996.

17 BUPA Ireland, which was set up in conformity with that legislation, has been operating on the Irish PMI insurance market since 1 January 1997. Since then, with a market share of approximately 15% by members and 11% by receipts at the time when the application in the present case was lodged, it has been the VHI's main competitor on the Irish PMI market, while the VHI has retained approximately 85% by receipts and approximately 80% by members. At the present time some 50% of the Irish population has PMI cover.

18 The Health Insurance Act, 1994 and the Health Insurance Regulations 1996 also authorised the Minister for Health to order and regulate, inter alia, the establishment of a 'Risk Equalisation Scheme' ('RES'). In 1997 the Minister for Health set up an

Advisory Group with the mandate to make recommendations on the establishment of a RES. In its report of 1998 the Advisory Group concluded that it was necessary to set up a RES. In 1999 the Minister for Health published first a technical paper for consultation and then a White Paper proposing a RES.

19 On 2 March 1999, BUPA Ireland lodged a complaint with the Commission against the implementation of the proposed RES on the ground that it infringed, in particular, Article 87(1) EC. Between March 1999 and April 2003 BUPA Ireland supplemented that complaint by submitting a number of memoranda, reports and documents to the Commission.

20 In 2001, the Health Insurance Act, 1994 was amended by the Health Insurance (Amendment) Act, 2001, which authorised the Minister for Health to implement the RES and established the Health Insurance Authority ('the HIA'). The HIA was given the task of advising the Minister on the commencement of payments under the RES ('the RES payments' or 'the equalisation payments') and of administering those payments through a fund specially set up for that purpose.

21 The statutory instrument authorising the establishment of the RES entered into force on 1 July 2003.

22 In October 2004, a new PMI insurer, Vivas Healthcare, entered the Irish PMI market and under Section 12B of the Health Insurance Act, 1994, as amended, was exempt from RES payments for three years.

23 On 29 April 2005, the HIA recommended, on the basis of its report of April 2005 establishing a 'risk differential' of 4.7%, that the Minister for Health should commence the RES payments.

24 BUPA Insurance Ltd and BUPA Ireland lodged an application before the High Court (Ireland) against the Irish legislation governing the RES and the HIA's recommendation of 29 April 2005. By judgment of 24 May 2005, varied on 30 May and 29 December 2005, the High Court dismissed the application for an injunction against the Minister for Health prohibiting him from ordering commencement of the RES payments, but none the less suspended implementation of the RES payments by the applicants pending judgment on the substance in the main proceedings.

25 On 27 June 2005, the Minister for Health decided not to follow the HIA's recommendation of 29 April 2005. Following a new recommendation by the HIA, the Minister for Health decided on 23 December 2005 to set the date for commencement of the RES payments at 1 January 2006, subject to suspension of implementation of those payments by the applicants, as ordered by the High Court.

26 By judgment of 23 November 2006, the High Court disposed of the substance of the case and dismissed the applicants' application.

II — *The functioning of the RES*

A — *The objective of the RES*

27 The RES is essentially a mechanism which provides for payment of a charge to the HIA by PMI insurers whose risk profile is healthier than the average market risk

profile and for a corresponding payment by the HIA to PMI insurers whose risk profile is less healthy than the average market risk profile. Those payments are made through a fund specially established for that purpose and administered by the HIA (Article 12 of the RES).

B — *Activation of the RES payments*

28 Under the relevant statutory instrument, the RES payments become payable following the stages outlined below.

29 PMI insurers subject to the RES are required to submit to the HIA returns covering six-month periods, the first return covering the half year commencing 1 July 2003 (Article 9 of the RES). On the basis of those returns, the HIA examines and evaluates the distribution of risks among PMI insurers and submits a report and, if necessary, makes a recommendation to the Minister for Health (Article 10 of the RES).

30 On the basis of that report and, where appropriate, a recommendation from the HIA, the Minister for Health decides whether it is appropriate to commence RES payments. His decision is subject to the following conditions (Article 10 of the RES):

— where the risk differential between operators is under 2% RES payments are not commenced;

— where the risk differential is between 2 and 10% the Minister for Health decides, on the recommendation of the HIA, whether or not to commence RES payments;

— where the risk differential between operators is more than 10%, the Minister for Health will, in principle, commence RES payments, unless there are good reasons for not doing so.

C — *Method of calculation of RES payments*

31 The method of calculating RES payments payable following a decision to commence those payments is set out in the Second Schedule to the RES and explained in greater detail in the Guide to the Risk Equalisation Scheme, 2003 as prescribed in Statutory Instrument No 261 of 2003, July 2003 ('the RES guide').

32 Determination of RES payments is directly linked to the differential between the risk profiles of the PMI insurers, the assessment of which involves consideration of a number of risk factors. Those factors include, first, the age and sex of the persons covered and, if appropriate, a weighting (between 0 and 50%) known as the 'health status weight', which is based on hospital bed utilisation. The HIA has not thus far applied that weighting, which is currently zero, and has based its assessment of risk differentials between PMI insurers solely on the factors of the age and sex of the persons covered.

33 According to the RES guide (page 14 et seq.), the principle governing the calculation of RES payments is that each PMI insurer must bear the costs which it would have had to bear if its own risk profile had been equivalent to the average market risk profile. The costs relating to the insurer's real risk profile and to the average market risk profile are calculated according to the age and sex of the persons covered. For that purpose, those persons are first divided into different age and sex cells in order to identify the sum of the costs generated by those cells respectively and to determine the actual average cost per person covered within each cell. According to Article 3 of the RES, the costs to be taken into account in that context are exclusively those generated by claims (claims costs) submitted to PMI insurers during the reference period for payment of the fees due for medical services received during a hospital stay. Subsequently, the HIA determines the average market risk profile for each age and sex cell, in comparison to the total population insured in the market, on the basis of data provide by the PMI insurers. That average market risk profile is then substituted for the real risk profile of the PMI insurers by age and sex cell in order to identify the hypothetical costs that those insurers would have incurred if they had actually had such an average market risk profile. The cost differential determined on the basis of the comparison between the actual costs (on the basis of the insurer's real risk profile) and the hypothetical costs (on the basis of the insurer's average market risk profile) ultimately provides the basis for calculating the equalisation payments, as referred to in paragraph 27 above. Those payments must correspond precisely to that cost differential and may be adjusted, by application of the 'zero sum adjustment factor', to ensure that the system is self-financing.

34 Although in theory the RES is intended to apply to every PMI insurer active on the Irish market, the parties are agreed that as matters currently stand its application would essentially lead to a transfer of funds from BUPA Ireland for the benefit of the VHI.

III — *Contested decision*

35 On 23 January 2003, the Irish authorities formally notified the RES to the Commission pursuant to Article 88(3) EC.

36 By Decision C(2003) 1322 final of 13 May 2003 (State aid N 46/2003-Ireland; 'the contested decision'), the Commission decided not to raise objections, under Article 4(2) and (3) of Regulation No 659/1999, concerning the establishment of the RES in Ireland.

37 Article 1 of the operative part of the contested decision states:

'The [RES] involves payments which are limited to the minimum necessary to compensate [PMI] insurers for [SGEI] obligations and therefore does not involve State aids in the sense of Article 87(1) EC.'

38 In the presentation of the facts relating to the RES at recitals 17 to 30 to the contested decision, the Commission described in detail the scope and the functioning of the RES. Recitals 20 to 30 to that decision describe the conditions for the commencement of the RES (recitals 20 to 24) and the criteria and method of calculation of the RES payments (recitals 25 to 30).

39 In its legal assessment, the Commission concluded that the notified measure '[did] not constitute State aid within the meaning of Article 87(1) EC or [could] be declared compatible with the common market pursuant to Article 86(2) [EC]' (recitals 37 and 61 to the contested decision).

40 In support of that appraisal, the Commission essentially considered, initially, that the RES fulfilled in principle the conditions set out in Article 87(1) EC. It observed in that regard that the RES payments came from public resources, originating in a fund established by national legislation, financed by compulsory contributions and controlled by the public authorities, which in practice benefited the VHI, an undertaking in a dominant position with an 85% market share, to compensate it for the costs which it would normally have had to bear. The Commission considered that those payments were capable of affecting competition and intra-Community trade and that the RES could therefore be qualified as State aid (recital 39 to the contested decision).

41 However, the Commission concluded that the compensation provided by the RES none the less did not constitute State aid within the meaning of Article 87(1) EC, since according to the case-law of the Court of Justice (Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 27), it was intended as compensation for the obligations of services in the general economic interest ('SGEI obligations') imposed on all insurers active on the Irish PMI market, namely obligations designed to ensure that all persons living in Ireland would receive a minimum level of PMI services at an affordable price and on similar quality conditions. The Commission observed (at recitals 40 and 41 to the contested decision) that that objective would be achieved by establishing solidarity between policy-holders and that, in particular:

— the open enrolment requirement, that is to say, the obligation for the PMI insurer to offer a PMI contract to any person requesting such a contract, independently

of his age, sex or health status, ensured that old or chronically ill persons were not excluded from PMI;

— the lifetime cover requirement ensured that insurers would not reject the policy-holders when they became sick or old;

— community rating imposed upon the insurers the obligation to apply the same premium to all policy-holders for the same type of product irrespective of their health status, age or sex; premiums would therefore be fixed at a higher rate than young persons would have to pay for PMI services priced on the basis of risk assessment and premiums paid by old or sick persons would be much more affordable than if they were fixed by reference to the risk covered; thus, community rating constituted the very basis of inter-generational solidarity and provided all insured persons with the certainty that the advent of a chronic illness or serious injury would not render the cost of cover unaffordable;

— last, the regulations on minimum benefits ensured that the products proposed would respect certain minimum quality standards, although PMI insurers were free to design their insurance products.

42 As regards the applicants' denial, in their complaint, that the obligations referred to in paragraph 41 above constitute SGEI obligations, the Commission considered, in essence, that the national authorities were entitled to take the view that certain services were in the general interest and must be provided by means of SGEI obligations when market forces were not sufficient to ensure that they would be provided. The Commission further observed that in the absence of harmonisation at Community level in the medical insurance sector, the national authorities were competent to

impose SGEI obligations on all operators on the relevant market. In that regard, the Commission observed that the freedom left to operators in Ireland to fix prices and define their insurance products did not call into question the fact that the obligations laid down by the relevant legislation constituted SGEI obligations in so far as the obligations served to achieve the objectives of a mission of general economic interest ('SGEI mission'), such as access by anyone living in Ireland to a certain level of PMI services at affordable prices and on similar conditions of quality. In that regard, the Commission considered that the Irish authorities had not made a manifest error by qualifying as SGEIs certain services going beyond those offered by the public social security scheme and accepted, in consequence, that the obligations at issue in the present case might be qualified as SGEI obligations within the meaning of Community law (recitals 42 to 49 to the contested decision).

43 The Commission then found, in substance, that the application of the RES was strictly necessary in order to maintain stability on the relevant market, to neutralise the differential in risk profiles between PMI insurers and to compensate for the discharge of the SGEI obligations in question. It thus concluded that the RES was proportionate (recitals 50 to 59 to the contested decision).

44 As regards the necessity of the RES, the Commission observed that economic studies had highlighted the fact that in a community rated system, and notwithstanding the open enrolment obligation, PMI insurers would, in the absence of the RES, have a strong incentive to target, using selective marketing strategies, for example, low-risk, healthy consumers in order to be able to charge a lower community rate then their competitors. The Commission also observed that, in those circumstances, even in the absence of active risk selection, consumers would be likely to change insurers, which could give rise to spiralling costs for PMI insurers whose risk profile is made up of a greater proportion of insured persons in poor health.

45 As regards the Irish PMI market, the Commission considered, in light of the Report of the Society of Actuaries in Ireland of April 2002 and the available data, that the situation could change and lead to a 'spiralling down' since some PMI insurers had attempted to attract young and presumably healthier consumers, by means of a strategy based on risk selection rather than one of quality or efficiency (footnote 9 to the contested decision). Consequently, the Commission concluded that although such market instability had not yet been observed, the danger of risk selection on the Irish PMI market based on community rating could not be excluded, so that it was necessary to maintain stability on that market by introducing the RES, which ensured an appropriate distribution of risks on that market. In fact, in a PMI market with a risk-based rating, the RES would not be necessary (recitals 50 to 52 to the contested decision).

46 As regards the proportionality of the RES, the Commission observed, in substance, that an unequal distribution of risks among PMI insurers did not lead automatically to the activation of the RES, but that the RES would be activated when certain conditions were met and, in particular, when certain percentages of risk differential were reached. It further observed that the RES limited transfers of payments between PMI insurers to the level strictly necessary to neutralise the differential between their risk profiles. It considered that a system which compensates PMI insurers for expenditure incurred in covering 'bad' risks in excess of the market average was strictly necessary to compensate for the SGEI obligations with which they are entrusted, which prohibit them from setting premiums by reference to the risk insured and from rejecting 'bad' risks.

47 The Commission also observed that not all payments by PMI insurers to insured persons were equalised, as the RES provided for a specific ceiling corresponding to the level of benefits received by most insured persons on the Irish PMI market, to the exclusion of 'luxury' services. It also observed that the RES took account of the average costs of the insurer generated by claims for reimbursement in such a way as to avoid an equalisation of the average cost per cell of insured persons and to allow the PMI insurers to keep the benefit of their own efficiencies. Last, the Commission

considered that the RES limited the application of the health status weight, for the purpose of determining the risk profile, to 50% of the observed use of hospital facilities (also called 'market experience'), which was an additional guarantee to encourage insurers to promote shorter hospital stays, early detection and best practice generally. The Commission noted that, in consequence, the RES never equalised the entire market risk differential (recitals 27, 28 and 53 to 57 to the contested decision).

48 The Commission concluded that, even if the compensation for SGEI obligations must be regarded as State aid within the meaning of Article 87(1) EC, the aid element was compatible with the common market under Article 86(2) EC, without prejudice to its compatibility with other rules of Community law, in particular with the third non-life insurance directive, examination of which must take place in the appropriate procedures (recitals 60 and 61 to the contested decision).

49 By letter of 2 June 2003, in response to the applicants' letter of 7 May 2003, the Commission informed the applicants that it had concluded that the RES did not constitute State aid within the meaning of Article 87(1) EC or could be declared compatible with the common market pursuant to Article 86(2) EC.

50 By letter of 6 June 2003, the Commission, at the applicants' request, sent the applicants a copy of the contested decision, which they received on 11 June 2003.

51 By letter of 23 July 2003, the Commission confirmed to the applicants that the contested decision involved rejection of their complaint and, in response to a further request, sent them a list of seven economic studies submitted in support of the notification by the Irish authorities, which, according to the Commission, were 'publicly available'.

Procedure and forms of order sought by the parties

52 By application lodged at the Registry of the Court of First Instance on 20 August 2003, the applicants brought the present action. Pursuant to Article 14(1) of the Rules of Procedure of the Court of First Instance, the Court decided to allocate the case to a chamber of extended composition.

53 By separate document lodged at the Court Registry on the same date, the applicants requested the Court, in accordance with Article 76a of the Rules of Procedure, to adjudicate under an expedited procedure. By letter of 5 September 2003, the defendant submitted its observations on that request. By letter of 23 September 2003, the Court informed the applicants that it had decided to reject the request for an expedited procedure.

54 By documents lodged at the Court Registry on 27 November and 12 and 17 December 2003 respectively, Ireland, the Kingdom of the Netherlands and the VHI requested leave to intervene in the proceedings in support of the defendant. By orders of 3 February and 2 April 2004, the President of the Third Chamber (Extended Composition) of the Court granted, first, Ireland and the Kingdom of the Netherlands, and then the VHI, leave to intervene in support of the form of order sought by the defendant.

55 By letter of 28 April 2004, Ireland objected to a request for confidential treatment submitted by the applicants and requested the Court to communicate to it a complete set of all the procedural documents. By order of 4 March 2005, the President of the Third Chamber (Extended Composition) of the Court rejected the applicants' request for confidential treatment vis-à-vis Ireland and ordered that a complete version of the procedural documents be sent to that Member State.

56 The interveners lodged their statements in intervention and the applicants lodged their observations on those statements within the prescribed periods.

57 By separate document registered at the Court Registry on 22 June 2005, the applicants submitted an application for interim measures pursuant to Articles 242 EC and 243 EC, which was registered as Case T-289/03 R, seeking suspension of the implementation of Article 1 of the contested decision. By letter of 1 July 2005, the applicants withdrew their request for interim measures. By order of 12 September 2005, the President of the Court ordered that Case T-289/03 R be removed from the register and reserved the decision on costs.

58 On 19 January 2006, the applicants lodged a request for priority treatment under Article 55(2) of the Rules of Procedure. The defendant, Ireland and the VHI submitted their observations on that request.

59 Upon hearing the report of the Judge Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure and to give the case priority treatment pursuant to Article 55(2) of the Rules of Procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, invited the parties to answer a number of written questions before the hearing. The parties answered those questions within the periods prescribed.

60 The parties submitted oral argument and their answers to the oral questions put by the Court at the hearing on 7 March 2007.

61 The applicants claim that the Court should:

— annul the contested decision;

— order the defendant to pay the costs;

— declare the arguments which Ireland and the VHI derive from Article 87(1) EC inadmissible;

— order the interveners to pay the costs.

62 The defendant and the supporting interveners contend that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

I — *Admissibility*

A — *Arguments of the parties*

63 In the rejoinder, the defendant challenges the admissibility of the action on the ground that the applicants are not individually or directly concerned by the contested decision for the purposes of the fourth paragraph of Article 230 EC.

64 The defendant claims, first, that the RES applies to all PMI insurers active on the Irish market and therefore applies to objectively determined situations and produces legal effects only with respect to categories of persons envisaged in the abstract. As may be seen from the HIA's report of 28 April 2004 to the Minister for Health, which was communicated to the Commission on 14 May 2004, and contrary to the assertion in the application that only the applicants and the VHI are subject to the RES, a third PMI insurer, the Electricity Supply Board's Staff Medical Provident Fund ('the SMPF') is also subject to the RES. Accordingly, the applicants are not individually concerned by virtue of attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36), nor are they in a position comparable to that giving rise to the judgment of 16 May 1991 in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501. The fact that it is possible to determine, at a given moment, the likely identity of the beneficiaries of the RES does not alter the general character of the scheme in question.

65 The defendant further maintains that the adoption of the contested decision did not necessarily result in the application of the RES, which still required a recommendation from the HIA and ministerial approval of that recommendation (Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 51). The defendant explained at the hearing that the applicants were not directly concerned by the contested decision since the application of the RES depended on intermediate measures to be taken by the Irish authorities and amenable to appeal before the national courts.

66 In its observations on the plea alleging failure to initiate the formal investigation procedure provided for in Article 88(2) EC, the defendant further submits that the essential aim of the action is to challenge the substance of the contested decision. The action cannot therefore be declared admissible on the ground that the applicants are seeking to protect their procedural rights in accordance with Article 88(2) EC, as recognised in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487.

67 The applicants maintain that the plea of inadmissibility raised by the defendant is contrary to Article 48(2) of the Rules of Procedure in that it was raised out of time in the rejoinder. Furthermore, the commencement of the RES had the inevitable consequence that payments were made by BUPA Ireland for the benefit of the VHI and the contested decision was adopted at the end of the preliminary examination procedure under Article 88(3) EC. However, the applicants do not dispute the fact that the SMPF is also subject to the RES and that it may even benefit from a transfer of funds in the context of the application of the RES.

68 The applicants conclude that, in accordance with the case-law, they are individually and directly concerned by the contested decision. Furthermore, their action is also based on the plea alleging failure to initiate the formal investigation procedure under Article 88(2) EC and seeks to ensure respect for their procedural rights. They

rely on the judgment in Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 41), where the Court held that an applicant is entitled to plead any of the grounds of illegality set out in the second paragraph of Article 230 EC, provided that they concern the total or partial annulment of the contested decision.

B — *Findings of the Court*

1. Admissibility of the plea of inadmissibility

69 In response to the applicants' argument that the plea of inadmissibility was raised out of time, by reference to Article 48(2) of the Rules of Procedure, the Court observes that in any event a plea of inadmissibility alleging that the applicant lacks *locus standi* is a plea of inadmissibility that is a matter of public policy, for the purposes of Article 113 of the Rules of Procedure, which the Court may examine of its own motion at any stage of the proceedings and independently of the pleas and arguments put forward by the parties (see, to that effect, Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraphs 20 to 22, and Case T-210/02 *British Aggregates* v *Commission* [2006] ECR II-2789, paragraph 57). It is also claimed that the defendant raised in the rejoinder a new fact of which it was informed by Ireland only on 14 May 2004, namely that a third PMI insurer, the SMPF, was also subject to the RES payments obligation.

70 The Court must therefore examine the merits of the plea of inadmissibility raised by the defendant.

2. The merits of the plea of inadmissibility

(a) Whether the applicants were individually concerned

71 The defendant does not accept, primarily, that the applicants were individually concerned, for the purposes of the fourth paragraph of Article 230 EC, by the contested decision.

72 In that regard, according to a consistent body of case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107; *Cook* v *Commission*, paragraph 66 above, paragraph 20; and Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 36). With more specific regard to a Commission decision on State aid, it must be borne in mind that in the procedure for reviewing State aid provided for in Article 88 EC, a distinction must be drawn between the preliminary procedure for reviewing the aid established in Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, and the investigation stage referred to in Article 88(2) EC. It is only in connection with the latter investigation, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 66 above, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraphs 33 and 34).

73 Where, without initiating the formal investigation procedure provided for in Article 88(2) EC, the Commission finds, by decision adopted on the basis of Article 88(3) EC, that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance with them only if they are able to challenge that decision before the Community Courts (*Cook* v *Commission*, paragraph 66 above, paragraph 23; *Matra* v *Commission*, paragraph 72 above, paragraph 17; and *Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 40). For those reasons, the Courts will declare admissible an application for annulment of such a decision brought by a 'party concerned' within the meaning of Article 88(2) EC where the applicant intends, by bringing the action, to ensure that the procedural rights which he derives from that provision are protected (*Cook* v *Commission*, paragraph 66 above, paragraphs 23 to 26, and *Matra* v *Commission*, paragraph 72 above, paragraphs 17 to 20). The 'parties concerned' for the purposes of Article 88(2) EC who are entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment are any persons, undertakings or associations whose interests may be affected by the grant of aid, in particular undertakings competing with the recipients of the aid and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 72 above, paragraphs 35 and 36).

74 On the other hand, if the applicant challenges the substance of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The applicant must then demonstrate that it has a particular status within the meaning of the case-law established in *Plaumann* v *Commission*, paragraph 71 above. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates (see *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 72 above, paragraph 37 and the case-law there cited).

75 In the present case, the applicants contest, in particular by their first and second pleas, the substantive legality of the contested decision, while only their sixth plea goes to the failure to open the formal investigation procedure and thus failure to respect the procedural guarantees provided for in Article 88(2) EC from which the

applicants might have benefited as concerned parties. In that last plea, the applicants claim, moreover, that the Commission ought to have initiated the formal investigation procedure owing to the doubts as to whether the RES was compatible with the common market on account of the factual and economic complexity of the case.

76 As regards, first, the applicants' capacity to secure respect for their procedural rights, it is not disputed by the defendant that the applicants, and in particular BUPA Ireland, as the VHI's main competitor on the Irish PMI market, are 'parties concerned' within the meaning of the case-law cited at paragraph 69 above. The fact that in this case the applicants were able, after lodging their complaint against the RES in 1999, that is to say, before the Commission initiated its examination of the RES notified by Ireland in 2003, to put forward their arguments even during the preliminary examination procedure under Article 88(3) EC cannot deprive them of the right to respect for the procedural guarantee expressly conferred on them by Article 88(2) EC (see, to that effect, Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraphs 94 to 98). It follows that the applicants have *locus standi* in so far as they seek to secure respect for their procedural rights under Article 88(2) EC.

77 As regards, next, the applicants' *locus standi* to challenge the substance of the contested decision, the defendant is wrong to claim that the applicants are not individually distinguished, within the meaning of the *Plaumann* case-law cited at paragraph 69 above, by the contested decision.

78 So far as, first of all, BUPA Ireland is concerned, it is common ground that even though the RES is in theory intended to apply to all insurers active on the Irish PMI market, BUPA Ireland is the VHI's main competitor on the Irish PMI market, on which the VHI occupies a dominant position, and, moreover, that the application of the RES would necessarily give rise, initially, to RES payments being made

by BUPA Ireland for the sole benefit of the VHI, through the fund administered by the HIA. In those circumstances, the contested decision not only substantially affects BUPA Ireland in its competitive position on the Irish PMI market but is also aimed at BUPA Ireland, at the time of its adoption, as the only net contributor to the fund set up for the RES. In that regard, the defendant's argument that the circle of persons concerned by the RES and, accordingly, the scope of the contested decision also extends to the SMPF, cannot be upheld, *a fortiori* because there is no suggestion that that fact is capable of altering the burden imposed on BUPA Ireland as the only net contributor. It should be added that it is on account of the fear of such a substantial effect on its competitive situation, even to the point of having to leave the Irish PMI market, that BUPA Ireland lodged a complaint with the Commission and that it was the only interested third party to have played an active part, following a dispute lasting approximately three years, in the procedure leading to the adoption of the contested decision, the content of which it determined, at least in part (see, in particular, paragraphs 33 to 35 and 42 to 49 of the contested decision).

79 The Court concludes from the foregoing that BUPA Ireland has thus established the existence of a set of facts constituting a special situation which distinguishes it, from the viewpoint of the contested decision, from any other economic operator (see, to that effect, judgment of 16 May 1991 in *Extramet Industrie* v *Council*, paragraph 64 above, paragraph 17). It follows that the contested decision distinguishes BUPA Ireland as an addressee.

80 As regards, next, whether the first and second applicants are individually affected, it is sufficient to note that the considerations set out at paragraphs 78 and 79 above apply *mutatis mutandis*, since, at the time of lodging the present application and until the present, those applicants, together with BUPA Ireland, formed a group of undertakings in which the first applicant, British United Provident Association Ltd, wholly controls its subsidiaries BUPA Insurance Ltd (the second applicant) and BUPA Ireland (the third applicant) (see, by analogy, Case T-112/97 *Monsanto* v *Commission* [1999] ECR II-1277, paragraphs 57 and 58, a point not taken in the appeal in Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1).

(b) Whether the applicants were directly concerned

81 As to the issue of direct concern raised by the defendant, it has consistently been held that the contested measure must directly produce effects on the legal situation of the person concerned and its implementation must be purely automatic and follow solely from the Community rules, without the application of other intermediate measures. In the case of a decision authorising aid, the same applies where the possibility that the national authorities will decide not to grant the aid authorised by the contested Commission decision is purely theoretical and there is no doubt that those authorities intend to act in that way (see, to that effect, *Mitteldeutsche Erdöl-Raffinerie* v *Commission*, paragraph 65 above, paragraphs 47 and 48; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraphs 60 and 61; and Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraphs 45 and 46; see also Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraphs 43 and 44).

82 In the present case, it follows from the events preceding the adoption of the contested decision, and in particular from the steps taken following the liberalisation of the Irish PMI market, including the setting-up of the HIA (see paragraph 18 et seq. above), that the Irish authorities firmly intended to implement the RES, the mechanism of which was rediscussed and revised on a number of occasions, the only questions that remain open being the precise date on which the RES would become applicable and the RES payments commence together with the determination of the amounts of those payments. Therefore, at the time of adoption of the contested decision, the possibility that the Irish authorities would decide not to implement the RES was purely theoretical, as the delay in implementing it was attributable solely to the actions brought by the applicants before the High Court against the implementing measures provided for in the relevant national legislation.

83 Consequently, it is appropriate to reject the defendant's argument that the adoption of the contested decision did not necessarily have as a consequence the application of the RES, on the ground that the Irish authorities had to take certain intermediate measures that were amenable to appeal.

84 It follows that the applicants are directly and individually concerned, within the meaning of the fourth paragraph of Article 230 EC, by the contested decision and that the application must be declared admissible in its entirety.

85 The plea of inadmissibility raised by the defendant must therefore be rejected.

II — *Substance*

A — *Preliminary observation*

86 The applicants raise seven pleas in law in support of their application, namely, first, misapplication of Article 87(1) EC; second, misapplication of Article 86(2) EC; third, an error of law in failing to examine the legality of the RES under Article 86(1) EC in conjunction with Article 82 EC; fourth, an error of law in failing to examine the legality of the RES under Articles 43 EC and 49 EC; fifth, an error of law and a failure to state reasons regarding the failure to carry out a proper examination of the legality of the RES in the light of the third non-life insurance directive; sixth, unlawful failure to open a formal investigation procedure under Article 88(2) EC; and, seventh, breach of the obligation to state reasons under Article 253 EC.

87 The Court notes, by way of preliminary observation, that the arguments which the parties put forward in connection with the first and second pleas overlap to a significant extent. They raise, in particular, the question of the existence of an SGEI mission and also the question whether the RES is necessary for the purpose of discharging that mission and whether it is proportionate. It is therefore appropriate to begin by setting out the substance of all of those arguments so that they can properly be taken into account in the examination of those two pleas.

B — *First and second pleas*

1. Arguments of the parties

(a) The plea alleging misapplication of Article 87(1) EC

(i) Arguments of the applicants

(1) General observations

88 The applicants submit, by way of preliminary observation, that by their first plea they take exception to Article 1 of the contested decision, which states that the RES 'does not involve State aids in the sense of Article 87(1) EC'. They observe that the defendant puts forward no defence to that plea, so that the decision ought to be annulled on that ground alone.

89 The applicants further observe that the Commission correctly stated, at recital 39 to the contested decision, that in principle the RES satisfies the criteria set out in Article 87(1) EC and could therefore be qualified as State aid. At recitals 61 and 62 to the contested decision, however, the Commission wrongly considered that the RES nevertheless did not constitute State aid within the meaning of that provision because it compensated for SGEI obligations. However, in this case the conditions for financial compensation for SGEI obligations, as recognised by the Court of Justice (*Ferring*, paragraph 41 above, paragraph 27, and Case C-280/00 *Altmark Trans und Regierungspräsidium Magdeburg* [2003] ECR I-7747, '*Altmark*', paragraphs 87 to 93), are not satisfied. In particular, in *Altmark* the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) EC (*Altmark*, paragraph 87). Furthermore, according to the Court of Justice, in that connection four cumulative conditions must be satisfied (*Altmark*, paragraphs 88 to 93; 'the *Altmark* conditions'), and they are not satisfied in this case.

90 In that regard, the defendant's attempt to avoid annulment of the contested decision by relying solely on Article 86(2) EC cannot succeed since the operative part of that decision makes no reference to Article 86(2) EC and the reason stated in that regard, at recital 61 to that decision, is not sufficient. Even to the extent to which the conditions for the application of Article 86(2) EC are equivalent to those applicable to Article 87(1) EC, which the defendant does not dispute, the defendant's argument cannot succeed since it does not in any event demonstrate the existence of an SGEI obligation which would justify the RES or that the RES is proportionate within the meaning of *Altmark* and Article 86(2) EC.

91 In that context, the applicants further claim that, unlike the defendant and the Kingdom of the Netherlands, Ireland and the VHI seek to defend the legality of the contested decision by asserting that the *Altmark* conditions are satisfied.

Under Article 116(3) of the Rules of Procedure, however, interveners must accept the case as they find it at the time of their intervention and thus cannot alter the framework of the dispute (Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraph 70) as defined by the applicants and the defendant in their pleadings. However, since the defendant has failed to submit argument based on Article 87(1) EC, the framework of the dispute at the time of the intervention related only to Article 86(2) EC. In the applicants' submission, it follows that the arguments of Ireland and the VHI concerning Article 87(1) EC must be declared inadmissible.

92 In any event, the defects in the reasoning in the contested decision cannot be cured retroactively in the course of the proceedings by new legal and factual arguments put forward by the interveners (Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraphs 255, 271 and 282; Opinion of Advocate General Fennelly in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, at I-8894, point 70). On that ground, the arguments put forward by Ireland and the VHI must in any event be rejected as unfounded.

93 Last, with respect to Ireland's statement in intervention, the applicants maintain that, under Article 116(4)(b) of the Rules of Procedure and the case-law (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraphs 31 and 34), the substantive arguments in Annexes 4, 7, 9 and 10 to that statement in intervention are admissible only in so far as they are set out in the statement in intervention itself.

94 The applicants maintain that in the present case the four cumulative *Altmark* conditions are not satisfied so far as the RES is concerned. They contend, moreover, that the Commission completely failed to examine the second, third and fourth conditions, after having accepted, without making a proper evaluation, the Irish authorities' position on the first condition.

(2) The first condition: there must be actual and clearly-defined SGEI obligations

95 The applicants refer to the first condition laid down by the Court of Justice in *Altmark* (paragraph 89), namely that the recipient undertaking must actually have public service obligations to discharge, and those obligations must be clearly defined.

96 The applicants maintain that, owing in particular to the close connection between Article 87(1) EC and Article 86(2) EC, the concept of public service obligation used by the Court of Justice is equivalent to that of an SGEI obligation (Opinion of Advocate General Tizzano in *Ferring*, paragraph 41 above, ECR I-9069, points 51 and 60, and Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769, at I-13772). The Commission itself recognised in the contested decision that those two concepts are equivalent. Moreover, the Commission has explained publicly that those two concepts refer to services with special characteristics which the public needs (Commission report on the state of play in the work on the guidelines for State aid and [SGEIs], section 2) which do not benefit specific categories of service users (Commission non-papers on services of general economic interest and State aid, 12 November 2002, p. 21) and which, therefore, have the following common elements: universal service, continuity, quality of service, affordability, as well as user and consumer protection (Commission Green Paper on services of general interest, 21 May 2003, COM(2003) 270 final, paragraph 49).

97 In the applicants' submission, in light of the case-law on SGEI obligations, the conditions mentioned above imply a further essential characteristic, namely that since the service in question is a universal service the provision of the service must be obligatory (Case 172/80 *Züchner* [1981] ECR 2021, paragraph 7; Case C-170/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 48; Case C-242/95 *GT-Link* [1997] ECR I-4449; and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 45).

98 The applicants further maintain that, in light of the specific and limited definition of the concept of an SGEI obligation, while any State regulation which imposes obligations on an undertaking may be regarded as being in the general or public interest, it does not follow that all such obligations are SGEI obligations in the strict sense, for which the State may legitimately compensate the undertakings concerned. In accordance with the case-law and the Commission's practice when taking decisions, a distinction must be drawn between the creation of SGEI obligations and the control and regulation of the activities of undertakings (Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraphs 31 and 32, and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 22; Commission Decision 97/606/EC of 26 June 1997 pursuant to Article [86(3) EC] on the exclusive right to broadcast television advertising in Flanders (OJ 1997 L 244, p. 18); and Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329). In the applicants' submission, if that were not the case and if Member States were not required to respect that precise and limited definition of the concept of an SGEI obligation, they would be able to evade the application of Article 87(1) EC and compensate for all kinds of obligations imposed on undertakings in the public interest.

99 The applicants submit that the concept of an SGEI obligation is a concept of Community law which must be interpreted objectively in the same way as the concept of State aid within the meaning of Article 87(1) EC, of which it forms an integral part (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13, and Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25; and Opinion of Advocate General Jacobs in *GEMO*, paragraph 96 above, point 73). That is confirmed by the case-law according to which the concept of an SGEI within the meaning of Article 86(2) EC is to be interpreted strictly (*GT-Link*, paragraph 97 above, paragraph 50, and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 37), in order to ensure that the Member States cannot easily escape the application of the rules on State aid.

100 Although a Member State is free to determine, in the exercise of its discretion, the way in which it proposes to provide and regulate the provision of an SGEI (Report

from the Commission on the state of play in the work on the guidelines for State aid and SGEIs, section 4.1; Commission Decision SG (99) D/10201 of 14 December 1999 on State aid No NN 88/98 — United Kingdom), the qualification of an SGEI obligation is subject to strict control by the Community institutions (Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 30).

101 In that regard, the applicants dispute the assertions of the defendant and the interveners that, first, the concept and application of an SGEI obligation are subject to control only for manifest error and, second, the definition of the scope of that concept is essentially a matter within the discretion of the Member States. Moreover, the case-law on which the interveners rely (Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 104, and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 137) confirms, on the contrary, the applicants' argument. Last, the applicants maintain that the interveners put forward no argument capable of calling in question the Community definition of the concept of an SGEI obligation.

102 The applicants contend that in the present case the first *Altmark* condition is not satisfied because there are no SGEI obligations connected with the RES. The Commission's finding to the contrary at recital 49 to the contested decision is incorrect in two respects.

103 The applicants first of all maintain that the Commission did not undertake an assessment of whether the SGEI obligations invoked by the Irish authorities, namely the requirements of open enrolment, community rating, lifetime cover and minimum benefits ('the PMI obligations') actually and objectively constituted SGEI obligations. In reality, the Commission avoided that question by incorrectly taking the view that the matter came within the competence of the Irish authorities and that its control

was limited to a control of manifest errors on the part of those authorities in the exercise of their competence. By adopting that approach, the Commission ignored the need for a strict and objective Community definition of SGEI obligations and unlawfully delegated to the Irish authorities the power to define what constituted such obligations. The Commission thus failed to exercise the degree of control required by Article 87(1) EC.

104 The applicants further maintain that the PMI obligations are not in the nature of an SGEI obligation, for the reasons set out below.

105 First, in accordance with the case-law and the Commission's practice in taking decisions, the PMI obligations are simply normal regulatory obligations attached to the authorisation to provide a service and to the control by the public authorities of the activity of the operators concerned. The regulations in issue do not impose on the operators concerned the obligation to provide PMI services, still less a minimum level of those services or a universal service. It is merely a matter of an authorisation to provide such services according to market demand subject to the condition that the operator concerned observes the principles of open enrolment, community rating, lifetime cover and minimum benefits. That is also true for the VHI, which, with the exception of Plan P, is not subject to any regulatory obligation to provide specific PMI services.

106 Second, the Commission's assertion that the PMI obligations seek to ensure a certain level of PMI services for all persons living in Ireland, at an affordable price and on similar quality conditions, is manifestly incorrect, as elderly persons and those suffering from pre-existing diseases may be excluded from PMI services. In that regard, the Commission is incorrect to state that the 'open enrolment' rule avoids the exclusion of those persons. On the contrary, PMI insurers are entitled to exclude persons over the age of 65, or approximately 8% of the Irish population, who are seeking cover for the first time (recital 34, third indent, to the contested decision)

and in practice the VHI and BUPA Ireland do not offer insurance policies to such persons. As regards persons suffering from pre-existing diseases, moreover, PMI insurers are entitled to limit cover by imposing 'waiting periods' of 5 to 10 years, depending on the age of the persons concerned, before they are covered, a possibility of which both VHI — except for Plan P — and BUPA Ireland make use in practice. Last, according to current figures, approximately 49% of the Irish population do not benefit from PMI services. Furthermore, the regulations on minimum benefits provide for such a low level of cover that, in practice, they are immaterial, since the level specified is significantly exceeded even by the most basic plans on the market, such as the VHI's 'Plan A'.

107 Third, the applicants deny that the PMI obligations ensure uniformly affordable rates. Even for those persons for whom those services are available and who can thus benefit from community rating, rates, with the exception of those for Plan P, are exclusively fixed by market forces. Thus, waivers or significant premium reductions are available, in particular for persons under the age of 18 or aged between 18 and 23. Accordingly, community rating allows only rates freely determined by insurers on the basis of market conditions to be made uniform.

108 Fourth, the PMI obligations do not in any event display the characteristics of an SGEI obligation. Far from corresponding to a universal service created in the general interest, such as a service that replaces the public social security system, the PMI services in issue are merely optional financial services designed to provide cover that is complementary or supplementary to the universal service. In that regard, the present case must be distinguished from that in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, concerning the German health insurance system, which is compulsory for the great majority of German employees and which takes the place of the universal (public) healthcare provision (Opinion of Advocate General Jacobs in *AOK-Bundesverband and Others*, at [2004] ECR I-2495, and judgment in *Albany*, paragraph 101 above).

The applicants further submit that the present case bears more resemblance to the situation in *Danske Busvognmænd* v *Commission*, paragraph 68 above (paragraphs 90 to 92), where the Court of First Instance held that the transport service in question could not be characterised as an SGEI because the transport activities were open to competition between the various transport undertakings which were active in the market and were all in the same situation.

109 In that regard, the applicants dispute the defendant's argument, raised essentially in the defence (paragraphs 13 and 35 to 43) and not in the contested decision, that it is the provision of PMI services — rather than PMI obligations — that constitutes the veritable SGEI mission and, without the RES, the Irish PMI market could not operate in economically acceptable conditions. That, in the applicant's contention, is not the case, because of the lack of any obligations on BUPA Ireland or the VHI, with the exception of 'Plan P', to supply PMI services. In reality, the contested decision seeks only to implement the PMI obligations which it incorrectly qualifies as SGEI obligations. Furthermore, although the PMI services, as optional financial services, provide cover that ensures faster and better access to healthcare, they do not respond to a need and, as the Comité européen des assurances states, are voluntary and not in substitution of the State system. If the Commission had none the less wished to establish that the rules governing the PMI services were themselves SGEI obligations, a question which has no relevance to the present case, it ought to have demonstrated that the rules in question were in the nature of an SGEI obligation, which it failed to do.

110 In that context, the defendant's attempt in the rejoinder to remedy its contradictory approach by stating that it is in fact the provision of PMI services as such or a combination of the provision of those services and the PMI obligations that constitutes the relevant SGEI cannot succeed. The only obligations defined by the contested decision which are deemed to be SGEI obligations applicable to PMI insurers and the costs of which are capable of being compensated within the meaning of *Altmark* are the PMI obligations and not the PMI services themselves, which no insurer is obliged to provide. That position is also supported by the VHI and by Ireland.

111 Last, at the hearing the applicants further submitted that, as confirmed by the judgment of the High Court, the Commission based its reasoning in the contested decision on a misunderstanding of the principle of community rating and, accordingly, on irrelevant facts, as it referred only to the community rating obligation for individual PMI contracts within the meaning of section 7 of the Health Insurance Act, 1994, as amended, whereas the justification put forward by Ireland with respect to the need for the compensation provided for by the RES was to be found in the principle of community rating applicable to the whole of the Irish PMI market within the meaning of section 12 of that Act.

(3) The second condition, relating to objective and transparent parameters for the calculation of the compensation

112 The applicants recall the second *Altmark* condition (paragraph 90), namely that the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. In the applicants' submission, the determination of the compensation on the basis of strict, transparent, objective and pre-determined criteria is an essential guarantee for competitors and potential competitors of the undertaking in receipt of the subsidy and enables them better to plan their commercial decisions with knowledge of the extent of the compensation which their rivals will receive (*Altmark*, paragraph 59).

113 The applicants maintain that this second condition is not satisfied either, owing to the absence of any objective parameters for calculating the compensation for the alleged SGEI obligations. According to the applicants, the parameters used when the RES payments are determined are neither objective nor transparent and depend on the exercise of a broad discretion by the HIA and the Minister for Health.

114 First, the HIA has considerable latitude in determining the risk differential between PMI insurers on the basis of the so-called 'market equalisation percentage' formula, which is liable to influence the amount of the RES payments. That percentage has first to be determined according to the age and sex profile of the persons covered by each PMI insurer, and is liable to be adjusted by the HIA to reflect the extent to which those persons actually make use of the health services (Article 10 of the RES; RES guide, page 14). That adjustment factor, know as the 'health status weight', is defined in the RES as a percentage which the HIA 'may from time to time determine' (paragraph 1 of the Second Schedule to the RES) and which may be between 0 and 50%. Moreover, the Commission explicitly recognises that the HIA 'has the power to determine the extent to which this factor is taken into account, within prescribed parameters, subject to the HIA having established that this is warranted by circumstances relating to the differences in risk profiles between [PMI] insurers and is in the best overall interests of health insurance companies'.

115 Second, the HIA is required to report the deemed risk differential to the Minister for Health but has a discretion as to whether or not to recommend the commencement of risk equalisation if the differential is between 2 and 10% (Article 10(4) of the RES), a discretion which is also expressly recognised by the Commission. Third, the Minister for Health has a discretion as to whether to accept the HIA's recommendation where the deemed risk differential is between 2 and 10%. Even if the deemed risk differential exceeds 10%, giving rise to the presumption that risk equalisation should be commenced, the Minister for Health could still exercise his discretion by considering whether there are good reasons for not commencing risk equalisation (Article 10(6) and (7) of the RES). Fourth, in the event of a decision activating the RES, the risk equalisation commencement day is also determined at the discretion of the Minister for Health (Article 13 of the RES). Fifth, the calculation of RES payments is carried out by the HIA, on a discretionary basis, on the basis of the further submission of returns by the insurers, taking into account the deemed risk differential or the 'market equalisation percentage' determined, where appropriate, after application of the 'health status weight' adjustment factor.

116 The applicants conclude from the foregoing that the decision to activate the RES and determination of the amount of the RES payments to be made are not based on objective and transparent factors within the meaning of the second *Altmark* condition but depend largely on the discretion of the Irish authorities. That is confirmed by the three reports adopted by the HIA since 2003 in which it found risk differentials of between 3 and 10% and concluded that there was no evidence of past or imminent instability on the market. For reasons unknown to the applicants, the third report none the less recommended commencement of RES payments. Contrary to the view expressed by Ireland and the VHI, that lack of objectivity and transparency cannot be remedied by the fact that the parameters for the operation of the RES were 'clearly set out' and published in advance, since the parameters themselves include a number of inbuilt elements of discretion. In the absence of objective criteria relating to market disequilibrium the HIA and the Minister for Health are in reality in a position to base their assessments on other matters, a situation which the second *Altmark* condition specifically seeks to avoid.

(4) The third condition: the compensation must be strictly necessary

117 The applicants refer to the third *Altmark* condition (paragraph 92), namely that the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. In the applicants' submission, that condition requires that the compensation be a strict *quid pro quo* for the discharge of the SGEI obligations in question (Opinion of Advocate General Jacobs in *GEMO*, paragraph 96 above, point 119). That implies, at the very least, identification of the relevant SGEIs, identification of the costs inherent in those obligations and of the fixed and variable costs, including an appropriate allocation of the general overheads to the SGEI obligations, quantification of the revenues received by the beneficiary undertaking for the performance of the SGEI obligations, determination of a reasonable profit for the performance of the SGEI obligations

and, last, a guarantee that the financial benefit provided by the aid does not exceed the additional costs attributable to the SGEI obligation, taking into account the relevant receipts and a reasonable profit.

118 The applicants contend that in the present case that condition, which is equivalent to the criterion of proportionality within the meaning of Article 86(2) EC, is not satisfied either. On the one hand, the Commission did not examine the relevant elements referred to at paragraph 117 above and its failure to do so constitutes an error of law and an error affecting the reasoning of the contested decision concerning the application of the proportionality test. On the other hand, since the Commission has no discretion in applying Article 87 EC, it cannot reasonably rely on the judgment in Joined Cases T-125/96 and T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427, which concerns the restricted review of the discretion of the Community legislature in the sphere of the common agricultural policy.

119 In any event, even if the Commission had carried out such an examination, the RES would not satisfy the strict *quid pro quo* condition, essentially for three reasons.

120 First, even on the assumption that the PMI obligations could, at least in part, be classified as SGEI obligations, they would not create a financial burden for PMI insurers, including the VHI. The applicants submit that, as is apparent from section 3 of the report prepared by the consultants NERA, as annexed to the application ('the NERA report'), PMI obligations do not prevent insurers from safeguarding their profitability, in particular by adopting commercial measures. Thus, they can protect themselves against bad risks by refusing new members over the age of 65 or imposing long waiting periods for people who are ill. Similarly, PMI insurers are able to adjust their

contractual terms and to differentiate premiums to take account of the varied risks they must bear by virtue of their PMI obligations. They can therefore segment the market according to the risk insured and offset the higher expenses associated with bad risks by charging higher premiums.

121 Second, even on the assumption that the PMI obligations entail costs, the RES would not be capable of compensating for them. The RES payments are not in any way related to the PMI obligations and any costs which those obligations might generate, but are calculated on the basis of the difference in deemed risk profiles between PMI insurers, as measured by the 'market equalisation percentage'. However, the calculation of that risk differential likewise bears no relation to the calculation of the costs attributable to the PMI obligations for which the RES is intended to compensate. Such an exercise would involve in particular separating those costs from the costs of other activities and quantifying them, measuring the relevant revenues and determining reasonable profits. The applicants contend that the defendant's argument in the defence confirms that the RES is in reality intended to compensate for the cost of providing the PMI services as such. However, in the light of the contested decision, those services do not in any event constitute SGEIs. An abstract relationship between the PMI obligations and the costs of each PMI insurer is not sufficient and does not meet the requirement that the RES be strictly limited to any (clearly quantified) costs arising from the PMI obligations. Last, Ireland's argument that the specific financial burden associated with PMI obligations might consist in 'the difference between the market community rate and the cost of the insurer's own claims' cannot succeed, in particular because there is no link with the actual costs occasioned by the settlement of claims.

122 Third, the RES is not even capable of compensating for the 'bad risks' of PMI insurers. On the contrary, as stated in section 4.2 of the NERA report, the RES does not take account of the premiums and receipts of the PMI insurer. Because of that, the RES ignores the fact that extra claims costs of higher-risk members are in fact offset by higher premiums. If those revenues are not taken into account, it is not possible to assess whether 'bad risks' result in a net financial burden for the PMI insurer which merits compensation.

(5) The fourth condition: comparison with an efficient undertaking

123 Last, the applicants refer to the fourth *Altmark* condition (paragraph 93), namely that where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The applicants observe that that condition essentially means that, in the absence of a public procurement procedure, the level of compensation must be determined, according to the criteria set out at paragraph 117 above, by reference to what would have been required by a (hypothetical) efficient undertaking rather than by reference to the subjective costs of a particular undertaking. Furthermore, that quantification exercise concerning the beneficiary undertaking must be accompanied by a comparison with the costs and profits of other undertakings in the sector or with what would reasonably be expected in that regard in conditions of competition. As the Commission correctly asserted in its decision of 3 May 2005 not to raise objections to the risk equalisation scheme and retention of reserves set up by the Netherlands authorities in the health insurance sector, the compensation must be limited to the extraordinary costs of an efficient operator, taking the premiums into account (Commission decision of 3 May 2005 relating to State aid N 541/04 and N 542/04 — Netherlands — Risk equalisation scheme and retention of reserves, OJ 2005 C 324, p. 28; 'the Netherlands RES decision').

124 The applicants maintain that the fourth *Altmark* condition is not satisfied in this case, as there was no comparison with an efficient undertaking. They contend that the Commission did not even consider whether the costs incurred by the VHI in complying with the PMI obligations were comparable to those which would have

been incurred by an efficient operator. For the purpose of estimating the risk differential, the RES provides neither a reference point for assessing efficiency nor a mechanism for comparing the pricing, contract design and risk management practices of the PMI insurers by reference to those of an efficient operator. The applicants further submit that in the decision on the Netherlands RES, the Commission specifically stated that the compensation paid in that case did not satisfy the fourth *Altmark* condition.

(ii) Arguments of the defendant

125 The defendant makes the preliminary observation that the contested decision relies first on the case-law that was current at the date of its adoption, notably the judgment in *Ferring*, paragraph 41 above, to support the conclusion that the RES is not State aid. Since the adoption of that decision, however, the Court of Justice, in *Altmark*, has refined the conditions laid down in *Ferring*. However, according to the defendant, the implications of *Altmark* are not determinative of the present proceedings, since the contested decision also relies on Article 86(2) EC when it concludes that even if the RES does constitute State aid it is none the less compatible with the common market. The defendant states that, for that reason, it will concentrate its submissions on Article 86(2) EC and will submit no argument in respect of the plea alleging infringement of Article 87(1) EC.

(iii) Arguments of Ireland and of the VHI

126 Ireland maintains that the reasoning of the Court of Justice in *Altmark* is essentially that followed in Case 240/83 *ADBHU* [1985] ECR 531, paragraphs 3 and 18),

and *Ferring*, paragraph 41 above (paragraph 27). Ireland and the VHI are also of the opinion that, contrary to the applicants' contention, the RES and the Commission's findings in that regard in the contested decision satisfy all the conditions laid down in *Altmark*.

(iv) Arguments of the Kingdom of the Netherlands

127 Like the defendant, the Kingdom of the Netherlands observes that the present dispute turns essentially on the interpretation of Article 86(2) EC and that, accordingly, it intends to confine its intervention to the interpretation of that provision and in particular of the concept of SGEI and the conditions of its application to an undertaking.

(b) The plea alleging misapplication of Article 86(2) EC

(i) Arguments of the applicants

(1) Preliminary observation

128 The applicants maintain that the Commission's finding that in any event any aid element in the RES can be regarded as compatible with the common market pursuant to Article 86(2) EC is not reflected in the operative part of the contested decision and is not supported by a sufficient statement of reasons in that decision. Furthermore,

that finding is manifestly wrong in law. In the applicants' submission, the RES and the associated PMI obligations do not meet the requirements of that provision.

(2) The absence of SGEI obligations

129 In the first place, the applicants submit, as they did in connection with the first plea (see paragraphs 95 to 100 above), that the PMI obligations do not fulfil the strict and objective conditions which SGEI obligations must satisfy under Article 86(2) EC, and examination of which was unlawfully delegated by the Commission to the Irish authorities.

(3) The lack of an act of entrustment of an SGEI mission

130 In the second place, according to the applicants, Article 86(2) EC requires that undertakings be 'entrusted' with the operation of SGEIs, which implies that an obligation to provide the services in question is imposed by the public authorities. However, as the Commission recognises in its own practice in taking decisions, a mere granting of authorisation to provide such services is not sufficient (Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article [82 CE] (IV/29.839 — GVL), OJ 1981 L 370, p. 49, paragraph 66; Decision 97/606, paragraph 14; and decision on the Netherlands RES). That condition takes account, in particular, of the universal nature of the SGEI in question, the provision of which must be sheltered only from market forces. However, in this case, with the exception of the requirement imposed on the VHI to offer Plan P, there is no real binding universal service task, within the meaning of Article 86(2) EC, associated with the PMI obligations, but only an authorisation to the operators concerned to provide

certain services in compliance with certain regulatory conditions. In that regard, the Kingdom of the Netherlands' attempt to remedy, in the course of the proceedings, the failure in the contested decision to examine the entrustment of an SGEI mission is bound to fail. In particular, there is no legal basis for the Kingdom of the Netherlands' view that an explicit obligation to perform an SGEI mission is not necessary where several undertakings are entrusted with that mission and that it is sufficient if there is a system of authorisation or control. In the applicants' opinion, on the contrary, compliance with Article 86(2) EC necessarily presupposes the entrustment of an SGEI mission by an official act, which is missing in this case. They refer in that regard to the draft Commission decision on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of [SGEIs], to the draft Community framework for State aid in the form of public service compensation and to the Netherlands RES decision (section 4.2.1).

(4) The lack of necessity and of proportionality of the RES

Preliminary observations

131 In the third place, according to the applicants, in the light of Article 86(2) EC, the application of the EC Treaty competition rules must obstruct the performance of SGEI missions which have been entrusted to the undertaking. Where there is a grant of special rights or financial assistance to an undertaking, the case-law requires that such measures enable the undertaking in question to operate under economically acceptable conditions (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16; Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 107; Joined Cases C-147/97 and C-148/97 *Deutsche Post* [2000] ECR I-825, paragraph 49; and Opinion of Advocate General Stix-Hackl in Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, at I-14247, point 102 and footnote 76). That implies

a requirement of both necessity and proportionality regarding the economic viability of providing the SGEI in question without thereby seeking to protect the entrusted undertakings as such (Commission Decision 97/310/EC of 12 February 1997 concerning the grant to Portugal of further time for the implementation of Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets, OJ 1997 L 133, p. 19, paragraph 10; Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, paragraphs 8 and 9). That requirement of proportionality is, moreover, very similar, or indeed identical, to the criterion of the strict *quid pro quo* within the meaning of the third *Altmark* condition for compensation for SGEI obligations, in that it limits the subsidy to the amount necessary to offset any losses which might be incurred in rendering the universal service in question (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraphs 57 and 58).

The lack of necessity for the RES

132 The applicants maintain that the Commission has not demonstrated the necessity for the RES. In that regard, they claim that the Commission made errors affecting the reasoning on which the contested decision is based and errors of fact.

133 As regards the errors affecting the reasoning on which the contested decision is based, the applicants submit that the Commission wrongly concluded that the RES was necessary to ensure the application of the principles of community rating, lifetime cover and open enrolment. That conclusion is contradicted by the facts set out in the contested decision itself, which explains that the relevant market, since its liberation and the entry of BUPA Ireland, has not encountered instability problems. In that regard, the mere possibility of a danger of risk selection — a danger that is theoretical, speculative, remote and not quantified by reference to economic facts — is not in any event sufficient to demonstrate such instability.

134 So far as the errors of fact are concerned, the applicants contend that the Commission's findings regarding the possibility and consequences of such risk selection are manifestly erroneous. Contrary to the arguments of the Irish authorities set out at recital 31 to the contested decision, there is no incentive for PMI insurers to 'cherry pick' the good risks and reject the bad risks. On the contrary, since those insurers offer a range of services at different premiums and are able to adapt their contractual terms according to the risk covered, they are able, independently of their risk profile, to offset the highest risks by raising premiums and by tailored plans. Accordingly, there is no financial benefit to be drawn from a low risk portfolio of members compared with a high risk portfolio. Similarly, contrary to the Commission's assertion at recital 50 to the contested decision, there is no passive risk selection resulting in an alleged greater tendency for individuals to switch PMI insurer. In that regard, the reference to the seven economic studies, not mentioned in the contested decision and of which the applicants were informed only belatedly, is not sufficient to corroborate the Commission's conclusions and the Commission has not been able to provide further support for them in its defence. Only one of those studies, which is irrelevant because it relates to the Swiss market, mentions consumers' willingness to switch PMI insurers and the Commission failed to take into consideration a relevant study relating to the Irish market (The Private Health Insurance Market in Ireland, March 2003, prepared by Amárach Consulting for the HIA; 'the Amárach report'), relied on by the applicants in the course of the administrative procedure, according to which members in the 18 to 34 age category were less likely to consider switching PMI insurers than members in the 35 to 64 age category.

135 In that context, the applicants reject the Commission's view that the asymmetry of the risk profiles, like that between BUPA Ireland and the VHI concerning the age of members, is accounted for by risk selection. Those differences are the result of two other factors, namely, first, customer inertia and unwillingness to switch between PMI insurers and, second, the VHI's own pricing strategy. As regards the first factor, the applicants claim to have shown, in the administrative procedure, that, in view of the need to offer PMI services at a very wide price differential in order to encourage members to switch PMI insurer, a new entrant to the market would necessarily have to target 'new' customers who are, by definition, younger customers. As regards the

second factor, the applicants claim that the premium levels offered by the VHI to high risk individuals do not cover average claim costs. In that connection, the VHI is selling at a loss and BUPA Ireland is thus unable to compete for generally older customers.

136 Furthermore, the Commission erroneously concluded, solely on the basis of asymmetry of risk profiles and without relevant factual and economic evidence, that there might be market instability. However, both the VHI and BUPA Ireland are perfectly capable of attracting low risk younger subscribers, and in fact do so. The applicants maintain that the average age of members joining the VHI is lower than the average age of those joining BUPA Ireland. Moreover, the high costs involved when a customer switches from one PMI insurer to the other have a stabilising effect, which contradicts the 'spiralling down' theory defended by the Commission. On the contrary, the RES, for its part, is apt to have a significant effect on the stability of the Irish PMI market because it results in higher premiums for young customers, the elimination of BUPA Ireland from that market and increased barriers to entry. Furthermore, the argument put forward by the defendant in the defence, but not in the contested decision, that the VHI's solvency ratios were far from satisfactory and that further deterioration of its finances was not acceptable is purely speculative and not supported by evidence, and is even contradicted by the contested decision since that decision concludes that there had been no market instability in the past. The applicants add that the absence of any imminent and future market instability is expressly confirmed by the three reports submitted by the HIA since 2003 (see paragraph 116 above), each of which concluded that there was no relevant evidence in that regard. The arguments to the contrary put forward by Ireland in that regard are merely speculative or irrelevant because they relate to healthcare schemes in other countries. In any event, those new arguments are not sufficient to justify the RES, since the aim of Article 86(2) EC is to preserve SGEIs as such and not specific undertakings (*Commission* v *Netherlands*, paragraph 99 above, paragraph 43).

The lack of proportionality of the RES

137 The applicants also maintain that the Commission erroneously concluded that the RES was proportionate for the purposes of Article 86(2) EC. In fact, the Commission has not shown that the RES payments would not exceed the amount necessary to compensate the VHI for the costs incurred pursuant to its PMI obligations.

138 In that regard, the five arguments put forward by the Commission are irrelevant. First, the 2% risk differential required in order to activate the RES has no practical effect because the risk profile is calculated on the basis of age and sex and BUPA Ireland inevitably has a younger age profile than that of the VHI, so that that threshold is inevitably exceeded. Second, the Commission's assertion that all payments in favour of the policy holders, in particular those in the 'luxury markets', are not equalised is manifestly incorrect. On the contrary, the 'maximum equalised payments' provisions in principle cover all PMI policies, the only exclusion relating to the very highest levels of claims. Third, contrary to the Commission's assertion that the RES takes into account the PMI insurers' average claim cost so as to enable those insurers to keep the benefit of their own efficiencies, the taking into account of insurers' actual costs gives rise to larger payments to the PMI insurers with the highest costs and, therefore, provides incentives for inefficiency. Thus, contrary to the VHI's assertions, the RES permits compensation to be paid for costs which would not be incurred by an efficient PMI insurer. Fourth, the Commission relies, wrongly, on the limitation of the 'health status weight' to 50%, whereas that aspect is linked neither to the PMI obligations nor to justification of the RES. Moreover, that weighting also gives rise to inefficiencies because it is actual costs rather than the costs incurred by an efficient operator that are taken into account. Fifth, with regard to the alleged exclusion from the RES of new entrants to the market for the first three years of their activity on the Irish PMI market, the applicants contend that this cannot mitigate the highly deterrent effect of the RES for those operators. Sixth, in contrast to the Netherlands RES, the RES at issue in this case does not provide for any corrective mechanism to avoid overcompensation.

139 Last, at the hearing the applicants further submitted that, contrary to the defendant's and Ireland's assertion, the criterion of the efficiency of the operator in receipt of aid should be applied, in the framework of the examination of proportionality under Article 86(2) EC, in the same way as in the framework of the analysis of the fourth *Altmark* condition relating to the existence of aid within the meaning of Article 87(1) EC. On the one hand, that assessment of efficiency is inherent in the assessment of the criterion of proportionality also provided for by Article 86(2) EC, which requires that the compensation be limited to what is necessary from the point of view of an efficient operator. On the other hand, that requirement follows from the case-law to the effect that Article 86(2) is not intended to protect specific operators. Furthermore, the failure to take the criterion of efficiency into account in that context runs counter to the principle of an internal market with undistorted competition and, accordingly to the Community interest. As regards any lack of efficiency being passed on to all PMI insurers as a result of the 'zero sum adjustment' factor being taken into account in the calculation of the RES payments, the applicants submitted however that their complaint did not relate to that aspect and acknowledged that the amounts potentially concerned in the RES payments are negligible. Last, the applicants also stated at the hearing that any inefficiencies linked with overconsumption, or the fact that a PMI insurer may provide its members with an incentive to undergo treatment that is not medically necessary and to claim the related costs, were not addressed either during the procedure leading to the adoption of the contested decision or during the judicial proceedings and that their complaint focused on the need for a comparison between the PMI insurer in receipt of RES payments and an efficient operator.

(5) The effect on the development of trade

140 Last, in the applicants' submission, Article 86(2) requires that derogation from the Treaty competition rules must not affect the development of trade to such an extent as would be contrary to the interests of the Community. However, contrary to the requirements established in the case-law (*Danske Busvognmænd* v *Commission*, paragraph 68 above, paragraph 96), in the contested decision the Commission neither examined nor demonstrated the absence of adverse effects on the development of trade.

(ii) Arguments of the defendant

(1) Preliminary observation

141 The defendant contends at the outset that the complaint alleging failure to mention Article 86(2) EC in the operative part of the decision, which is raised in the reply, is inadmissible under Article 48(2) of the Rules of Procedure and in any event is unfounded and must therefore be rejected.

(2) Competence to define SGEI obligations

142 As for the question of the characterisation of the PMI obligations as SGEI obligations, the defendant first of all rejects the applicants' argument that that characterisation falls primarily within the competence of the Community institutions and entails the interpretation of an objective and specific concept of Community law. On the contrary, it is apparent from the Commission's practice in taking decisions that it is essentially for the Member States to define what they consider to be SGEIs and that the Commission's control in that respect is limited to a control of manifest errors.

143 The defendant contends that recitals 44, 48 and 49 to the contested decision are wholly compatible with that premiss and display no error.

(3) The characterisation of the PMI obligations as SGEI obligations

144 As regards the characterisation of the PMI obligations as SGEI obligations, within the meaning of Article 86(2) EC, the defendant observes that the contested decision

sets out, at recitals 44 to 46, a number of considerations militating in favour of that characterisation, such as those relating to recognition of the margin of appreciation granted to Member States to designate SGEIs, the limited harmonisation of laws on health insurance and the competence of the Member States for health matters under Article 152 EC. In that regard, the defendant disputes the correctness of the applicants' objections based, first, on the fact that the PMI obligations are in reality simple legal conditions governing the commercial activities of PMI insurers and imposed in the public interest, second, on the fact that there is no guarantee of a minimum PMI level for all at an affordable price, and, third, on the fact that the PMI services do not replace the social security system.

(4) The imposition of SGEI obligations on PMI insurers

145 According to the defendant, the applicants are wrong to claim that there must be legislation requiring the VHI and BUPA Ireland to provide PMI services, whereas, according to the case-law, it is sufficient for an operator to be required to observe certain terms stipulated in a concession granted to it (Case C-159/94 *Commission* v *France* [1997] ECR I-5815). In this case, the Health Insurance Act 1994 requires PMI insurers to be registered and to observe the PMI obligations, failing which they may be removed from the register. That situation is similar to the one giving rise to the *Ferring* judgment, paragraph 41 above.

(5) The necessity of the RES

146 With regard to the necessity of the RES, the applicant observes that Member States may have regard to objectives pertaining to their national policy when assigning SGEIs. Under the case-law (*Albany*, paragraph 101 above, paragraphs 107 to 111),

the relevant question is not whether the RES responds to some absolute standard of necessity, but rather whether the contested decision is manifestly in error in finding that the RES is necessary in the sense that the absence of the RES might make it impossible for the Irish PMI market to operate under economically acceptable conditions. Therefore, the necessity of the RES must be assessed by reference to what is economically acceptable and not to what is indispensable.

147 As for the danger of active risk selection, the defendant asserts, in essence, that compliance with PMI obligations, such as open enrolment and community rating, necessarily encourages PMI insurers to engage in active risk selection and to reduce the number of high-risk policy-holders. Furthermore, the defendant contends that the contested decision does not claim that the applicants' entry on to the Irish PMI market will inevitably lead to instability on that market, but is based on the observation that there may be risk selection, leading to instability. That is sufficient in the light of the *Albany* judgment, paragraph 101 above, and of the restricted degree of review which the Court is required to exercise over the necessity criterion.

(6) The proportionality of the RES

148 As regards the proportionality of the amount of the RES payments by reference to the costs incurred, the defendant observes that it is for the applicants to demonstrate, which they have failed to do, that the Commission made a manifest error of assessment in accepting the proportionality of the RES system (*Boehringer* v *Council and Commission*, paragraph 118 above, paragraph 74 et seq.). In light of the discretion left to the Member States both in defining an SGEI and in determining the method of calculating the compensation for the SGEI obligations, within the meaning of Article 86(2) EC, the applicants ought to have shown that the RES was manifestly disproportionate as a means of ensuring the functioning of the Irish PMI market under economically acceptable conditions (Opinion of Advocate General Jacobs in *AOK-Bundesverband and Others*, paragraph 108 above, points 95 to 101). It follows

from the case-law that, while the Member State, when it invokes Article 86(2) EC, must 'demonstrate that the conditions which are laid down by that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions' (*Commission* v *Netherlands*, paragraph 99 above, paragraph 58). The applicants have failed to demonstrate that that is the case.

149 The defendant therefore submits that the present plea must be rejected.

(iii) Arguments of Ireland and of the Kingdom of the Netherlands

150 Ireland adopts the argument developed by the Commission in support of the present plea.

151 The Kingdom of the Netherlands submits that in the present case the PMI obligations fulfil the conditions which must be satisfied by the SGEI obligations for the purposes of Article 86(2) EC.

2. Findings of the Court

(a) The admissibility of the arguments put forward by Ireland and the VHI with respect to the first plea

152 It is appropriate to examine first of all the applicants' argument that the arguments put forward by Ireland and by the VHI against the first plea alleging infringement of Article 87(1) EC are inadmissible.

153 In that regard, it must be borne in mind that, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 52 and the case-law there cited, and Case T-237/02 *Technische Glaswerke Ilmenau* v *Commission* [2006] ECR II-5131, paragraph 40).

154 In that regard, the Court notes that the defendant explicitly declined in its defence to submit arguments against the first plea. The fact none the less remains that the first plea, as raised by the applicants, continues to form an integral part of the framework of the present dispute. Second, the mere fact that the defendant declines to comment on that plea cannot restrict the scope of the dispute. Furthermore, far from implying an admission that the plea is well founded, that waiver of the right to reply is based on the argument that the plea is of no relevance to the outcome of the dispute. In

addition, in its defence to the second plea, the defendant in essence disputes the arguments put forward by the applicants in support of their first plea in so far as that argument refers to the criteria for the application of both Article 86(2) EC and Article 87(1) EC, as laid down in *Altmark*. In those circumstances, there is no limitation in this case of the framework of the dispute as regards the first plea that would preclude the interveners from raising arguments in addition to those raised by the defendant. In effect, Ireland and the VHI fully comply with the scope of the first plea by putting forward arguments which entail the satisfaction of the four cumulative criteria resulting from the *Altmark* judgment. Likewise, those arguments do not affect the form of order sought by the defendant, namely that the present application should be dismissed in its entirety, a form of order which Ireland and the VHI continue to support.

155 However, in so far as Ireland seeks to establish, in the context of the first plea, that the RES does not involve State aid within the meaning of Article 87(1) EC because there is no transfer of public resources (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 59 to 61), that argument cannot be upheld, as it is inadmissible under the fourth paragraph of Article 40 of the Statute of the Court of Justice, read in conjunction with Article 116(3) of the Rules of Procedure. Although the defendant does not comment on that point in its written pleadings, that argument contradicts the finding made at recital 39 to the contested decision that the RES does in fact involve the transfer of public resources. Furthermore, that finding was not discussed by the applicants in the application. In effect, the application, taken in conjunction with the defence, determines the framework of the dispute which the applicants must accept in the state in which they find it at the time of their intervention. Consequently, Ireland's argument on that point is inadmissible in that it alters the scope of the subject-matter of the dispute within the meaning of the case-law cited at paragraph 153 above. It must therefore be accepted that, in accordance with the concordant assessment made by the applicants and the defendant, the RES constitutes a system that involves the transfer of public resources within the meaning of Article 87(1) EC.

156 It follows from all of the foregoing considerations that, apart from the argument that there was no transfer of public resources, the arguments put forward by Ireland and the VHI with respect to the first plea are admissible.

(b) The applicability of the Altmark conditions

157 It must be borne in mind that the first plea is based, particularly, on the conditions laid down by the Court of Justice in *Altmark*, paragraph 89 above, a judgment delivered after the contested decision was adopted and the contents of which the Commission could not therefore have been aware of when it adopted its decision. In the contested decision, in order to justify the finding that there was no State aid in this case, the Commission relied primarily on the judgment in *Ferring*, paragraph 41 above (recital 40 to the contested decision).

158 However, it must be stated that the Court of Justice did not place any temporal limitation on the scope of its findings in *Altmark*. In the absence of such a limitation *ratione temporis*, those findings resulting from an interpretation of Article 87(1) EC are therefore fully applicable to the factual and legal situation of the present case as it presented itself to the Commission when it adopted the contested decision.

159 In that connection, it must be borne in mind that the interpretation which the Court of Justice gives of a provision of Community law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force. It follows that the provision as thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgment in question and it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relationships established in good faith. However, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought (see, to that effect and by analogy, Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 66 and 67, and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraphs 34 to 36 and the case-law there cited). The Court considers that those considerations, which derive from case-law dealing, in particular, with the national courts' duty to apply Community law, apply

mutatis mutandis to the Community institutions when they, in turn, are required to implement the provisions of Community law which are subsequently interpreted by the Court of Justice.

160 The Court must therefore examine whether and to what extent the contested decision is compatible with the criteria laid down in *Altmark*, the scope of which, as the applicants too acknowledge, to a large extent overlaps that of the criteria of Article 86(2) EC. However, in light of the particular nature of the SGEI mission relied on in this case, which consists in the obligation for all operators active on the Irish PMI market to comply with a number of obligations characterised by the contested decision as SGEI obligations, and which the Community judicature has thus far never had to consider, it is appropriate to apply the criteria formulated in *Altmark*, in accordance with the spirit and the purpose which prevailed when they were laid down, in a manner adapted to the particular facts of the present case.

(c) The existence of an SGEI mission within the meaning of the first Altmark condition and Article 86(2) EC

(i) Preliminary observation

161 According to the first *Altmark* condition (paragraph 89), the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

162 It is common ground between the parties that the concept of public service obligation referred to in that judgment corresponds to that of the SGEI as designated by the contested decision and that it does not differ from that referred to in Article 86(2) EC.

163 In the context of the first and second pleas, the applicants essentially claimed that the concept of SGEI is a concept of Community law which is strict and objective in nature and compliance with which is subject to unlimited control by the Community institutions and not capable of being delegated to the national authorities. Although the Member States have a certain latitude as to the manner in which they propose to ensure and regulate the provision of an SGEI, the determination of the SGEI depends on a set of objective criteria, such as the universality of the service and its compulsory nature, the presence of which must be verified by the institutions. In the present case, on the other hand, there is no obligation, or indeed mission, of general interest imposed on insurers to provide certain PMI services and those services are not available to the entire Irish population. PMI services are merely optional, indeed 'luxury', financial services and are not intended to replace the public social security system. Furthermore, the contested decision designates only PMI obligations, and not PMI services as such, as SGEIs. However, PMI obligations, although they are adopted in the general interest, are merely ordinary regulatory obligations applying to the exercise and control of the activity of PMI insurers, which, according to the case-law and to the Commission's practice in taking decisions, does not suffice for them to be characterised as SGEIs.

164 The defendant, supported by Ireland, the Kingdom of the Netherlands and the VHI, contends that the definition of SGEIs falls primarily within the competence and discretion of the Member States and that the control which the Community institutions are authorised to carry out in that respect is limited to control of a manifest error of assessment, which is not present in this case. The defendant and Ireland submit that PMI is an important instrument of the social and health policy pursued by Ireland, a matter which, under Article 152 EC, is essentially reserved for the competence of the Member States, and an important supplement to the public health insurance system, although it does not replace that system. In this case, contrary to the applicants' allegations, the PMI services as such, in conjunction with the PMI

obligations, constitute the relevant SGEIs to which the contested decision refers. In particular, the PMI obligations, including open enrolment and community rating, ensure that the PMI services are available to all. In that regard, contrary to the applicants' opinion, it is not necessary that the PMI services be universal and compulsory in the strict sense, that they be free of charge or economically accessible to the whole of the Irish population and that they constitute a substitute for the public social security system. Furthermore, in the opinion of the Kingdom of the Netherlands, in light of the dynamic concept of SGEIs, it is sufficient that the State imposes certain requirements, such as PMI obligations, on all insurers, compliance with those requirements being subject to a system of authorisation and control, in order for them to be able to be characterised as SGEIs. Accordingly, the grant of a special or exclusive right to an undertaking is not necessary.

(ii) The concept of an SGEI mission and the powers to define and control SGEIs

165 It must be made clear that in Community law and for the purposes of applying the EC Treaty competition rules, there is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, either within the meaning of the first *Altmark* condition or within the meaning of Article 86(2) EC.

166 As regards competence to determine the nature and scope of an SGEI mission within the meaning of the Treaty, and also the degree of control that the Community institutions must exercise in that context, it follows from paragraph 22 of the Communication on SGEIs (see paragraph 12 above) and from the case-law of the Court of First

Instance that Member States have a wide discretion to define what they regard as SGEIs and that the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error (see Case T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031, paragraph 216 and the case-law there cited).

167 That prerogative of the Member State concerning the definition of SGEIs is confirmed by the absence of any competence specially attributed to the Commission and by the absence of a precise and complete definition of the concept of SGEI in Community law. The determination of the nature and scope of an SGEI mission in specific spheres of action which either do not fall within the powers of the Community, within the meaning of the first paragraph of Article 5 EC, or are based on only limited or shared Community competence, within the meaning of the second paragraph of that article, remains, in principle, within the competence of the Member States. As the defendant and Ireland maintain, the health sector falls almost exclusively within the competence of the Member States. In that sector, the Community can engage, under Article 152(1) and (5) EC, only in action which is not legally binding, while fully respecting the responsibilities of the Member States for the organisation and provision of health services and medical care. It follows that the determination of SGEI obligations in this context also falls primarily within the competence of the Member States. That division of powers is also reflected, generally, in Article 16 EC, which provides that, given the place occupied by SGEIs in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of the Treaty, are to take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

168 In that regard, the applicants cannot validly rely on Case 41/83 *Italy* v *Commission*, paragraph 100 above (paragraph 30), to demonstrate the need for full and unrestricted control by the Community institutions of the existence of an SGEI mission in the health sector. In effect, that judgment shows that the Member State's power to take action under Article 86(2) EC and, accordingly, its power to define SGEIs is

not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector, such as telecommunications, from the application of the competition rules.

169 Consequently, the control which the Community institutions are authorised to exercise over the use of the discretion of the Member State in determining SGEIs is limited to ascertaining whether there is a manifest error of assessment. In the contested decision (recital 44), the Commission did in fact exercise that control by considering whether Ireland's assessment of the presence of an SGEI mission and of the characterisation of the PMI obligations as SGEI obligations was vitiated by a manifest error.

170 Accordingly, the complaint that the Commission unlawfully delegated to the Irish authorities the definition of the SGEIs in question and that it failed to exercise full and unrestricted control of the assessment made by those authorities with respect to a strict and objective definition of the SGEIs in Community law cannot be upheld.

(iii) The existence of an SGEI mission in the present case

(1) Allocation of the burden of proof

171 It is appropriate to consider whether the Commission was entitled to take the view in the contested decision that the measures notified by Ireland related to an SGEI mission within the meaning of the first *Altmark* condition and Article 86(2) EC.

172 In that regard, the Court notes at the outset that even though the Member State has a wide discretion when determining what it regards as an SGEI, that does not mean that it is not required, when it relies on the existence of and the need to protect an SGEI mission, to ensure that that mission satisfies certain minimum criteria common to every SGEI mission within the meaning of the EC Treaty, as explained in the case-law, and to demonstrate that those criteria are indeed satisfied in the particular case. These are, notably, the presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission. Conversely, the lack of proof by the Member State that those criteria are satisfied, or failure on its part to observe them, may constitute a manifest error of assessment, in which case the Commission is required to make a finding to that effect, failing which the Commission itself makes a manifest error. Furthermore, it follows from the case-law on Article 86(2) EC that the Member State must indicate the reasons why it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities (see, to that effect, *Merci Convenzionali Porto di Genova*, paragraph 97 above, paragraph 27, and *Enirisorse*, paragraph 131 above, paragraphs 33 and 34). In the absence of such reasons, even a marginal review by the Community institutions on the basis of both the first *Altmark* condition and Article 86(2) EC with respect to the existence of a manifest error by the Member State in the context of its discretion would not be possible.

173 It is in the light of those considerations that the Court will examine the complaints whereby the applicants seek to demonstrate that in this case the Commission was wrong to accept the existence of an SGEI mission.

(2) The identity and the nature of the SGEI mission in question

174 In the present case, the applicants do not agree as to the identity and the nature of the SGEIs forming the subject-matter of the contested decision and, accordingly, of

the notified measure. The applicants submit, in essence, that the contested decision refers only to the PMI obligations, the characterisation of which as SGEI obligations is accepted by the Commission. On the other hand, the contested decision does not examine the question whether the PMI services as such constitute SGEIs, which in the applicants' submission is not the case (see paragraph 110 above). The defendant and Ireland counter that assertion by claiming that, in view of the indissoluble link between the PMI services and the PMI obligations which govern the supply of those services, the contested decision, by characterising the PMI obligations as SGEI obligations, necessarily also recognises that the PMI services as such are SGEIs.

175 It is true that the contested decision primarily examines, in particular at recitals 41 to 49, headed 'Public service obligations', the PMI obligations, namely community rating, open enrolment, lifetime cover and minimum benefits, explaining the reasons why these must be characterised as SGEI obligations. However, although the contested decision does not explicitly settle the question whether the PMI services as such or the Irish PMI system in general also represent SGEIs, it does state, at recitals 41 and 47, that the '[PMI] obligations aim to ensure the achievement of a general interest mission, [that is to say,] a certain level of PMI to all persons living in Ireland, at [an] affordable price and on similar quality conditions'. Furthermore, at recital 48 to the contested decision, the Commission states that the Irish authorities did not make a manifest error 'in including in their notion of SGEI[s] services which go beyond those offered by the basic [social] security scheme'. Those findings confirm that in the contested decision the Commission also accepted, at least by implication, that the PMI services have as such an SGEI character. In any event, in light of the indissoluble link between the PMI obligations and the PMI services, it was impossible for the Commission to limit its assessment solely to the PMI obligations without also taking into account the PMI services forming the subject-matter of those obligations and the provision of which is dependent on compliance with those obligations.

176 Therefore, contrary to the applicants' opinion, the contested decision recognises that the PMI obligations constitute SGEI obligations and at the same time that the PMI services form part of an SGEI mission.

(3) The distinction between the regulation of the operators' activities and the existence of an SGEI mission entrusted by an act of the public authority

177 The applicants dispute the existence of an SGEI mission; they contend that the legislation in question merely subjects the activity of all PMI insurers to 'normal' regulatory obligations and that there is no entrustment of a particular mission defined by an act of the public authority.

178 In the first place, as the case-law shows, the provision of the service in question must, by definition, assume a general or public interest. Thus, SGEIs are distinguished in particular from services in the private interest, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial (see, to that effect, *Züchner*, paragraph 97 above, paragraph 7, and *GVL* v *Commission*, paragraph 98 above, paragraphs 31 and 32). In addition, as the applicants claim, the general or public interest on which the Member State relies must not be reduced to the need to subject the market concerned to certain rules or the commercial activity of the operators concerned to authorisation by the State. The mere fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, of functioning or of control on all the operators in a particular sector does not in principle mean that there is an SGEI mission (see, to that effect, *GVL* v *Commission*, paragraph 98 above, paragraph 32, and *GB-Inno-BM*, paragraph 98 above, paragraph 22).

179 On the other hand, the recognition of an SGEI mission does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. It follows from a reading of paragraph 1 together with paragraph 2 of Article 86 EC that a distinction must be drawn between a special or exclusive right conferred on an operator and the SGEI mission which, where appropriate, is attached to that right (see, in that regard, *Merci Convenzionali Porto di Genova*, paragraph 97 above, paragraphs 9 and 27; *Almelo*, paragraph 97 above, paragraphs 46 to 50; and *Albany*, paragraph 101 above, paragraphs 98 and 104 to 111). The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform an SGEI mission. Therefore, as the Kingdom

of the Netherlands asserts, the Commission's finding at recital 47 to the contested decision, which refers to paragraphs 14 and 15 of the communication on services of general interest, that the attribution of an SGEI mission may also consist in an obligation imposed on a large number of, or indeed on all, the operators active on the same market, is not vitiated by an error (see, with respect to an SGEI mission entrusted in the context of a non-exclusive concession governed by public law, *Almelo*, paragraph 97 above, paragraph 47).

180 Consequently, the applicants' argument that the existence of an SGEI mission is precluded because all PMI insurers are subject to certain obligations cannot succeed.

181 In the second place, it must be borne in mind that, in essence, both the first condition laid down by the Court of Justice in *Altmark* and the wording of Article 86(2) EC, as such, require that the operator in question be entrusted with an SGEI mission by an act of a public authority and that the act clearly define the SGEI obligations in question (see, to that effect, *Züchner*, paragraph 97 above, paragraph 7; Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, paragraph 55; *GT-Link*, paragraph 97 above, paragraph 51; *Altmark*, paragraph 89; and *Olsen* v *Commission*, paragraph 166 above, paragraph 186).

182 In the present case, contrary to the theory put forward by the applicants, the relevant Irish legislation does not involve any regulation or authorisation whatsoever relating to the activity of PMI insurers, but must be characterised as an act of a public authority creating and defining a specific mission consisting in the provision of PMI services in compliance with the PMI obligations. Sections 7 to 10 of the Health Insurance Act, 1994, as most recently amended by the Health Insurance (Amendment) Act, 2001, and also the 1996 Health Insurance Regulations (see paragraph 16 above), define in detail the PMI obligations, such as community rating, open enrolment, lifetime cover and minimum benefits, to which all PMI insurers within the meaning of

that legislation are subject. Furthermore, with the stated object of serving the general interest by allowing what is at present approximately half of the Irish population to benefit from alternative cover for certain health care, in particular hospital care, the abovementioned PMI obligations restrict the commercial freedom of the PMI insurers to an extent going considerably beyond ordinary conditions of authorisation to exercise an activity in a specific sector (see paragraph 191 et seq. below).

183 Similarly, the Court considers that that legislation satisfies the condition of a clear and precise definition of the SGEI obligations in question within the meaning of the first *Altmark* condition (paragraph 89), which the applicants do not dispute. Furthermore, since the system chosen by Ireland does not provide for the grant of exclusive or special rights, but for the achievement of the mission by all operators active on the Irish PMI market, which is a choice open to the Member State (see paragraph 179 above), it follows that, contrary to what the applicants appear to claim, there can be no requirement that each of the operators subject to the PMI obligations be separately entrusted with that mission by an individual act or mandate.

184 Accordingly, the complaint that the activity of the PMI insurers is governed by 'normal' regulatory obligations and that there is no act of a public authority creating and entrusting an SGEI mission must be rejected.

(4) The universal and compulsory nature of the services coming within the SGEI mission

185 The applicants submit that the fact that the PMI services are not universal and compulsory by nature supports their conclusion that there is no SGEI mission in this case.

General observations

186 As regards the universal nature of the PMI services, it must be noted at the outset that, contrary to the theory put forward by the applicants, it does not follow from Community law that, in order to be capable of being characterised as an SGEI, the service in question must constitute a universal service in the strict sense, such as the public social security scheme. In effect, the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory (see, in that regard, *Ahmed Saeed Flugreisen*, paragraph 181 above, paragraph 55; *Corsica Ferries France*, paragraph 97 above, paragraph 45; and *Olsen* v *Commission*, paragraph 166 above, paragraph 186 et seq.). As stated at recital 47 to the contested decision, with reference to paragraph 14 of the communication on SGEIs, although those characteristics correspond to the classical type of SGEI, and the one most widely encountered in Member States, that does not preclude the existence of other, equally lawful, types of SGEIs which the Member States may validly choose to create in the exercise of their discretion.

187 Accordingly, the fact that the SGEI obligations in question have only a limited territorial or material application or that the services concerned are enjoyed by only a relatively limited group of users does not necessarily call in question the universal nature of an SGEI mission within the meaning of Community law. It follows that the applicants' restrictive understanding of the universal nature of an SGEI, based on certain Commission reports or documents, the content of which, moreover, is not legally binding, is not compatible with the scope of the discretion which Member States have when defining an SGEI mission. Consequently, that argument must be rejected as unfounded.

188 As regards the argument that the PMI services represent only optional, indeed 'luxury', financial services, intended to provide complementary or supplementary cover by reference to the compulsory universal services provided for by the public health insurance system, the Court observes that the compulsory nature of

the service in question is an essential condition of the existence of an SGEI mission within the meaning of Community law. That compulsory nature must be understood as meaning that the operators entrusted with the SGEI mission by an act of a public authority are, in principle, required to offer the service in question on the market in compliance with the SGEI obligations which govern the supply of that service. From the point of view of the operator entrusted with an SGEI mission, that compulsory nature — which in itself is contrary to business freedom and the principle of free competition — may consist, inter alia, particularly in the case of the grant of an exclusive or special right, in an obligation to exercise a certain commercial activity independently of the costs associated with that activity (see also, to that effect, paragraph 14 of the communication on SGEIs). In such a case, that obligation constitutes the counterpart of the protection of the SGEI mission and of the associated market position by the act which entrusted the mission. In the absence of an exclusive or special right, the compulsory nature of an SGEI mission may lie in the obligation borne by the operator in question, and provided for by an act of a public authority, to offer certain services to every citizen requesting them (see also, to that effect, paragraph 15 of the communication on SGEIs).

189 Contrary to the applicants' opinion, however, the binding nature of the SGEI mission does not presuppose that the public authorities impose on the operator concerned an obligation to provide a service having a clearly predetermined content, as is the case of Plan P offered by the VHI (see paragraph 14 above). In effect, the compulsory nature of the SGEI mission does not preclude a certain latitude being left to the operator on the market, including in relation to the content and pricing of the services which it proposes to provide. In those circumstances, a minimum of freedom of action on the part of operators and, accordingly, of competition on the quality and content of the services in question is ensured, which is apt to limit, in the community interest, the scope of the restriction of competition which generally results from the attribution of an SGEI mission, without any effect on the objectives of that mission.

190 It follows that, in the absence of an exclusive or special right, it is sufficient, in order to conclude that a service is compulsory, that the operator entrusted with a particular mission is under an obligation to provide that service to any user requesting it. In other words, the compulsory nature of the service and, accordingly, the existence

of an SGEI mission are established if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party. That element makes it possible to distinguish a service forming part of an SGEI mission from any other service provided on the market and, accordingly, from any other activity carried out in complete freedom (see, to that effect, *GT-Link*, paragraph 97 above, paragraph 53, and *Merci Convenzionali Porto di Genova*, paragraph 97 above, paragraph 27).

Application to the present case

191 In this case, the Court considers that it follows from the combination of the various PMI obligations imposed on all Irish PMI insurers, that is to say, from the open enrolment, community rating, lifetime cover and minimum benefit obligations, that the PMI services must be regarded as compulsory.

192 In fact, the open enrolment obligation (section 8 of the Health Insurance Act, 1994, as amended), that is to say, the obligation for every PMI insurer to offer a PMI contract to every person who requests it, independently of age, sex or health, is sufficient for the compulsory nature of the PMI services in question to be recognised. That compulsory nature is reinforced by the fact that the obligation to contract is associated with other constraints that restrict the commercial freedom of PMI insurers to determine the terms of PMI contracts, namely the community rating, lifetime cover and minimum benefit obligations.

193 Under the community rating obligation, when a PMI insurer offers PMI cover on the market, it is required to provide the PMI services concerned at a uniform rate whatever the personal situation of the insured, the health history and the frequency of claims submitted by that person (section 7 of the Health Insurance Act, 1994, as

amended). Because of the lifetime cover obligation, moreover, following a subscription by the insured for such cover, the PMI insurer cannot unilaterally cancel the PMI contract, nor can it refuse to renew the contract when the insured person seeks to renew it (section 9 of the Health Insurance Act, 1994, as amended). Last, the rules on minimum benefits provide that reimbursement for care covered by PMI contracts must be made by reference to the amounts and minimum percentages of the costs incurred (section 10 of the Health Insurance Act, 1994, as amended, read in conjunction with the rules on minimum benefits).

194 In that regard, the applicants have claimed that the minimum benefits obligation is not sufficient for the existence of an SGEI mission to be recognised, because the level of cover thus determined is so low that, in practice, it is considerably exceeded even by the most basic insurance policies available on the market, such as the VHI's Plan A. However, that argument does not affect the compulsory nature of the requirements to which PMI insurers are subject under the PMI obligations. First, it ignores the fact that the compulsory nature of an SGEI mission does not require that the law demand and predetermine the provision of a specific service by depriving the operator concerned of all commercial freedom (see paragraph 188 above). Second, even if the established commercial practice on the market generally reveals a level of service higher than the minimum prescribed benefits, it cannot affect the fact that the minimum benefits that every PMI insurer is required to observe in all circumstances constitute a legal obligation.

195 Nor is the characterisation of the PMI services as universal and compulsory services affected by the argument that the services are optional in the sense that their supply is left to the free choice of both insurers and insured persons and that, accordingly, those services do not replace the universal or basic social security services. First, recognition of the compulsory nature of the SGEI mission is not precluded by the fact that consumers can choose not to request the supply of the services in question, since the State considers that, for general social policy and health considerations, the service in question satisfies a real need of a large part of the population — in this case

currently approximately 50% of the Irish population — and thus makes it accessible by an obligation to contract imposed on the supplier of the service. In effect, the universal and compulsory nature of the SGEI is not dependent on a reciprocal obligation to contract, that is to say, in this case, by compulsory PMI membership. As the applicants themselves acknowledge, at paragraph 29 of the reply, the *Albany* judgment, paragraph 101 above (paragraph 98 et seq.) permits of no other interpretation, since compulsory membership of the complementary pension scheme forming the subject-matter of that case was not in any event decisive for the Court's recognition of that system as forming part of an SGEI mission.

196 Second, in light of the nature of the SGEI mission in question, based on PMI obligations imposed on all PMI insurers and not linked with a special or exclusive right, the possibility that an insurer may voluntarily withdraw from the Irish PMI market does not affect the continuity of the supply of the PMI service concerned and, accordingly, the universality and accessibility of that service. Therefore, since the PMI insurers that have decided to offer cover on the market must comply in full with the PMI obligations in question, the fact that the PMI insurer has the option to cease completely to provide PMI services or to leave the market is in itself also incapable of affecting the universal and compulsory nature of those services.

197 The applicants further submit that the universal and compulsory nature of the PMI services is contradicted by the various statutory exceptions to the open enrolment obligation (section 8 of the Health Insurance Act, 1994, as amended, read together with the Health Insurance Act, 1994 (Open Enrolment) Regulations 1996). In effect, persons over the age of 65 seeking new PMI cover for the first time may be refused (Regulation 6 of the Health Insurance Act, 1994 (Open Enrolment) Regulations 1996). Below the age of 65, where a person takes PMI cover the PMI insurers may impose initial waiting periods which are, in principle, 26 weeks for persons under the age of 55 and 52 weeks for persons aged between 55 and 65 (Regulation 7 of the Health Insurance Act, 1994 (Open Enrolment) Regulations 1996). While persons suffering from pre-existing diseases are eligible for cover, they may, depending on

their age, be subject to waiting periods of 5 to 10 years before they are eligible for payments for certain care (Regulation 8 of the Health Insurance Act, 1994 (Open Enrolment) Regulations 1996). In that regard, the defendant and Ireland responded, in substance, that, first, those exceptions did not appreciably reduce the real scope of the open enrolment obligation and, second, they constituted, in any event, lawful and objectively justified measures to protect the Irish PMI market subject to PMI obligations against malfunction and abuse.

198 In that regard, the Court considers that, even on the assumption that the exclusion of persons over the age of 65 who have never had PMI cover — as provided for in the Irish legislation at the time of adoption of the contested decision — may in theory, as the applicants claim, affect 8% of the Irish population, the significance of that exception seems to be limited in practice. First, as the defendant states, the exception does not apply to persons who already have or have had PMI cover and wish to renew it. Second, the applicants have not disputed the defendant's and Ireland's assertion that, taking into account the fact that PMI has existed in Ireland since 1957, there is a normal tendency to subscribe to a PMI policy for the first time at a much younger age than previously, particularly since the initial waiting periods, which increase with age, provide an additional incentive to do so. In those circumstances, it may be expected that the number of persons thus excluded from PMI is decreasing. It is therefore not plausible that, in practice, a significant number of persons will be affected in future by the possibility that they will be refused cover from the age of 65. In any event, the Court considers that that limited restriction does not affect the fact that open enrolment guarantees free access to PMI to the entire population of Ireland.

199 As regards the initial waiting periods, the defendant and Ireland have submitted, without being really contradicted by the applicants, that although those periods temporarily restrict access to PMI cover, they are essential and lawful measures designed to prevent abuse consisting in obtaining purely temporary cover in order to obtain treatment rapidly without having contributed beforehand, by paying

premiums, to the PMI community rating system. In that regard, it must be borne in mind that, as the defendant and Ireland claim, community rating is intended to guarantee, by means of uniform premiums for the same cover (see paragraph 192 above), an equal allocation of the burdens occasioned by the health care of all insured persons of all generations. Thus, community rating, like open enrolment, has the ultimate objective of ensuring the sharing of risks and solidarity between generations; and, having regard to Articles 16 EC and 152 EC, the Member State's choice of those objectives cannot be called in question by the Community institutions (see paragraph 167 above).

200 The Court acknowledges that it is plausible that a practice such as that described above might jeopardise that objective. Furthermore, as the defendant claims, the absence of waiting periods would have the consequence that the PMI insurers, faced with an increase in requests for payment, would have to increase premiums to the detriment of all insured persons in order to cover the additional costs that would arise. Such a consequence would run counter to the objective of accessibility of PMI cover guaranteed to all insured persons, an objective which also underlies community rating. In those circumstances, the Court accepts that the initial waiting periods are inherent in a PMI market subject to open enrolment and community rating and that they constitute an appropriate means of reconciling the accessibility and universality of the PMI service, in that they make it possible to ensure that solidarity between generations is not abused by persons who delay subscribing to PMI until the time when they have significant care needs.

201 It follows from the foregoing considerations that the combination of the obligations of open enrolment, community rating, lifetime cover and minimum benefits is apt to guarantee that the Irish population has wide and simple access to PMI services, which entitles those services to be characterised as universal within the meaning of Community law. The applicants' argument that, notwithstanding the mutualisation of premiums resulting from the community rating, the PMI services are not universal because they are not available to all strata of the Irish population, cannot be accepted. First, as stated at paragraph 186 above, the criterion of universality does not require that the entire population should have or be capable of having recourse

to it in practice. Second, the fact that approximately 50% of the Irish population has subscribed to PMI cover indicates that, in any event, the PMI services respond to a very significant demand on the Irish PMI market and that they make a substantial contribution to the proper functioning of the social security system, in the broad sense, in Ireland. Third, that argument does not take account of the fact that, as the applicants themselves acknowledge, the PMI services available on the Irish PMI market may be subdivided into different groups of cover, including in particular basic cover, average cover and 'luxury' cover, which are offered at different prices and which meet separate demand from insured persons.

202 In that context, the fact that the prices of PMI services are neither regulated nor subject to a ceiling does not affect their universal nature either. While it is true that, in the absence of regulations on premiums for PMI cover, the level of rates for such cover is in principle determined by market forces, the fact none the less remains that, owing to the community rating obligation, the rate fixed is made uniform and applicable to all PMI contracts offering the same cover, independently of the age, sex and state of health of the persons insured. Owing to that uniformity of rates and to competition on rates between the different PMI insurers subject to PMI obligations, to the advantage of all insured persons, the risk of an excessive rate, which would be economically unaffordable for certain groups of persons, in particular as regards basic PMI cover, seems to be very limited in practice. On the contrary, as Ireland submits, community rating permits a cross-subsidy of premiums to the advantage of the most vulnerable insured persons, in particular the elderly and the sick, and ensures that they have easier access to PMI services, whereas such access would potentially be impeded, or indeed excluded, in a market in which rates were risk-based.

203 Furthermore, the universality criterion does not require that the service in question be free of charge or that it be offered without consideration of economic profitability. The fact that certain potential users do not have the necessary financial resources to take advantage of all the PMI cover available on the market, in particular 'luxury'

cover, does not undermine its universal nature provided that the service in question is offered at uniform and non-discriminatory rates and on similar quality conditions for all customers (see, to that effect, *Corbeau*, paragraph 131 above, paragraph 15; *Almelo*, paragraph 97 above, paragraph 48; and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 55).

204 In the light of the foregoing, the applicants' very general argument concerning the optional, complementary and 'luxury' nature of the PMI services cannot succeed. Apart from the fact that the applicants disregard, in this context, the various levels of PMI cover available, they have not submitted a detailed challenge to the argument put forward by the defendant and by Ireland that Irish PMI constitutes, alongside the public health insurance system, the second pillar of the Irish health system, the existence of which fulfils a mandatory objective of social cohesion and solidarity between the generations pursued by Ireland's health policy. According to the explanations provided by Ireland, PMI helps to ensure the effectiveness and profitability of the public health insurance scheme by reducing pressure on the costs which it would otherwise bear, particularly as regards care provided in public hospitals. Within the framework of the restricted control that the Community institutions are authorised to exercise in that regard, those considerations cannot be called in question either by the Commission or by the Court. Accordingly, it must be accepted that the PMI services are used by Ireland, in the general interest, as an instrument indispensable to the smooth administration of the national health system and they must be recognised, owing to the PMI obligations, as being in the nature of an SGEI.

205 Consequently, the applicants' arguments concerning the absence of universal and compulsory nature of the PMI services must be rejected as unfounded in their entirety.

206 In those circumstances, the Commission's assertion at recital 47 to the contested decision that the PMI obligations aim to ensure a certain level of PMI services to all persons living in Ireland, at an affordable price and on similar quality conditions, is not vitiated by an error. Nor does the Commission err in finding that the PMI

insurers' freedom to define the prices and to design the terms of PMI cover does not put in question the qualification of the PMI obligations as SGEI obligations. That is all the more true because that freedom preserves a certain level of competition without affecting the implementation of the SGEI mission in question (see paragraph 188 above).

207 The Commission was therefore entitled to consider, at recitals 48 and 49 to the contested decision, that the conditions for recognition of the PMI services and PMI obligations as relating to an SGEI mission were satisfied and that Ireland had made no manifest error in that regard.

208 Consequently, the complaint alleging that there was no SGEI mission within the meaning of the first *Altmark* condition and Article 86(2) EC must be rejected.

(d) The existence of clearly defined parameters for the calculation of compensation for the RES within the meaning of the second Altmark condition

(i) Preliminary observations

209 The Court observes at the outset in limine that under the second *Altmark* condition (paragraph 90), the parameters on the basis of which the compensation for carrying out the SGEI mission is calculated must be established in advance in an objective and transparent manner.

210 In that regard, it must be borne in mind that, for the reasons set out at paragraphs 157 to 160 above, the Commission refers, at recital 40 to the contested decision, in its analysis of the compensation for the costs incurred in discharging the SGEI obligations in question, only to the *Ferring* judgment, paragraph 41 above (paragraph 27). According to that judgment, the compensation must correspond to the additional costs actually incurred by the operator entrusted with an SGEI mission. The Court considers that that requirement necessarily presupposes a certain transparency and a certain objectivity in the criteria for the compensation, in the absence of which even marginal review by the Community institutions would not be possible.

211 The Court must therefore examine whether the Commission could validly consider, at least impliedly, that in this case the criteria for the compensation provided for by the RES were sufficiently transparent and objective to satisfy the second *Altmark* condition.

(ii) The objective and transparent nature of the criteria governing the calculation of the compensation under the RES

212 The applicants essentially claim (see paragraph 113 et seq. above) that the calculation of the compensation under the RES is not carried out according to objective and transparent parameters, but depends largely on the discretion of the HIA and the Minister for Health on several levels. Thus, the assessment of the risk differentials and in particular that based on the health status weight are largely left to the discretion of the HIA. That is confirmed by the three divergent reports published by the HIA since 2003, which found clearly different risk differentials and drew contradictory conclusions as to the reality of market instability. Furthermore, the HIA and the Minister for Health have a wide discretion as to the decision to activate RES payments by reference to the percentage of risk differential achieved.

213 In that regard, it must first of all be noted that, contrary to the applicants' contention, the discretion of the HIA and, where appropriate, the Minister for Health as to the decision to commence the RES payments, a decision which implies in particular the finding of a risk differential in excess of a certain percentage and market instability, is not linked to the question whether the compensation is calculated according to objective and transparent parameters. That calculation is carried out, on the basis of the data provided by the PMI insurers subject to the RES and, accordingly, of their respective risk profiles, only after the decision to commence the RES payments has been taken. In that context, the applicants are confusing the determination of the risk differentials, which constitutes a step preparatory to the decision to commence the RES payments, with the calculation of the compensation paid in the form of RES payments, which depends on a detailed comparison between the actual risk profile and the average market risk profile for each of the PMI insurers (see paragraph 33 above).

214 Furthermore, even on the assumption that the Irish authorities have a discretion in calculating the RES payments — which Ireland, in particular, denies —, that discretion is not in itself incompatible with the existence of objective and transparent parameters within the meaning of the second *Altmark* condition. As Ireland asserts, that condition does not prevent the national legislature from leaving to the national authorities a certain discretion to determine the compensation for the costs incurred in discharging an SGEI mission. On the contrary, as established in the case-law of the Court of First Instance, the Member State has a wide discretion not only when defining an SGEI mission but also when determining the compensation for the costs, which calls for an assessment of complex economic facts (see, to that effect, *FFSA and Others* v *Commission*, paragraph 101 above, paragraphs 99 and 100). It is precisely because the determination of the compensation is subject to only restricted control by the Community institutions, moreover, that the second *Altmark* condition requires that those institutions must be in a position to verify the existence of objective and transparent parameters, which must be defined in such a way as to preclude any abusive recourse to the concept of an SGEI on the part of the Member State.

215 Consequently, the applicants' arguments concerning the absence of objective and transparent parameters for the calculation of the compensation, owing to the existence of a discretion of the Irish authorities, are inoperative and cannot be upheld.

216 It should be noted, next, that at recitals 25 to 30 to the contested decision (see paragraph 38 above) the Commission sets out in detail the criteria, the method and the procedure governing the determination of the RES payments. It follows from the description of the method of calculating the RES payments set out at paragraphs 31 to 33 above, moreover, that the different calculation parameters used are clearly established by the applicable legislation, in particular the Second Schedule to the RES. Thus, the legislation provides, in a detailed, non-discriminatory and transparent manner, that the PMI insurers subject to the RES must regularly provide information about their risk profile and the corresponding costs by groups of age and sex of the persons insured (parts II and III of the RES). In the light of that information, the HIA makes a comparative assessment in order to determine the risk differential between PMI insurers (part IV read in conjunction with the Second Schedule to the RES), which in turn determines the calculation of the RES payments (part V of the RES). Last, part V read in conjunction with the Second Schedule to the RES also provides for the parameters and the detailed economic and mathematical formulae for that calculation, including the method of adjustment with application of health status weight.

217 In that regard, the Court considers that the complexity of the economic and mathematical formulae which govern the calculations to be carried out does not by itself affect the precise and clearly-determined nature of the relevant parameters. In any event, the applicants have not disputed the precise, transparent and objective nature of those parameters, but essentially confined themselves to asserting that the Irish authorities have a wide discretion with respect to the decision, which precedes the calculation of the compensation, to activate the RES payments (see paragraphs 210 and 211 above). That consideration also applies to the criteria governing the application of the health status weight — which is not currently applicable —, mentioned in the Second Schedule to the RES, with which the HIA must comply when it decides to take that factor into account and also to the maximum limit of 50% fixed for the taking into account of the observed use of hospital capacity in the determination of the PMI insurers' risk profiles (recitals 28 and 57 to the contested decision).

218 In the light of the foregoing, the Commission cannot be criticised for not having taken into account, in its assessment of the RES by reference to Article 87(1) EC, the various parameters governing the calculation of the RES payments. The Court further considers that, regard being had to the considerations set out at paragraph 160 above, recitals 25 to 30 to the contested decision, although they are found only in the factual presentation of the RES (see paragraph 38 above), constitute a sufficient statement of reasons in that regard, the content of which was properly taken into account by the Commission in its assessment of the compatibility of the compensation mechanism in question with Article 87(1) EC.

219 Consequently, the complaint based on the second *Altmark* condition must be rejected as unfounded.

(e) The necessity and proportionality of the compensation provided for by the RES within the meaning of the third Altmark condition

(i) The scope of judicial review

220 As regards the scope of control of the necessity and the proportionality of the compensation under the RES by both the Commission and the Court, it must be observed that that control is necessarily restricted on account of the fact that Ireland justified the RES by the existence of an SGEI mission (see paragraph 166 above). Given the discretion enjoyed by a Member State in defining an SGEI mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts, the scope of the control which the Commission is entitled to exercise in that regard is limited to one of manifest error (see, to that effect, *FFSA and Others* v *Commission*, paragraph 101 above, paragraph 100, and *Olsen* v *Commission*, paragraph 166 above,

paragraph 216). Furthermore, it follows that the Court's review of the Commission's assessment in that regard must also observe the same limit and that, accordingly, its review must be confined to ascertaining whether the Commission properly found or rejected the existence of a manifest error by the Member State.

221 Furthermore, that review implies that the Community judicature determines whether the evidence adduced by the applicants is sufficient to render implausible the assessments of the complex economic facts made in the contested decision (see, by analogy, Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 59). Subject to that review of plausibility, it is not the Court's role to substitute its assessment of the relevant complex economic facts for that made by the institution which adopted the decision. In such a context, review by the Court consists in ascertaining that the Commission complied with the rules of procedure and the rules relating to the duty to give reasons and also that the facts relied on were accurate and that there has been no error of law, manifest error of assessment or misuse of powers (see, to that effect, *FFSA and Others* v *Commission*, paragraph 101 above, paragraph 101; Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* v *Commission* [2005] ECR II-1579, paragraph 91; *Olsen* v *Commission*, paragraph 166 above, paragraph 266; and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 138 and the case-law there cited).

222 As regards, more particularly, review of the proportionality of the compensation for discharging an SGEI mission, as established by an act of general application, it has further been specified in the case-law that that review is limited to ascertaining whether the compensation provided for is necessary in order for the SGEI in question to be capable of being performed in economically acceptable conditions (see, to that effect, *Commission* v *Netherlands*, paragraph 99 above, paragraph 53, and *Albany*, paragraph 101 above, paragraphs 107 and 111 and the case-law there cited), or whether, on the other hand, the measure in question is manifestly inappropriate by reference to the objective pursued (see, to that effect and by analogy, *Boehringer* v *Council and Commission*, paragraph 118 above, paragraphs 73 and 74).

223 The applicants' assertion that a global review must be carried out in that context must therefore be rejected as unfounded (see paragraph 118 above).

(ii) The necessity and proportionality of the compensation made by means of the RES payments

(1) Preliminary observations

224 As regards the necessity and proportionality of the compensation provided for by the RES, it must be borne in mind at the outset that the parties are agreed that the third *Altmark* condition broadly coincides with the criterion of proportionality as established by the case-law in the context of the application of Article 86(2) EC. It follows that their analysis applies *mutatis mutandis* to the second plea alleging infringement of that provision. On the other hand, as regards the assessment of the proportionality of the compensation provided for by the RES, in so far as the parties disagree on the need to take account of the efficiency of the operator concerned and the impact of that inefficiency on the determination of that compensation, the Court will examine the arguments put forward on that point together with the complaint alleging absence of the fourth *Altmark* condition.

225 It must also be borne in mind that, in the applicants' submission, the third *Altmark* condition, namely that the compensation must be strictly necessary, is not fulfilled. First, they claim that the Commission did not examine all the relevant factors in that regard, which constitutes an error of law and an error affecting the reasoning in the contested decision concerning the application of the criterion of proportionality. Second, compliance with the PMI obligations does not create a financial burden for the PMI insurers because they are in a position to protect their profitability by

commercial measures. On the one hand, the PMI insurers can protect themselves against 'bad' risks, for example by refusing new members over the age of 65 or by imposing long waiting periods on the sick. On the other hand, they are able to adjust the contractual terms and of differentiating premiums according to the risks and thus, by charging higher premiums, of compensating for the higher costs associated with the 'bad' risks which they are required to assume under the PMI obligations. Third, in any event, in the absence of any link between the costs occasioned by the PMI obligations and the RES, the RES is not capable of compensating for those costs. The RES payments are calculated on the basis of the risk differential of the PMI insurers and do not depend on the calculation of the actual costs incurred in complying with the PMI obligations. Furthermore, the RES is aimed in reality at compensating for the cost of supplying the PMI services as such which, however — in the light of the contested decision —, are not SGEIs. Such an abstract relationship between the PMI obligations and the costs incurred by the PMI insurer is not sufficient and does not satisfy the requirement that the RES be strictly limited to clearly quantified costs. Fourth, the RES is not even capable of compensating for the 'bad' risks. It does not take account of the premiums and receipts of the PMI insurers capable of compensating for those risks and, accordingly, it is not possible to assess whether the 'bad' risks create a net financial burden for the PMI insurer. Moreover, as regards the Commission's argument that the RES takes account of the average costs of requests for payment and thus allows the PMI insurers to benefit from their own efficiency (recital 56 to the contested decision), the applicants object that where the insurer's actual costs are taken into account that gives rise to larger RES payments to PMI insurers with the highest costs and thus provides them with an incentive not to be efficient. Last, in any event, in the absence of a reference point for the assessment of efficiency and a mechanism for comparing prices, the fourth *Altmark* condition relating to the need to determine the level of compensation by reference to the needs of an efficient undertaking, by including receipts and profits, is not fulfilled.

226 The defendant replies that the applicants have neither demonstrated that the Commission had made a manifest error in assessing the proportionality of the RES nor established that the RES was manifestly disproportionate by reference to the objective of ensuring the functioning of the Irish PMI market in economically acceptable conditions (see paragraph 148 above). Furthermore, the defendant, supported by Ireland and by the VHI, challenges the argument that compensation under the RES

is not linked with the costs generated by compliance with the PMI obligations. The RES payments are linked to the costs generated by the differentials in risk profile — determined by age group and sex — between PMI insurers and do not exceed what is necessary to cover the costs incurred in discharging the PMI obligations. In that regard, the legislation governing the RES makes no reference to fixed and variable costs, receipts or profit margins. In effect, there is no precise correlation between receipts and risks, which would be contrary to the principle of community rating, which means that the premium should reflect the risk represented by the community and not by what may be an unrepresentative group of insured persons. Likewise, it is a requirement of the open enrolment and community rating obligations that PMI insurers are unable to take advantage of a risk portfolio that is more beneficial than that of other PMI insurers. The RES is thus necessary for the smooth operation of the community rating and to stimulate competition between PMI insurers, for all age classes, by means of commercial efforts, such as those devoted to marketing, quality of services, links with care providers or management efficiency. For those reasons, the relevant legislation requires that the costs associated with discharging the PMI obligations be quantified and apportioned between the PMI insurers on an equitable basis by means of the RES. On the other hand, as the PMI insurers are free to determine their premiums and their profitability according to market conditions, the RES is not intended to equalise costs which depend on their efficiency and the PMI insurers retain the benefit of their good management. Last, since the RES grants compensation to PMI insurers only in respect of the difference between their own risk profile and the average risk profile on the market, a PMI insurer cannot consider the RES to be an incentive not to be efficient. In effect, the method used to calculate the compensation precludes, in practice, the application of the RES from depending on the costs generated by the poor management of a PMI insurer. Under Article 3 of the RES, the mechanism for calculating RES payments takes account only of the costs generated by requests for payment addressed to PMI insurers, to the exclusion of other costs, such as administrative and marketing costs, which means that this method of calculation cannot have the consequence that any inefficiencies are borne by all PMI insurers. In addition, the RES aims only to equalise, by means of that method, the burdens resulting from the variations between the risk profiles of those insurers and not of the burdens incurred in providing PMI services as such, or the corresponding receipts or profits.

227 The defendant and Ireland also contest the applicants' argument that PMI insurers are able to reject 'bad' risks by taking commercial measures. In practice, it is not

possible to segment the market according to risk by means of a flexible determination of premiums and to impose more expensive cover on high-risk consumers to cover the costs occasioned by additional requests for payment. On the one hand, high-risk consumers do not withdraw from a lower level of cover because that would entail losing the benefit of community rating. On the other hand, in view of the competitive pressure on the market, a portfolio of high-risk insured persons would not readily be offset by means of higher premiums. Last, the applicants' argument to the contrary is contradicted by their own strategy of aligning the prices for their PMI services with those of the VHI. The defendant, supported by the VHI, further submits that the RES payments are calculated not by reference to all claims settled by the PMI insurers, but only by reference to claims covered by the most widely-sold and the least expensive PMI covers. Furthermore, the corrective constituted by the health status weight, which is limited to 50%, is not currently taken into consideration by the RES. The need for such a corrective factor, however, results from the fact that age and sex cannot explain all the differences between the risk profiles of the PMI insurers and, accordingly, cannot fully reflect the resulting disequilibrium.

(2) The relationship between the RES and the costs generated by discharging the PMI obligations

228 Before examining the parties' arguments concerning the nature of the compensation made by the RES payments, in the first place, the Court will examine the merits of the applicants' theory that such compensation is not necessary because the PMI insurers could avoid any burden linked with compliance with, inter alia, the community rating obligation by segmenting the PMI market according to the risk insured by adopting commercial measures, in particular by differentiating the PMI covers and the corresponding premiums.

229 While it is true that in the absence of national provisions to the contrary the PMI insurers are in principle free to determine the extent, the quality and the price of PMI cover according to the needs of the various groups of insured persons and according to their own commercial strategy, that freedom is severely restricted by the PMI obligations once the PMI makes its choice as to the precise terms of a PMI policy and decides to offer it on the market (see paragraph 192 above). In effect, the community rating obligation laid down in section 7 of the Health Insurance Act, 1994, as amended, which provides that any insured person, independently of his age, sex and state of health, must benefit from the same premiums for the same PMI cover, prohibits discrimination to the detriment of higher-risk insured persons in the form of higher premiums for the same cover or any reduction in the extent or the quality of cover under the PMI contract at the same level of premium. However, the applicants have not really contended that compliance with that obligation entails additional burdens for the PMI insurer in that it prevents the insurer from adjusting the premium according to the risk covered and from thus offsetting, by charging higher premiums, the higher payments corresponding to 'bad' risks.

230 In addition, in spite of the fact that their theory was disputed by the defendant and by Ireland, the applicants have not sufficiently explained the reasons why those additional burdens might be offset by any practice of differentiating cover and premiums that would be lawful by reference to the community rating obligation. In that regard, the mere fact that PMI insurers active on the Irish market offer PMI policies providing distinct cover and adjusted to the needs of the different groups of insured persons is not sufficient to render the applicants' theory plausible, since even the most basic cover, which is generally preferred by young persons in good health, remains and must remain accessible to persons at risk, thus satisfying the essential objective of the open enrolment and community rating obligations. As Ireland asserts, the applicants have put forward no evidence to show that those 'at risk' persons will no longer request, or will give up, that basic cover, the price of which they find particularly attractive on account of the community rating, in response to any changes in the PMI contracts. Likewise, the applicants have not disputed the detailed information supplied by the applicant in support of its argument that the PMI cover offered by BUPA Ireland and that offered by the VHI are very similar and that the insured persons, notably those with VHI, remained rather indifferent to the differentiation of the benefits and premiums (see paragraph 147 above).

231 In that regard, the Court rejects the argument that the PMI insurers could protect themselves against excessive burdens caused by claims by persons at risk by refusing to cover persons who have reached the age of 65 or by imposing long waiting periods. On the one hand, it follows from the considerations set out at paragraph 198 above that the possibility of refusing to cover persons aged 65 or over seems very limited in practice, owing in particular to the fact that this applies only to persons who have never subscribed to PMI cover. On the other hand, the initial waiting periods, which constitute a legitimate means of protecting the PMI market subject to open enrolment and community rating (see paragraph 199 above), allow only temporary avoidance of the burdens attributable to 'bad' risks, since, once that period has elapsed, the PMI insurer is fully exposed to the claims of the high-risk persons whom it is required to accept under the open enrolment obligation. Accordingly, contrary to the applicants' contention, those restrictions do not suffice to offset the additional costs resulting from the assumption of the 'bad' risks which PMI insurers are unable to avoid because of the PMI obligations.

232 It follows that the argument that there is no need for compensation because the PMI insurers remain free to determine the terms of PMI cover and to segment the market according to the risk insured cannot be upheld.

233 In the second place, the Court will examine the argument that, in the light of the third *Altmark* condition, the compensation system provided for by the RES should be directly linked with the costs occasioned by compliance with the PMI obligations.

234 In that context, it must be borne in mind that the SGEI mission in question consists in the supply of PMI services in compliance with the PMI obligations (see paragraph 175 above). Therefore the applicants' argument that the compensation awarded by means of the RES payments could not be justified by the costs of supplying the

PMI services as such, because those services do not constitute SGEIs, is unfounded. It is common ground, moreover, that the costs taken into account for the purposes of calculating the RES payments are merely those incurred by the PMI insurers when settling members' claims (see paragraph 33 above) and that, accordingly, those costs are closely linked with the supply of the PMI services in question. The applicants are therefore wrong to deny the existence of a link between the costs associated with the supply of the PMI services and the compensation provided for by the RES.

235 The Court none the less observes that, in the functioning of the compensation system constituted by the RES, there is no direct relationship between the amounts actually paid by the PMI insurer following a claim and the compensation awarded by means of the RES payments. It must be emphasised that the RES payments do not aim to compensate any costs or additional costs associated with a specific supply of certain PMI services, but only to equalise the additional burdens which are supposed to result where a PMI insurer has a negative risk profile differential by comparison with the average market risk profile (see paragraph 33 above). In that regard, the amounts actually paid by the PMI insurers during a given period serve only as a basis for calculating the average market risk profile and the differential between that risk profile and the individual and actual risk profile of each of the PMI insurers subject to the RES. Thus, a PMI insurer's individual and actual risk profile represents the average payment costs borne by that insurer during that period, the amount of which rises in proportion to the large number of high-risk members submitting frequent claims for high amounts. That individual and actual risk profile of each of the PMI insurers is then compared with the average market risk profile, which represents the average burdens borne by all PMI insurers when meeting claims, with the aim of reproducing, as faithfully as possible, the average of the burdens generated by all insured persons on the PMI market.

236 In fact, as the defendant and Ireland claim, the essential purpose of the open enrolment and community rating obligations is to spread those burdens fairly over the entire Irish PMI market, so that any PMI insurer bears only the burdens linked with the average market risk profile. If those burdens were not equalised, the functioning

of the community rating aimed at an equal allocation of risks between PMI insurers to enable the cross-subsidy of premiums between the generations would be impeded. Consequently, the additional burdens which a PMI insurer must bear on account of its negative risk profile by comparison with the average market risk profile represent the additional costs which a PMI insurer must assume on a PMI market subject to open enrolment and community rating as a consequence of its obligation to cover high-risk persons without fixing the amount of the premiums according to the risk insured. It is only those additional costs that the RES is designed to offset. In those circumstances, the applicants' argument that the RES payments are not linked with the costs occasioned by compliance with the PMI obligations and are not capable of compensating for the unequal allocation of the 'bad' risks on the PMI market cannot succeed.

237 In the context of the restricted control that applies in the present case (see paragraphs 220 to 222 above), the validity of the objectives pursued by the compensation system constituted by the RES as described at paragraph 235 above and the legality of the rules governing its operation cannot be called in question. In that regard, it is indeed appropriate to observe that the operation of that system is radically different from that of the compensation systems forming the subject-matter of the judgments in *Ferring*, paragraph 41 above, and *Altmark*, paragraph 89 above. Accordingly, it cannot strictly fulfil the third *Altmark* condition, which requires that it be possible to determine the costs occasioned by the performance of an SGEI obligation. The Court considers, however, that the quantification of the additional costs by means of a comparison between the actual risk profile of a PMI insurer and an average market risk profile in light of the amounts paid by all PMI insurers subject to the RES is consistent with the purpose and the spirit of the third *Altmark* condition in so far as the compensation is calculated on the basis of elements which are specific, clearly identifiable and capable of being controlled (see paragraph 216 above). Furthermore, although they assert failure to comply with the third *Altmark* condition, the applicants have not denied that the calculation of the RES payments satisfies those criteria. Nor have they succeeded in calling in question the existence of a link, as described at paragraph 235 above, between compliance with the PMI obligations, in particular the open enrolment and community rating obligations, and the compensation granted by means of the RES payments.

238 It follows that the applicants have not demonstrated that the RES was a manifestly inappropriate means of compensating for the additional costs resulting from compliance with the PMI obligations. In those circumstances, there is no manifest error in the Commission's finding at recital 53 to the contested decision that, essentially, the RES limits payments between PMI insurers to the level strictly necessary to neutralise the differential between their risk profiles and to compensate for the costs incurred in covering the 'bad' risks in excess of the market average, in order to compensate those insurers for the financial consequences of the PMI obligations which prohibit them from setting premiums according to the risk insured and from rejecting the 'bad' risks.

239 In the third place, the Court must reject the applicants' argument that the Commission ought to have taken account in the present case, in the light of the third *Altmark* condition, of the receipts and a reasonable profit that the PMI insurers might make by discharging the PMI obligations.

240 It follows from the considerations set out at paragraph 235 above that the compensation system constituted by the RES is wholly independent of the receipts and profits achieved by the PMI insurers in that it is based exclusively on the costs occasioned by the claims honoured by the PMI insurers during a certain period and in that its sole objective is to equalise the burdens that result from the differential between the individual and actual risk profile of a PMI insurer and the average market risk profile. As the defendant claims, notably in answer to a written question put by the Court, in such a system there is by definition no correlation between risk profile and receipts that would allow those receipts to be taken into account for the purpose of determining the compensation for any additional costs. In effect, in such circumstances, there can be no overcompensation for costs by reference to receipts, since the costs taken into account in the calculation of compensation are not directly linked with the supply of an SGEI or with the resulting receipts.

241 Consequently, since the RES does not aim to compensate for the costs directly linked to the supply of the PMI services (see paragraph 235 above), which would correspond to the situation specifically envisaged by the third *Altmark* condition, there is no need to take into consideration the receipts obtained for those services in order to establish any actual additional costs incurred in making that supply. Such an approach would even run counter to the principle of community rating, which requires that the premium payable for PMI cover reflect the risk represented by all insured persons and not by a specific group of insured persons. In those circumstances, a strict application of the third *Altmark* condition, which is aimed at a different form of compensation for an SGEI obligation, would not take account of the particular nature of the functioning of the compensation system provided for by the RES. On the contrary, such an approach would amount to calling in question as such Ireland's choice to establish such a system, which is completely independent of the receipts and profits of the PMI insurers and which is designed to ensure the proper functioning of a PMI market subject to the PMI obligations. However, the Court considers that neither the purpose nor the spirit of the third *Altmark* condition requires that receipts be taken into account in a system of compensation which operates independently of receipts.

242 For those reasons, the Commission cannot be criticised for not having taken account of the receipts and profits achieved by the PMI insurers in discharging the PMI obligations. Furthermore, it follows from the foregoing considerations that the complaint that the Commission did not examine that question or state the reasons in the contested decision on that point cannot be upheld either. In that regard, the Commission expressly relied in its analysis of the existence of aid under Article 87(1) EC on the judgment in *Ferring*, paragraph 41 above, which requires that the additional costs actually borne by the operators entrusted with discharging an SGEI obligation be determined (recital 40 to the contested decision). The Court considers that, as subsequently confirmed and explained by the Court of Justice in *Altmark*, the additional costs criterion implies in principle, in the case of a compensation system such as the ones referred to in those cases, a determination of the costs actually borne by the operator concerned when discharging an SGEI mission and the corresponding receipts. In this case, however, the Commission properly observed, at recital 53 to

the contested decision, that the additional costs were merely those resulting from a negative risk profile, which means that the Commission correctly recognised that the calculation method provided for by the RES did not allow any receipts obtained by the PMI insurers to be taken into account (see paragraph 240 above).

243 Consequently, the applicants have not shown that the Commission had failed to have regard to the third *Altmark* condition by considering that the compensation system provided for by the RES was necessary and proportionate by reference to the costs incurred in discharging the PMI obligations.

244 The complaint alleging failure to have regard to the third *Altmark* condition must therefore be rejected as unfounded.

(f) Comparison with an efficient operator within the meaning of the fourth Altmark condition

245 According to the fourth *Altmark* condition (paragraph 93), where an SGEI mission is not entrusted to an undertaking pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The applicants maintain, in substance, that that condition is not satisfied in the absence of a reference point in the RES against which to measure efficiency and to draw a comparison with an efficient operator. In particular, the Commission ought to have examined whether the costs that might be incurred by the PMI insurers, notably the VHI, in complying with the PMI obligations were comparable with those which would have been borne by an efficient operator.

246 In that regard, it must be noted first of all that it follows both from the considerations set out at paragraphs 239 to 242 above and from the close link between the fourth and third *Altmark* conditions, each of which requires a determination of the costs and the receipts and profits relating to the discharge of an SGEI obligation, that the premisses of the present complaint are incorrect. Regard being had to the neutrality of the compensation system constituted by the RES by reference to the receipts and profits of the PMI insurers, and to the particular nature of the additional costs linked with a negative risk profile on the part of those insurers, the fourth *Altmark* condition, in that it requires a comparison of the costs and receipts directly linked to the supply of the SGEI, cannot be strictly applied to the present case. That is already confirmed, moreover, by the purpose of the third *Altmark* condition, which is to ensure that the SGEI in question is supplied at the least costs to the community (*Altmark*, paragraph 92). It is common ground that the RES is not intended to compensate for an identified cost occasioned by the supply of a PMI service.

247 It should be borne in mind, next, that the RES payments are not determined solely by reference to the payments made by the PMI insurer in receipt of the compensation — which would be a situation corresponding to that addressed by the third and fourth *Altmark* conditions —, but also by reference to the payments made by the contributing PMI insurer, which reflect the risk profile differentials of those two insurers by comparison with the average market risk profile.

248 Accordingly, the Commission was entitled in this case to consider case that in the context of the analysis of the existence of State aid within the meaning of Article 87(1) EC, there was no need to draw a comparison between the potential recipients of the RES payments and an efficient operator. Furthermore, even though it was likely, at the time of adoption of the contested decision, that the VHI would initially be the main beneficiary of RES payments, it was not until later that the RES was activated by the Irish authorities, owing to the changes in the risk profiles on the Irish PMI market. Accordingly, without knowing the future situation of the different PMI insurers active on the Irish PMI market, the Commission was unable to identify precisely the potential beneficiaries of RES payments and to make a specific comparison of their situation with an efficient operator.

249 Moreover, in light of the purpose of the fourth *Altmark* condition, the Commission was none the less required to satisfy itself that the compensation provided for by the RES did not entail the possibility of offsetting any costs that might result from inefficiency on the part of the PMI insurers subject to the RES. In that regard, the Court notes that the Commission expressly found, at recitals 27 and 56 to the contested decision, that the RES took into account the PMI insurers' own average claim cost, thus avoiding an equalisation of their average costs per cell of insured population and allowing the insurers to keep the benefit of their own efficiencies.

250 In that regard, the applicants have claimed that if the actual claim costs of PMI insurers were taken into account in the calculation of the RES payments, that would entail higher payments being made to the advantage of the least efficient PMI insurers, which have the highest costs. However, as may be seen from recital 56 to the contested decision and from the considerations set out at paragraph 235 above, those costs represent only the burdens associated with the claims settled by the PMI insurers during a particular period, to the exclusion of any other management costs, such as the administrative or marketing costs for which the PMI insurers are responsible. The applicants have neither disputed that point nor explained to what extent that method of calculation was capable of resulting in the costs attributable to any lack of efficiency being reflected in the settlement of claims. Contrary to the applicants' opinion, as the calculation of compensation under the RES depends solely on costs not linked with the efficiency of the operators in question, that compensation is not capable of leading to the sharing of any costs that might result from their lack of efficiency and affect the possibility for those operators to keep the entire benefit of their good management.

251 That assessment is not invalidated solely by the finding of the HIA, in its report of April 2005 (page 30) that BUPA Ireland's average daily treatment cost is around 17% lower than market average, as that lower cost could result specifically from BUPA Ireland's more favourable risk profile by comparison with that of other PMI insurers. In fact, in that regard, the HIA observes that the difference between costs per day of treatment might be explained by differences concerning efficiency, the PMI products and the state of health of those covered, and that cost can vary according to the age

of the patient. It is clear that a PMI insurer whose affiliates are in poorer health than the average of affiliates is exposed to proportionally higher treatment costs. Nor do the applicants indicate whether the expression 'differences in efficiency' used by the HIA refer to the management of the PMI insurers as such or to the management of the hospitals, which are at the origin of treatment costs, or to what extent those differences might be relevant to the taking into account of the payment costs and be reflected in the equalisation payments.

252 Nor is the applicants' argument that the impact of high claims on the level of RES payments encourages the recipient PMI insurer not to be efficient well founded. As the applicants themselves acknowledged at the hearing, they did not specify the nature of any lack of efficiency to which such a situation might give rise, but essentially confined themselves to invoking the absence of any comparison with an efficient operator within the meaning of the fourth *Altmark* condition. Last, in that regard, the defendant submitted, without being contradicted by the applicants, that, by virtue of the First Schedule to the RES, in the context of the calculation of the RES payments, the costs of meeting claims are taken into account only up to EUR 550 per day of hospitalisation irrespective of the level of cover involved, whereas the average hospitalisation costs of the VHI, for example, come to EUR 640 per day of hospitalisation, which in itself constitutes a measure of protection against over-consumption and against poor cost management by the PMI insurer. Furthermore, that ceiling on eligible costs under the RES is explained in detail at recital 55 to the contested decision.

253 However, the defendant and Ireland have acknowledged that the method of calculating the RES payments is none the less capable, to a very limited extent, of permitting the profits associated with efficiency or the costs associated with inefficiency of the various PMI insurers to be shared, in that it includes the application of certain adjustment factors, namely, first, the 'zero sum adjustment factor' which serves to ensure that the system is self-financing and, second, the health status weight, which is based on the observed use of hospital capacity (recitals 28 and 57 to the contested decision).

254 As regards the 'zero sum adjustment factor', the applicants however acknowledged at the hearing that their complaint did not relate to that aspect of the RES and that the variations in the level of RES payments that might result were negligible and incapable of giving rise to an appreciable equalisation of the costs associated with lack of efficiency. As regards the health status weight, the applicants none the less contend that its application would result in lack of efficiency being taken into account, since it is based on the actual costs of the PMI insurers rather than on the costs of an efficient operator. In that regard, it must be pointed out that the application of that adjustment factor, which is currently zero, is subject to certain conditions, as set out in the Second Schedule to the RES, and in particular that it is limited to 50% of the observed use of hospital capacity. In the light of that limited importance of that factor, and as the applicants have put forward no specific evidence to show that the actual use of hospital capacity was capable of reflecting inefficiencies, such as overconsumption of medical services, the Commission was entitled to conclude that the compensation system constituted by the RES, and in particular the application of the health status weighting fact, did not entail the possibility of the costs associated with inefficiency being passed on to all PMI insurers.

255 In that context, the Commission clearly explained, at recitals 28 and 57 to the contested decision, that the strict conditions governing the application of that factor made it possible to avoid the full equalisation of the effects of risk differentials and an incentive to hospitalise patients and that, on the contrary, the 50% ceiling was an additional guarantee that would encourage PMI insurers to promote shorter hospital stays, early detection and best practice generally. The applicants have not challenged that finding, in detail, during the proceedings. It should be added, for the sake of completeness, that, as the defendant and Ireland maintain, the Irish authorities have not thus far made use of that factor and have based their assessment of the risk differentials between PMI insurers solely on the criteria of the age and sex of the persons insured.

256 Last, the Court considers that the Commission took into account, to the requisite legal standard, at recitals 26 to 28, 56 and 57 to the contested decision, the evidence

which allowed it to conclude that the compensation provided for by the RES was neutral by reference to any costs associated with inefficiency incurred by certain PMI insurers.

257 Consequently, the Court considers that the Commission did not fail to have regard to the fourth *Altmark* condition and that the present complaint must be rejected in its entirety.

258 In the light of all of the foregoing considerations, it must therefore be concluded that the Commission was correct to state, in Article 1 of the contested decision, that the RES did not involve State aid in the sense of Article 87(1) EC. Accordingly, the first plea must be rejected as unfounded. The Court none the less considers it necessary also to examine the second plea, alleging infringement of Article 86(2) EC.

(g) The necessity and proportionality of the RES for the purposes of Article 86(2) EC

(i) Preliminary observation

259 By their second plea, the applicants essentially dispute the necessity and proportionality of the actual introduction of the RES. The Court will examine the applicants' arguments relating to this second plea only in so far as they raise issues that were not examined in connection with the first plea.

260 The applicants' complaint relating to the absence of any express reference to Article 86(2) EC in the operative part of the contested decision (see paragraphs 90 and 128) must be rejected at the outset. As the defendant observes, it does not follow either from the relevant legislation or from the case-law that the formulation of the operative part of decisions adopted pursuant to Article 87 EC in conjunction with Article 86(2) EC must of necessity meet specific requirements. It is also necessary, in order to assess the actual legal scope of an act, the operative part of which is indissolubly linked to the statement of reasons for it, that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraph 211 and the case-law there cited). Accordingly, although it might appear desirable, in the interest of clarity and legal certainty, that the Commission should expressly mention in the operative part of the act the Treaty provisions which it is applying, the failure to do so does not constitute an error of law provided that it is quite clear upon reading the statement of reasons in conjunction with the operative part of the act precisely what those provisions are. In this case, although the Commission did not refer in Article 1 of the contested decision to the application of Article 86(2) EC, it none the less clearly mentioned that provision at recital 61 to the contested decision, which summarises its findings. Consequently, an averagely attentive reader of the contested decision could not be mistaken as to its actual legal scope.

(ii) The necessity for the introduction as such of the RES

(1) General observations

261 The applicants maintain, in essence, that the Commission made errors of assessment in finding, at recitals 50 and 52 to the contested decision, that the RES was necessary to preserve stability in a market subject to PMI obligations and also the practical effect of those obligations. They submit that the contested decision itself acknowledges, at recital 51, that the Irish PMI market had not thus far experienced

stability problems. Furthermore, the alleged danger of risk selection is purely speculative and unsupported by the facts. In reality, that danger does not exist because there is no incentive actively to select good risks and there is no passive risk selection (see paragraph 134 above). The PMI insurers are capable of offsetting bad risks by adjusting their contractual terms, and in particular by increasing premiums and differentiating cover. In any event, since insured persons have as a general rule, as shown by the Amárach report, very little inclination to change insurers, a new entrant into the Irish PMI market would necessarily target new customers, who, by definition, are young. Furthermore, as regards the older insured persons, the VHI sells at a loss, thus making it impossible for BUPA Ireland to compete effectively. Last, the economic studies on which the defendant relies, which relate to markets other than the Irish market, are neither relevant nor capable of corroborating the risk selection theory. On the other hand, the three reports submit by the HIA since 2003 confirm that there is no imminent or future instability in the Irish PMI market (see paragraphs 131 to 138 above).

262 The defendant replies, in essence, that the applicants have not succeeded in calling in question the indication of the existence of a risk of active risk selection in a system of community rating and open enrolment, a risk the principle of which was even recognised in the NERA report. Ireland further submits that the community rating and open enrolment requirements must necessarily be counterbalanced by the RES in order to avoid preferential risk selection by new insurers on the PMI market. In the absence of any corrective, those new entrants, because of their favourable risk profile, would be able to achieve significant 'technical' benefits by keeping the amounts of premiums at virtual levels that were too high, to the detriment of all insured persons, which would be capable of affecting the stability of the PMI market. Market stability is also threatened where an insurer with a favourable risk profile appreciably reduces its premiums, thus triggering a 'downward spiral' consisting in the movement of the most mobile affiliates towards that insurer and weakening the financial situation of competing insurers, which, because of the community rating, are no longer capable of offering their products at competitive prices and attracting new customers. That is the current situation of the VHI, whose solvency ratios have fallen markedly by comparison with BUPA Ireland's.

263 In the opinion of the defendant and of Ireland, the applicants' argument that it is possible for insurers to offset 'bad' risks by adjusting the terms of their contracts is irrelevant and is contradicted by reality. First, such an approach is contrary to the principle of community rating and, in any event, is impracticable and incapable of maintaining the equilibrium of the Irish PMI market. Second, the PMI services offered by the VHI and by BUPA Ireland are very similar and, in practice, insured persons are in any event indifferent to any differentiation in the advantages offered by a PMI policy. Furthermore, the data on the age profile of the persons insured by the VHI clearly show that such risk selection exists. As regards the risk of passive selection, the defendant, supported by Ireland, disputes the applicants' interpretation of the Amárach report, which supports the existence of consumer migration from one insurer to another. Nor is the argument that the VHI fixes prices for high-risk customers at a loss supported or admissible. The defendant submits, last, that the contested decision proceeds solely from the finding that there was a possibility of risk selection, which is a factor of instability; and, according to the *Albany* judgment, paragraph 101 above, and to the limited degree of review which the Court is called upon to carry out concerning the criterion of necessity, that is sufficient.

(2) The subject-matter of the contested decision and of the Court's review

264 Before examining the merits of the various arguments raised by the parties, the Court considers it necessary to define the subject-matter of the examination carried out by the Commission in this case, it being understood that it is the examination carried out by the Commission which forms the subject-matter of the review by the Court.

265 It must be made clear that the RES, as notified, constitutes a general system, that is to say, a system based on a number of provisions of general application, the implementation of which is indeed predetermined, to a certain extent, by objective and transparent criteria (see paragraphs 213 to 217 above), but not predictable in every

detail. In particular, as that system is supposed to adjust and react to rapid developments on the market concerned, its functioning is subject to certain general provisions implying a wide discretion on the part of the authorities entrusted with its application. That is true, in particular, for part IV of the RES, on the assessment and recommendation of the HIA concerning the existence of a risk differential capable of activating the RES payments.

266 It follows that, in accordance with the definition of the scope of administrative and judicial review set out at paragraphs 220 and 221 above, the Commission's review in that regard, which has the joint basis of Article 87 EC and Article 86(2) and (3) EC, in particular as regards the necessity of the notified system, is necessarily limited to ascertaining whether, first, the system is founded on economic and factual premisses which are manifestly erroneous and whether, second, the system is manifestly inappropriate for achieving the objectives pursued. It is in that context that the Court, for its part, must examine whether the Commission's assessment in that regard is sufficiently plausible to support the necessity for the system in question.

267 Within the framework of that review, it is appropriate first of all to examine whether the market dysfunctions on which the Member State relies in order to justify the establishment and protection of the SGEI mission in question were sufficiently plausible and also to assess whether the Commission could reasonably consider that a system such as the RES was by nature necessary and appropriate in order to resolve the problems referred to. It is then for the Court to ascertain whether, in this case, the Commission's assessment on those points is well founded by reference to current conditions and probable developments in the Irish PMI market as they appeared at the time of adoption of the contested decision in the light of all the information which the Commission had, or ought reasonably to have had, at its disposal.

268 As regards, in particular, the extent of the Commission's review, in accordance with what is set out at paragraphs 220 to 222 above, the Commission cannot take the

place of the Member State in the exercise of the wide discretion which the latter enjoys. Thus, contrary to what the applicants appear to suggest, in assessing whether the measure in question is necessary, the Commission has no power to ascertain, on the basis of the available data, whether the market might actually develop in a certain way and whether the application of the regulatory instruments envisaged by the notified system will thereby become indispensable, at a given moment, to ensure the achievement of the SGEI mission in question. In effect, the review of necessity does not require that the Commission be convinced that the Member State, in the light of present or future market conditions, cannot abandon the notified measures, but is limited to ascertaining whether there has been a manifest error in the exercise of the wide discretion of the Member State as regards the way of ensuring that the SGEI mission may be achieved under economically acceptable conditions (see, to that effect, *Commission* v *Netherlands*, paragraph 99 above, paragraph 58, and *Albany*, paragraph 101 above, paragraphs 107 and 111).

269 Last, if that review on the part of the Commission is restricted, that circumstance must also be taken into account in the context of the review of the legality of the Commission's assessment carried out by the Community judicature. That review by the Court must be even more restricted because the Commission's assessment relates to complex economic facts (see paragraphs 220 and 221 above). That applies especially to the review based on the principle of proportionality, in particular where the contested act concerns State measures of general scope. In effect, such review by the Court must be limited to determining whether those measures are manifestly inappropriate by reference to the objective pursued (see, by analogy, *Boehringer* v *Council and Commission*, paragraph 118 above, paragraphs 73 and 74).

270 It follows from the foregoing that the Commission did not make a manifest error of assessment by not requiring that Ireland demonstrate that the RES was indispensable in order to ensure compliance with the PMI obligations. The Court must therefore reject the applicants' argument that the RES must be indispensable and that the Commission misunderstood the scope of the review which it must carry out in that regard.

(3) The presence of risk selection on the Irish PMI market

Preliminary observation

271 In the light of the foregoing, the Court must examine — first of all from a general viewpoint and then by reference to the particular conditions on the Irish PMI market — whether the Commission was entitled to consider that the RES constituted a necessary corrective in a PMI market subject to obligations of open enrolment, community rating, lifetime cover and minimum benefits. In that regard, it is appropriate to ascertain in particular whether the Commission relied on evidence which enabled it to demonstrate to the requisite standard that a PMI market with community rating was in danger of risk selection and whether it could reasonably consider that that situation might upset the balance of that market.

Active risk selection

— General economic premisses

272 As regards the existence of a danger of active risk selection, the parties are agreed that a new entrant on to the PMI market, such as BUPA Ireland in 1997, has an interest in seeking a low-risk customer base in order to minimise its economic risks and to reinforce what is still a fragile position on the market. That is particularly so in the case of a market whose competitive structure still shows significant traces of the situation preceding its liberalisation and of a certain inertia on the part of consumers, the majority of whom are affiliated to the former monopoly operator, such as the

VHI in this case. As the applicants themselves observe, young, healthy customers, in particular, constitute a significant group of new customers that is particularly likely to be targeted by a new entrant to the PMI market offering them lower rates than those offered by the other PMI insurers.

273 In that regard, the applicants have not disputed, with sufficient accuracy and in sufficient detail, the theory that that tendency to seek lower risks is reinforced by the community rating obligation. It is common ground that, because of that obligation, a PMI insurer is not entirely free to balance, by charging of higher premiums, the greater economic risk in providing PMI cover to an elderly or sick person whom the insurer cannot refuse owing to the open enrolment obligation. First, as the PMI insurer is unable to set its premiums on the basis of the risk insured, it is required to offer the same PMI cover, on the same conditions as regards rates, to all insured persons, independently of their age, sex and state of health (section 7 of the Health Insurance Act, 1994, as amended) and thus to cross-subsidise premiums between the different risks insured. Second, the PMI insurer is also unable to offer PMI cover at premiums fixed according to the highest risk that it is required to cover, as otherwise it will no longer be capable of attracting young, healthy customers, when they are essential for its economic equilibrium in a system of cross-subsidised premiums.

274 The applicants have not relied on any specific evidence capable of invalidating that description of the phenomenon of active risk selection in a PMI market with community rating. In that regard, the applicants essentially confined themselves to invoking the possibility for PMI insurers to segment the market according to risk by defining the terms of PMI insurance and fixing the amount of the premiums in order to be able to offset the 'bad' risks by higher premiums. However, it must be borne in mind that, for the reasons set out at paragraphs 229 and 231 above, the argument relating to the contractual freedom of PMI insurers cannot be upheld.

275 Furthermore, the Court considers that, on the contrary, that argument tends rather to confirm the existence of an increased risk of the selection of 'good' risks in a PMI market with community rating, in that it implies that, in practice, PMI insurers will seek to offset, by lawful means, the effects of the prohibition on risk-based rating by offering a specially-defined definition of PMI cover and fixing the corresponding premiums according to the needs of distinct groups of insured persons. In effect, the applicants claim that a PMI insurer may attract young 'good risk' customers by providing cover specially adapted to their needs, at attractive premiums, with the corollary that other groups of insured persons, the 'bad risk' customers, have no incentive to subscribe to such unsuitable cover, and are even deterred from doing so. Irrespective of whether such a strategy of indirect discrimination between insured persons — a point not addressed by community rating, which prohibits only direct price discrimination — is practicable, which Ireland, in particular, denies, that strategy seems to be all the more plausible when competition between PMI insurers is particularly strong for the new, youngest, customers, as is the case here, as the parties are agreed in their submissions, between BUPA Ireland and the VHI. However, in those circumstances, contrary to the applicants' opinion, that strategy does not contradict the existence of the phenomenon of active risk selection, but tends rather to confirm it, indeed to exacerbate it. Accordingly, the applicants' argument based on the contractual freedom of PMI insurers is not capable of demonstrating the absence of active risk selection. Consequently, there is no manifest error of assessment in the Commission's finding, at recital 50 to the contested decision, concerning the danger of active risk selection, that PMI insurers could seek to achieve a better risk profile by, for example, selective marketing techniques, benefit design or selective quality of service.

276 In that regard, the Court considers that the theory that a danger of active risk selection and, accordingly, a risk of market instability is real and strong when the PMI insurer with a favourable risk profile embarks upon a strategy of price 'predation', as described at paragraph 6 of the RES guide, is plausible. On the other hand, that danger appears to be less strong, but still sufficiently significant, when that insurer adopts — as the defendant, Ireland and the VHI claim with respect to BUPA Ireland's conduct — a 'price follower' strategy, consisting in fixing the rates for its own PMI services at just below the rates charged by its main competitors for the same services. In those circumstances, the customer would appear to have less financial incentive

to change PMI insurers than in the case of 'price predation'. However, in that regard, the defendant and Ireland assert, without being contradicted by the applicants, that such a strategy none the less allows an insurer to select the 'good' risks and that, especially, it affects the proper functioning of the PMI market and runs counter to the objective of community rating by maintaining premiums that are too high, to the detriment of customers, by comparison with the costs of claims which a PMI insurer with a favourable risk profile must actually bear.

277 It also seems plausible that the 'price follower' strategy will have the effect that, notwithstanding its lower costs, the PMI insurer will decline to reduce its premiums, which would none the less be in the interest of consumers and consistent with the objective of community rating, with the sole aim of increasing its profits. Likewise, it does not appear to be precluded that a PMI insurer with an advantageous risk profile will pursue active risk selection by adopting the 'price follower' strategy so long as the price differential is sufficiently large to attract 'good risk' consumers.

278 The Court considers that both Ireland and the Commission, at recital 50 to the contested decision, submitted plausibly that such a commercial practice was likely to create a downward spiral and thus to destabilise the equilibrium and the functioning of the community rating PMI market in so far as PMI insurers with a favourable risk profile would be increasingly able to attract young, healthy customers and thus further improve their risk profile, whereas PMI insurers with an unfavourable risk profile would come under growing financial pressure owing to the increasing disequilibrium between premiums and the costs occasioned by the claims submitted by a large number of elderly insured persons in poor health.

279 In those circumstances, the Court considers that there is no manifest error affecting the consideration, in recital 50 to the contested decision, that in a PMI market subject to community rating, open enrolment and lifetime cover, there is, in the absence of a

mechanism to equalise risk, an incentive for insurers to select the favourable risks so as to be able to offer PMI services at more advantageous prices to all insured persons or to be able to make higher profits than competing PMI insurers.

— The situation on the Irish PMI market

280 The Court observes that the Commission found, at recital 51 to the contested decision, that on the Irish PMI market a danger of risk selection could not be ruled out even though no instability had yet been observed on that market.

281 In that regard, it must be emphasised that, at the time of the adoption of the contested decision, BUPA Ireland had a distinctly more favourable risk profile than that of the VHI, its main competitor. Without there being any need to rule on the disputed issue of whether or not the VHI's solvency ratios are satisfactory, it must be observed that the applicants have not really disputed the accuracy and the relevance of the data supplied by the defendant, by Ireland and by the VHI concerning the economic situation, the VHI's risk profile and its higher average payment costs per insured person. They accepted that the VHI had a less healthy risk profile than BUPA Ireland (see paragraphs 135 and 138 above).

282 Furthermore, in support of its assessment relating to the existence of a danger of active risk selection, the Commission relied on evidence showing that BUPA Ireland had in fact adopted a strategy of active risk selection combined with a 'price follower' strategy by offering rates that were in part significantly below those offered by the VHI to groups of consumers aged under 19 (with a price differential of 10%) and between the ages of 19 and 54 (with a price differential of 4%), whereas it required

higher premiums (20% higher) from persons over the age of 54 (recital 51 and footnote 9 to the contested decision). It should be emphasised that the applicants declined during the proceedings, including at the hearing, to comment on that evidence, notwithstanding the fact that both Ireland and the VHI relied expressly in their written submissions on BUPA Ireland's alleged 'price follower' practice.

283 In that regard, the applicants merely asserted, in the first place, that, as a new entrant on the Irish PMI market and because of the inertia of insured persons already tied to an insurer, BUPA Ireland necessarily had to target young consumers seeking cover for the first time. Although that allegation is plausible and supported by the findings of the Amárach report on the low rate of migration in Irish consumers, it cannot in itself, however, invalidate the finding relating to the presence of active risk selection, but tends rather to confirm it (see paragraph 274 above).

284 The applicants claimed, in the second place, that the VHI was selling PMI cover at a loss to elderly and, therefore, high-risk insured persons, which made it impossible for BUPA Ireland to compete with the VHI for that group of customers. That argument, which is short on detail and is disputed by the defendant and by Ireland, was not supported by the applicants during the proceedings and is in any event unfounded. On the assumption that such loss-making sales did exist, they would be difficult to reconcile with economic logic because they would mean that the VHI was seeking to ensure that its high-risk customers remained loyal and to prevent them from moving to other PMI insurers by offering them particularly advantageous premiums which did not cover the costs of meeting claims. Such conduct would be economically irrational, since those insured persons are the cause of the VHI's unfavourable risk profile, of the increase in its burdens and, accordingly, of the weakening of its competitive position on the PMI market.

285 In the light of the foregoing considerations, the Court considers that the Commission had sufficient relevant evidence to conclude, without manifest error, at recital 51 to the contested decision that a danger of active risk selection on the Irish PMI market could not be ruled out. Furthermore, regard being had to the restricted review applicable in this case (see paragraphs 220 to 222 and 265 to 270 above), the Commission could reasonably infer from the existence of such a danger of active risk selection that there was a risk of instability on the Irish PMI market (recitals 50 and 51 to the contested decision).

286 In that regard, the fact that the contested decision also finds that no market instability had yet been observed in the past cannot affect the legality of that conclusion. In view of its restricted power of review vis-à-vis the Member State (see paragraphs 220 to 222 and 269 above), the Commission was not entitled to substitute its own assessment of the evolution of the Irish PMI market for Ireland's. The Commission none the less satisfied itself, to the requisite legal standard, that at the time of the adoption of the contested decision the conditions that could justify the introduction of a risk equalisation mechanism in order to avoid future instability on that market that could result from active risk selection were fulfilled. The Court must therefore reject the applicants' argument that the Commission wrongly accepted the market instability argument. Last, in light of the plausible nature of the presence of a risk of instability based on active risk selection, there is no further need to ascertain whether the Commission could also validly conclude, at recital 50 to the contested decision, that there was a danger of passive risk selection.

(4) As to whether the RES was an appropriate means of resolving disequilibrium or instability on the PMI market

287 It is appropriate to examine, last, whether the Commission could reasonably consider that the RES constituted an appropriate instrument for resolving the disequilibrium that might result from active risk selection.

288 To that end, it is necessary to bear in mind at the outset the essential elements governing the functioning of the RES (see paragraphs 31 to 33 above).

289 Under the RES, the individual and actual risk profile of the PMI insurers is first of all determined on the basis of the periodic information which they supply concerning the costs of meeting claims by the person whom they insure, who, for that purpose, are divided into different groups by age (corresponding to age brackets) and sex. That individual and actual risk profile is based on the actual average cost per insured person in those groups and corresponds, in total, to the average of the costs of meeting claims generated by all of those groups. On the basis of the information supplied by the insurers subject to the RES, the HIA then determines the average market risk profile by reference to each of those groups.

290 In the following stage, that average market risk profile is substituted for the individual and actual risk profile in order to identify the hypothetical costs that the insurers would have incurred (per group) if they had had such a risk profile. The cost differential — whether positive or negative — between the individual and real risk profile on the one hand and the average and hypothetical market risk profile on the other is therefore of a size which depends on the data of all the PMI insurers subject to the RES. Last, that cost differential must correspond, possibly following the application of the 'zero sum adjustment factor', precisely to the amount to be equalised between the PMI insurers. By applying that method, the RES establishes a direct link between, on the one hand, the risk profile of PMI insurers, which is compared with an average and hypothetical market risk profile and, on the other, the differential in burdens resulting from the costs of meeting claims as thus determined. It follows that, the greater the positive risk profile by comparison with the hypothetical average profile, the more likely it is that the costs will be higher than the average market costs, and vice versa.

291 Furthermore, it follows from the considerations set out at paragraph 235 above that there is a real link between the additional costs associated with a negative risk profile and, in particular, the open enrolment and community rating obligations, and that the objectives pursued by those PMI obligations could not be achieved in the absence of a corrective such as that provided for by the RES.

292 First, the community rating objective could not be achieved in full, since community rating assumes an equitable apportionment of the costs associated with insured persons and, accordingly, of the risks between PMI insurers and that each of those insurers has a balanced risk profile. In effect, the purpose of community rating, namely that the young, healthy insured persons subsidise the premiums that would normally have to be paid by the elderly and sick insured persons, and, accordingly, solidarity between the generations, would be jeopardised if one PMI insurer, in an extreme situation, covered only young persons or elderly, sick persons. In other words, a PMI insurer can bear the burden of open enrolment and of community rating only if it is able to offset the costs of meeting claims submitted by its elderly, sick members, which are disproportionate by reference to the premiums, by the premiums paid by its young, healthy customers.

293 Second, in those circumstances, it seems plausible that, in the absence of a mechanism to restore equilibrium in the allocation of risks and to deter active risk selection, the Irish PMI market as thus regulated might experience disequilibrium that would jeopardise its functioning and, accordingly, the very achievement of those objectives. As the community rating obligation provides an incentive to adopt commercial practices, such as active risk selection, that might well threaten that equilibrium (see paragraph 273 above), the RES, as Ireland, in particular, submits, constitutes a mechanism for restoring equilibrium that is necessary and inherent in a regulated market subject to such obligations. In the absence of an open enrolment or a community rating obligation, the equilibrium of the market would be maintained or restored solely by market forces and, in particular, by means of risk-based rating. While such rating appears to be capable of significantly reducing the incentive to employ active risk selection (recital 52 *in fine* to the contested decision) and, accordingly, of maintaining a certain equilibrium, it does not permit the other objective pursued by the open enrolment and community rating obligations to be achieved, namely solidarity between the generations, which ensures easier access to PMI — owing, in particular, to the cross-subsidy of premiums — by the elderly and the sick.

294 In those circumstances, the Court cannot accept the applicants' argument — raised for the first time at the hearing and disputed by the defendant, by Ireland and by the VHI —, that the Commission relied in the contested decision on a misconception

of community rating to justify the need for the RES. There is no indication in the contested decision that the Commission relied on considerations other than those set out at paragraphs 291 to 293 above. Furthermore, as Ireland, in particular, asserted at the hearing, the grounds of the contested decision, in particular those set out at recitals 24, 41 and 60, refer to the principle of community rating as provided for in both section 7 and section 12(10)(iii) of the Health Insurance Act, 1994, as amended. Last, contrary to the applicants' view, the Commission did not confine itself to examining the community rating obligation solely from the viewpoint of individual PMI contracts, but concluded, at recital 60 to the contested decision, that the RES was necessary to maintain 'the stability of a community rated [PMI] market' in its entirety.

295 In the light of the foregoing, and taking account of the fact that the Commission could reasonably consider that, owing to a danger of active risk selection, there was a risk of disequilibrium on the Irish PMI market, the Court finds that the Commission did not disregard its obligation to review the need for the RES and that it was entitled to conclude that the RES was necessary in order for the PMI obligations to be discharged in economically acceptable conditions. The applicants, for their part, have neither adduced any evidence capable of invalidating the merits of the assessment set out at paragraphs 290 to 293 above concerning the link between the different relevant aspects of the PMI obligations and the RES nor demonstrated to the requisite legal standard that the RES was a manifestly inappropriate means of resolving the disequilibrium identified.

296 Consequently, the Court finds that the Commission did not make a manifest error in recognising the necessity of the introduction of the RES in the Irish PMI market and the applicants' complaints in that respect must be rejected in their entirety.

(iii) The proportionality of the RES

297 As regards the proportionality of the RES, it follows from the considerations set out at paragraphs 228 to 243 above that the applicants have not demonstrated that the compensation implemented by means of the RES payments was disproportionate to the additional costs linked with compliance with the PMI obligations. Accordingly, the applicants' arguments raised in the context of the second plea, whereby they seek to challenge the appropriateness and proportionality of the relevant criteria governing the calculation of the RES payments in so far, in particular, as they give rise, in the applicants' submission, to an allocation of the costs linked with inefficiency to the advantage of the PMI in receipt of those payments (see paragraph 138 above), must be rejected as unfounded. As the arguments alleging an allocation of a sharing of the inefficiency have been declared unfounded, there is no need to adjudicate in this case on the question whether, generally, the inefficiency of the operator entrusted with an SGEI mission should also be taken into account in the examination of proportionality under Article 86(2) EC (see paragraph 139 above).

298 Furthermore, the applicants have disputed the proportionality of the RES on the ground, first, that in view of the risk differential between BUPA Ireland and the VHI, the minimum level, namely 2%, of that differential required to activate the RES (recital 54 to the contested decision) had no practical effect; second, that the health status weight, even though it was limited to 50% of the observed use of hospital capacity (recital 57 to the contested decision), had no connection either with the PMI obligations or with the stated justification for the RES; third, that the exclusion of new entrants from the application of the RES for three years (recital 58 to the contested decision) did not offset the deterrent effect of the RES constituting an obstacle to entry; and, fourth, that the RES, unlike the Netherlands RES, did not provide for a mechanism to correct overcompensation.

299 In view of the restricted nature of the administrative and judicial review applicable in this case (see paragraphs 220 to 222 and 269 above), the Court considers, first, that the applicants have not shown to the requisite legal standard that the 2% level

of risk differential constituted a manifestly inappropriate or disproportionate criterion, particularly since that percentage does not necessarily lead to the activation of the RES, given the wide discretion which the Irish authorities have in that regard (recitals 22 to 24 and 54 to the contested decision and paragraph 265 above).

300 Likewise, the theory that the health status weight is not linked to the PMI obligations and the justification for the RES cannot be upheld. In that regard, the defendant and Ireland have explained, without being contradicted by the applicants, that the fact that the costs of the claims of the various groups by age and sex are taken into account did not necessarily fully reflect the individual and actual risk profile of a PMI insurer, owing in particular to the differences that could exist within those groups, which necessitated the application, limited to 50%, of an adjustment based on observed use of hospital capacity (recitals 28 and 57 to the contested decision). In so far as the application of that adjustment factor, which is not currently proposed, is intended to determine, as reliably as possible, the actual risk differentials between PMI insurers and, accordingly, the associated additional costs, that factor is wholly consistent with the logic of the compensation provided for by the RES for the burdens resulting from compliance with the PMI obligations (see paragraph 234 et seq. above).

301 As regards the alleged deterrent effect of the RES vis-à-vis potential new entrants, the applicants themselves acknowledge that the temporary exemption from the application of the RES during a PMI insurer's first three years of activity on the Irish PMI market, which had the specific aim of avoiding any possible foreclosure effect on that market and of not deterring operators from entering it, is apt to lower the alleged barrier to entry. In any event, even on the assumption that the RES does reinforce barriers to entry, that finding does not in itself permit the conclusion that the RES is a manifestly inappropriate or disproportionate instrument. To accept that it was would amount to calling in question the very existence of the risk equalisation system introduced by the RES and the achievement of the various objectives pursued by the PMI obligations (see paragraphs 291 to 293 above) and, accordingly, the discretionary power of the Irish legislature with respect to the organisation of the health sector in Ireland.

302 Furthermore, if the raising of the barriers to entry to the Irish PMI market to the detriment of potential new entrants is a necessary consequence of the introduction of the RES, it is clear upon weighing up the objectives of the RES and the interests involved that those objectives must take priority over the need to facilitate access to the market. For the sake of completeness, it should be noted that the applicants' argument is also contradicted by the entry to the PMI market, in October 2004, of the PMI insurer Vivas Healthcare (see paragraph 22 above), when the project to activate the RES had already materialised, and that insurer's entry to the market shows at the same time that, contrary to the applicants' opinion, the temporary three-year exemption from the application of the RES which the new arrival enjoys reduces the significance of the alleged barrier to entry.

303 Last, with respect to the considerations set out at paragraph 235 above concerning the method of calculating the RES payments, which are intended solely to offset the burdens linked with compliance with the PMI obligations, the applicants' argument that the RES should make provision for a special mechanism to avoid overcompensation in addition to the mechanisms already included for that purpose, such as the ceiling on reimbursable costs, cannot be upheld. The comparison which the applicants make in that context with the Netherlands RES is invalid, since, as they themselves acknowledge, there are fundamental differences between that system and the RES, as the former is a hybrid system in which the State covers 50% of the costs of providing PMI services in the form of direct aid.

304 In the light of the foregoing, the applicants have not demonstrated that the RES is manifestly inappropriate and disproportionate. Accordingly, the Commission was entitled to conclude, without making any manifest error in that regard, that the RES was proportionate within the meaning of Article 86(2) EC. That is all the more so because, as stated at recital 59 to the contested decision, all the decisions taken by the Irish authorities in connection with the activation of the RES are amenable to judicial review, as is confirmed, moreover, by the proceedings that led to the judgment of the High Court of 23 November 2006 (see paragraphs 24 to 26 above).

305 Consequently, the complaint alleging that the RES is disproportionate for the purposes of Article 86(2) EC must be rejected as unfounded.

(iv) An effect on trade to such an extent as would be contrary to the interest of the Community

306 Last, the applicants criticise the Commission for not having examined the criterion of an effect on trade to such an extent as would be contrary to the interest of the Community, within the meaning of Article 86(2) EC in fine, and submit that the contested decision contains no reasoning on that point. In that regard, the applicants seek to demonstrate, notably in the third, fourth, fifth and seventh pleas, that the RES runs counter to the interest of the Community in so far as it infringes other provisions of Community law. In particular, in support of their fourth and fifth pleas, they maintain that, in its assessment of a possible effect on intra-Community trade and the interest of the Community, under Article 86(2) EC, the Commission was required to examine the compatibility of the RES with Article 82 EC, with freedom to provide services and freedom of establishment and also with the third non-life insurance directive.

307 In that regard, it must be borne in mind that the Commission considered, at recital 61 to the contested decision, that even if it were assumed that the compensation for the SGEIs constituted State aid within the meaning of Article 87(1) EC, the aid elements would be compatible with the common market pursuant to Article 86(2) EC, without prejudice to the analysis of the compatibility of the scheme with other rules of Community law, in particular with the third non-life insurance directive, which would fall to be examined within the framework of the appropriate procedures.

308 The Court considers that the expression 'compatible with the common market pursuant to Article 86(2) EC' necessarily refers to the criterion of an effect on trade to such an extent as would be contrary to the interests of the Community. Furthermore, the reference to the third non-life insurance directive and to other rules of the Treaty implies that the Commission took account, in the context of the application of Article 86(2) EC, of the impact of the RES on, inter alia, freedom to provide services and freedom of establishment. In those circumstances, even though the reasoning in that regard may appear to be concise, it none the less suffices to show that the Commission was of the view that the RES did not affect trade to such an extent as would be contrary to the interests of the Community. Last, in so far as the applicants criticise the Commission for not having examined diligently and fully whether the RES was compatible with the other provisions of Community law and for not having stated the reasons on which the contested decision was based in that regard, their complaint must be examined in the context of the third, fourth, fifth and seventh pleas.

309 Therefore the complaint alleging failure to examine the criterion of an effect on trade to such an extent as would be contrary to the interests of the Community, within the meaning of Article 86(2) EC in fine, and to state reasons in that regard, cannot be upheld.

310 Consequently, the second plea must be rejected as unfounded in its entirety.

C — *The admissibility of the third, fourth and fifth pleas*

1. Arguments of the parties

311 The defendant contends that the applicants lack *locus standi* with respect to the alleged infringement of the other provisions of Community law invoked in the third,

fourth, fifth and seventh pleas. In the context of an assessment under the rules on State aid, those provisions are relevant only where they are closely linked to the grant of the State aid itself (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 85), which is not the case here.

312 The applicants, in their third plea, maintain that, according to consistent case-law, it is clear from the general scheme of the Treaty that the procedure under Article 88 EC must never produce a result which is contrary to the specific provisions of the Treaty and that, accordingly, where certain aspects of a State aid contravene other provisions of the Treaty, that aid cannot be declared by the Commission to be compatible with the common market (Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41, and *Germany* v *Commission*, paragraph 311 above, paragraph 78).

2. Findings of the Court

313 It must be observed, first of all, that, as the defendant contends, if the Commission were required to adopt a definitive position in a procedure relating to State aid under Regulation No 659/1999 on the existence or absence of an infringement of provisions of Community law distinct from those coming under Articles 87 EC and 88 EC, read together, where appropriate, with Article 86 EC, that would run counter to, first, the procedural rules and guarantees — which in part differ significantly and imply distinct legal consequences — specific to the procedures specially established for control of the application of those provisions and, second, the principle of autonomy of administrative procedures and remedies. In that regard, it should further be borne in mind that, even in the guise of an action for annulment of a decision on State aid, an individual lacks standing to act, in view of the discretionary power of the Commission in that context, against the Commission's failure to initiate

infringement proceedings under Article 226 EC or to adopt a position in respect of a possible infringement by a Member State of the provisions of the Treaty (see, to that effect, Case T-148/00 *Panhellenic Union of Cotton Ginners and Exporters* v *Commission* [2003] ECR II-4415, paragraph 62 and the case-law there cited).

314 The applicants cannot properly rely on the case-law to the effect that it follows from the general scheme of the Treaty that the procedure under Article 88 EC must never produce a result which is contrary to the specific provisions of the Treaty. According to that case-law, while the Commission has a wide discretion when it determines the compatibility of a system of aid with the common market, it is none the less required to ensure, in the context of that assessment, that the procedure does not produce a result which is contrary to specific provisions of the Treaty other than those of Articles 87 EC and 88 EC, in particular where those aspects of aid which contravene those provisions are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (see, to that effect, *Matra* v *Commission*, paragraph 72 above, paragraph 41 and the case-law there cited). However, while that obligation is the expression of a general principle that every application of Community law must be made in conformity with the higher rules of law, it does not mean that the Commission is required, in a procedure relating to aid, to apply the rules specially laid down for review of the application of other provisions of the Treaty or to adopt one or more decisions producing combined legal effects. Under that obligation, the Commission is required to make an assessment by reference to the relevant provisions which are not, strictly speaking, covered by the law on aid only where certain aspects of the aid in issue are so closely linked to its object that any failure on their part to comply with those provisions would necessarily affect the compatibility of the aid with the common market. In the present case, the applicants have neither explained nor shown to the requisite standard that the particular aspects of the implementation of the RES that are alleged to infringe other provisions of Community law were indissolubly linked to the object of the aid in issue, namely the equalisation payments. Furthermore, it must be borne in mind that the Commission correctly concluded, in Article 1 of the contested decision, that the RES did not

involve State aid in the sense of Article 87(1) EC and that therefore that article did not in any event amount to a declaration of compatibility with the common market within the meaning of the case-law cited above. Consequently, if only for those reasons, the third, fourth and fifth pleas must be rejected as inoperative.

315 Furthermore, it is clear from settled case-law that the discretion which Article 88 EC confers on the Commission in relation to aid does not permit it to authorise Member States to derogate from provisions of Community law other than those relating to the application of Article 87(1) EC (Joined Cases C-134/91 and C-135/91 *Kerafina — Keramische und Finanz-Holding and Vioktimatiki* [1992] ECR I-5699, paragraph 20, and Case T-184/97 *BP Chemicals* v *Commission* [2000] ECR II-3145, paragraph 55). It follows, first, that the Commission cannot adopt a definitive position in a procedure relating to aid as to compliance with other provisions of Community law where such compliance must be controlled under a different procedural regime. It also follows that, as the adoption of a definitive and legally binding Commission decision must be limited to the aid aspects, only those aspects, and not the aspects relating to other provisions of Community law which do not constitute the necessary support for the operative part of its decision, are capable of having adverse effects (see, to that effect and by analogy, *Panhellenic Union of Cotton Ginners and Exporters* v *Commission*, paragraph 313 above, paragraphs 57 and 58).

316 In that regard, it must be borne in mind that, according to consistent case-law, regardless of the grounds on which a decision is based, only the operative part of the decision is capable of producing legal effects and, consequently, of having adverse effects. On the other hand, the assessments made in the grounds of a decision are not in themselves capable of forming the subject-matter of an action for annulment. Their legality can be reviewed by the Community judicature only to the extent that, as the grounds of an act adversely affecting the person concerned, they constitute the essential basis for the operative part of that act (order of the Court of Justice in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 21; judgment in Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 186; see also paragraph 260 above), or if, at least, those grounds are capable of

altering the substance of what was decided in the operative part of the act in question (see, to that effect, Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraphs 67 and 68). It follows, *a fortiori*, that the complete failure to mention provisions other than those relating to State aid both in the operative part and in the grounds of a decision adopted pursuant to Articles 87 EC and 88 EC and, where appropriate, Article 86(2) EC, is not capable of adversely affecting an individual and of conferring on him an interest in bringing an action.

317 In this case, it must be emphasised that the contested decision is a decision not to raise objections in respect of notified aid measures, within the meaning of Article 4 of Regulation No 659/1999, which is addressed only to Ireland and which does not constitute, either in form or in substance, an explicit response to the applicants' complaint (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 45). Consequently, the decision cannot be interpreted as responding, even by implication, to all the complaints raised by the applicants, including those alleging infringement of Articles 82 EC, 43 EC and 49 EC or the provisions of the third non-life insurance directive. In those circumstances, the failure to assess those complaints in either the operative part or the grounds of the contested decision produces no legally binding effects vis-à-vis the applicants and is not capable of adversely affecting them, so that they do not have capacity to act in the context of the action for annulment of the contested decision. The Commission was therefore correct to state, at recital 61 to the contested decision, that the assessment made under Article 87 EC and Article 86(2) EC 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.

318 Last, contrary to the applicants' theory, the wording of Article 86(2) EC in fine does not invalidate that assessment. First, the criterion of an effect on trade to such an extent as would be contrary to the interests of the Community does not mean that the Commission is under an obligation to ascertain, definitively and comprehensively, whether the notified State measures infringe other provisions of Community law. Second, as the defendant claims, the applicants' theory is contradictory in that its application would deprive Article 86(2) EC of any practical effect as a derogation

from the rules of the Treaty. Such a derogation could never be effective if its application were at the same required time to ensure full compliance with the rules from which it is supposed to derogate.

319 The Court concludes from all of the foregoing considerations that the applicants have no standing to rely, within the framework of their action against the contested decision, on the third, fourth, fifth and seventh pleas in so far as they are based on infringement of Articles 82 EC, 43 EC and 49 EC and the third non-life insurance directive.

320 Consequently, the third, fourth and fifth pleas must be rejected as inadmissible and, at the very least, as inoperative, without there being any need to adjudicate on their merits. The seventh plea must also be rejected as inadmissible in so far as it refers to the provisions of Community law specifically covered by the third, fourth and fifth pleas.

D — *The sixth plea, based on the failure to initiate the formal investigation procedure under Article 88(2) EC*

1. Arguments of the parties

321 The applicants submit that, in the light of all of the foregoing, the Commission acted unlawfully in failing to initiate the formal investigation procedure, under Article 88(2) EC, in order to be able to adjudicate in full knowledge of the relevant facts of the present case. The contested decision was adopted following the preliminary examination, under Article 88(3) EC, which is intended merely to enable the

Commission to form a prima facie opinion on the compatibility of the aid with the common market. The Commission is entitled to limit itself to that preliminary examination only if that is sufficient for it to satisfy itself that the aid is compatible (*Matra* v *Commission*, paragraph 72 above, paragraphs 16 and 33; *Cook* v *Commission*, paragraph 66 above, paragraphs 22 and 29; *Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraphs 38 and 39; and *Portugal* v *Commission*, paragraph 312 above, paragraphs 32 and 33), which is not the case here.

322 In that regard, the Commission is required to examine all the facts and all the legal arguments brought to its notice by undertakings whose interests may be affected by the grant of the aid (*Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 51, and *Portugal* v *Commission*, paragraph 312 above, paragraph 35). In that context, the applicants refer back to their arguments concerning, first, the absence of SGEI obligations and of the conditions permitting compensation for such obligations and, moreover, infringement of the right to freedom of establishment, freedom to provide services and the third non-life insurance directive and also Article 86(1) EC in conjunction with Article 82 EC. In the applicants' submission, those arguments raise complex issues which require detailed factual and economic evidence which cannot be evaluated other than in the formal investigation procedure under Article 88(2) EC. That, they maintain, is borne out by the fact that the Commission did not examine those arguments properly, or indeed did not examine them at all.

323 The applicants dispute the assertion that the opening of the formal examination procedure would not have placed them in a better position to formulate their objections to the RES. The rules governing that procedure impose special obligations on the Commission, which were not complied with in this case, such as publication of the decision to open the procedure in the *Official Journal of the European Union*, pursuant to Article 26(1) of Regulation No 659/1999, and the requirement, under Article 6 of that regulation, to request comments from the interested parties, to examine those comments and to communicate them to the Member State.

324 As for the argument that they did not explain why the Commission ought to have expressed serious doubts as to the compatibility of the RES with Article 87 EC, the applicants observe that they explained in detail the evidence showing that their case raised serious problems from the aspect of State aid. Even on the assumption that the applicants are unsuccessful in their substantive pleas, the complexity of the present case, as described, in particular, in the first and second pleas, would in itself have required the initiation of the formal investigation procedure under Article 88(2) EC. The applicants further observe that the Commission examined the RES for four years before adopting the contested decision. In an investigation lasting so long, it is unusual for the formal investigation procedure not to have been initiated.

325 Accordingly, the contested decision must be annulled for unlawful failure to initiate the formal investigation procedure under Article 88(2) EC.

326 The defendant, supported by Ireland, claims that the applicants, who bear the burden of proof, have failed to explain why the Commission ought to have expressed serious doubts as to the compatibility of the RES with Article 87 EC and, conversely, why the Commission could not assess what are alleged to be the complex economic issues in the present case without initiating the formal investigation examination procedure under Article 88(2) EC. Furthermore, in view of the fact that the applicants submitted numerous pleadings and met the Commission's representatives in the course of the investigation of their complaint, they ought to have explained why they would have been in a better position to challenge the RES if the Commission had initiated the formal investigation procedure. In any event, the applicants add nothing to the other pleas relating to the substantive legality of the contested decision and merely reiterate them under the head of the present plea.

2. Findings of the Court

327 The Court observes at the outset that, under Article 4(3) of Regulation No 659/1999, the Commission is authorised to adopt, at the close of the preliminary examination

procedure, a decision not to raise objections if the notified measure raises no doubts as to its compatibility with the common market. Conversely, under Article 4(4) of that regulation, where the Commission has such doubts, it is required to initiate the formal investigation procedure under Article 88(2) EC and Article 6 of that regulation.

328 In that regard, it must further be observed that the Commission is required to initiate the formal investigation procedure if, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. That obligation follows directly from Article 88(3) EC, as interpreted by the case-law, and is confirmed by the provisions of Article 4(4) in conjunction with Article 13(1) of Regulation No 659/1999, when the Commission finds, after a preliminary examination, that the unlawful measure raises doubts as to its compatibility with the common market (see, to that effect, *British Aggregates* v *Commission*, paragraph 69 above, paragraph 165).

329 In effect, as established in a consistent line of cases, the procedure under Article 88(2) EC is obligatory where the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary procedure under Article 88(3) EC and take a favourable decision on a State measure unless it is in a position to reach the firm view, following an initial examination, that the measure cannot be classified as aid within the meaning of Article 87(1) EC or that the measure, while constituting aid, is compatible with the common market. On the other hand, if the initial examination results in the Commission taking the contrary view to the aid's compatibility with the common market, or if it does not put the Commission in a position to overcome all the problems raised by its assessment of the compatibility of the measure in question with the common market, the Commission has a duty to obtain all the necessary views and, to that end, to initiate the procedure under Article 88(2) EC (*Matra* v *Commission*, paragraph 72 above, paragraph 33; *Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 39; and *British Aggregates* v *Commission*, paragraph 69 above, paragraph 166).

330 That duty to initiate the formal investigation procedure applies in particular when the Commission, having analysed to the appropriate standard, on the basis of the information provided by the Member State concerned, the State measure in issue, entertains doubts as to the existence of aid elements for the purposes of Article 87(1) EC and as to their compatibility with the common market (see, to that effect, Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraphs 47 and 48, and *British Aggregates* v *Commission*, paragraph 69 above, paragraph 167).

331 The Court considers that, in the light of those requirements, the Commission, in adopting the contested decision, did not fail to have regard to the scope of Article 88(3) EC or to that of Article 4(2) and (4) of Regulation No 659/1999.

332 Without there being any need to rule on the question whether the applicants would have been in a better position, in the context of the formal investigation procedure and on the basis of the procedural guarantees expressly conferred on them by Article 88(2) EC, to rely effectively on their objections to the RES, the Court finds that the applicants were fully able to defend their point of view, by means of their complaint and other pleadings and studies lodged with the Commission, before the adoption of the contested decision.

333 Furthermore, the Court infers from the findings which led it to reject the first, second, third, fourth and fifth pleas that, on the basis of the relevant information provided by Ireland and by the applicants, the Commission was entitled to consider that, even if the RES required an analysis of economically complex facts, it did not raise serious problems or doubts as to the appraisal of the existence of State aid and of its compatibility with the common market. The Court considers that, in the light

of the considerations set out at paragraph 157 et seq. above, there is no indication, even after the applicants have abundantly developed their arguments in that regard during the proceedings, to support the assertion that the result of the Commission's assessment of the RES, following a formal investigation procedure, might have been different from that reached in the contested decision, which concludes that the RES does not involve State aid in the sense of Article 87(1) EC and that the conditions for the application of the derogation provided for in Article 86(2) EC are satisfied.

334 In those circumstances, the present plea must be rejected as unfounded.

E — *Seventh plea, alleging failure to state reasons within the meaning of Article 253 EC*

1. Arguments of the parties

335 The applicants claim that the contested decision breaches the obligation to state the reasons on which it is based as consistently interpreted in the case-law (Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29). They maintain that the decision is characterised by the making of repeated conclusory statements, without any proper examination of the supporting evidence, of both fact and law on the part of the Irish authorities. That failure to state reasons is particularly serious because the applicants disputed the relevant factual, economic and legal analysis put forward by those authorities.

336 Thus, at recitals 40, 53 and 60 to the contested decision, which deal with the RES as a means of compensating for the PMI obligations, the Commission does not identify either the costs of those obligations or the RES payments that are foreseen. Nor does

it explain why those payments are strictly necessary to compensate for those costs. At recital 50 to the contested decision, the Commission merely mentions '[e]conomic studies' which support the Irish authorities' claims. The Commission subsequently admitted having taken account of seven studies, only two of which are mentioned in the grounds of the contested decision. Furthermore, although the Commission concludes at recital 61 to the contested decision that any State aid is compatible with the common market under Article 86(2) EC, it does not explain in the grounds of the decision whether the alleged SGEI obligations were entrusted to the VHI or to BUPA Ireland or its reasons for considering that the RES payments are strictly proportionate to the relevant costs and receipts and that the RES does not affect the development of trade to such an extent as would be contrary to the interests of the Community. Last, the Commission merely asserts, in a single sentence at recital 61 to the contested decision, that the RES does not infringe the third non-life insurance directive, and makes no reference whatsoever to the question, raised by the applicants, of the infringement of Article 86(1) EC in conjunction with Article 82 EC or of the infringement of Articles 43 EC and 49 EC.

337 The defendant contends that this plea should be rejected.

2. Findings of the Court

338 First of all, the Court observes that, in the light of the considerations set out at paragraphs 313 to 320 above, the present plea is inadmissible and, at the very least, inoperative, in so far as it refers to the alleged illegalities invoked in connection with the third, fourth and fifth pleas.

339 Next, it must be borne in mind that according to consistent case-law, the scope of the obligation to state reasons depends on the nature of the act in question and the

context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the decision is well founded and to enable the Court to carry out its review (*Commission* v *Sytraval and Brink's France*, paragraph 72 above, paragraph 63; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 278; Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 119; and *Corsica Ferries France* v *Commission*, paragraph 221 above, paragraph 62).

340 As regards the defects in reasoning alleged in the context of the application of Article 87(1) EC and Article 86(2) EC, it must be observed, first of all, that, as follows from the considerations set out at paragraph 171 et seq. above, the grounds of the contested decision taken as a whole enabled the applicants to challenge in detail the merits of the contested decision before the Community judicature and enabled the latter to exercise its review in full. As regards, more particularly, the alleged failures to state reasons in recitals 40, 50, 53, 60 and 61 to the contested decision, concerning inter alia the necessity and proportionality of the compensation provided for by the RES by reference to the additional costs associated with the negative risk profile of a PMI insurer, it is sufficient to refer to paragraph 228 et seq. above to conclude that no such failures to state reasons are present in the contested decision.

341 As regards the failure in the contested decision to mention five studies used by the Commission, it must be borne in mind that, according to a consistent body of case-law, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; *Corsica Ferries France* v *Commission*, paragraph 221 above, paragraph 63; and *British Aggregates* v *Commission*, paragraph 69 above, paragraph 141). In particular, the Commission is not

obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 339 above, paragraph 280, and *Corsica Ferries France* v *Commission*, paragraph 221 above, paragraph 64).

342 In light of the considerations set out, in particular, at paragraph 228 et seq. and paragraph 273 et seq. above, the Court finds that the Commission set out the essential economic arguments and facts supporting its analysis, while citing, in footnotes 9 and 10 to the contested decision, at least, two relevant studies in support of that analysis. In those circumstances, the applicants' complaint alleging failure to state reasons on the ground that the Commission did not expressly discuss the results of the other studies in the contested decision cannot be upheld.

343 Last, as regards the reasons why trade between Member States was not affected to an extent contrary to the Community interest, it is sufficient to refer to the considerations set out at paragraphs 308 and 309 above to reject that complaint.

344 Consequently, the plea alleging infringement of Article 253 EC must be rejected as unfounded.

F — *The application for measures of inquiry*

1. Arguments of the applicants

345 The applicants request the Court to order the defendant, pursuant to Article 65 of the Rules of Procedure, to produce certain documents relating to the inter-service

consultations between the Directorate-General for Competition and the Directorate-General for the Internal Market concerning the compatibility of the RES with the third non-life insurance directive, in the event that the defendant should fail to disclose those documents on its own initiative.

2. Findings of the Court

346 As the third, fourth and fifth pleas are inadmissible and, at the very least, inoperative (see paragraphs 313 to 320 above), the Court considers that it has sufficient information about all the essential and relevant elements of the case to be able to adjudicate. Accordingly, it is appropriate to reject the applications for measures of inquiry submitted by the applicants.

Costs

347 Under Article 87(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. As the applicants have been unsuccessful, they must be ordered to pay the defendant's and the VHI's costs, in accordance with the forms of order sought by those parties.

348 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. Accordingly, Ireland and the Kingdom of the Netherlands, as interveners, shall bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd to bear their own costs and to pay the costs incurred by the Commission and the Voluntary Health Insurance Board;**

3. **Orders Ireland and the Kingdom of the Netherlands to bear their own costs.**

Jaeger Tiili Azizi

Cremona Czúcz

Delivered in open court in Luxembourg on 12 February 2008.

E. Coulon M. Jaeger

Registrar President

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