

JUDGMENT OF THE COURT (Grand Chamber)

10 February 2009\*

In Case C-110/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 March 2005,

**Commission of the European Communities**, represented by D. Recchia and F. Amato, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Italian Republic**, represented by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

\* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and T. von Danwitz, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, A. Borg Barthet, J. Malenovský, U. Lohmus (Rapporteur), A. Arabadjiev and C. Toader, Judges,

Advocate General: P. Léger, later Y. Bot,  
Registrar: L. Hewlett, Principal Administrator, later M. Ferreira, Principal Administrator,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2006,

having regard to the order of 7 March 2007 re-opening the oral procedure and further to the hearing on 22 May 2007,

having regard to the written and oral observations submitted by:

— the Commission of the European Communities, by D. Recchia and F. Amato, acting as Agents,

- the Italian Republic, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,
- the Czech Republic, by T. Boček, acting as Agent,
- the Kingdom of Denmark, by J. Bering Liisberg, acting as Agent,
- the Federal Republic of Germany, by M. Lumma, acting as Agent,
- the Hellenic Republic, by N. Dafniou, acting as Agent,
- the French Republic, by G. de Bergues and R. Loosli, acting as Agents,
- the Republic of Cyprus, by K. Lykourgos and A. Pantazi-Lamprou, acting as Agents,
- the Kingdom of the Netherlands, by H.G. Sevenster and C. ten Dam, acting as Agents,
- the Kingdom of Sweden, by A. Kruse, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2008,

gives the following

### **Judgment**

- <sup>1</sup> In its application, the Commission of the European Communities asks the Court to find that, by maintaining rules which prohibit mopeds, motorcycles, tricycles and quadricycles ('motoveicoli', hereinafter 'motorcycles') from towing a trailer, the Italian Republic has failed to fulfil its obligations under Article 28 EC.

### **Legal context**

#### *Community rules*

- <sup>2</sup> Council Directive 92/61/EEC of 30 June 1992 relating to the type-approval of two or three-wheel motor vehicles (OJ 1992 L 225, p. 72) laid down uniform definitions and the

procedure for granting Community type-approval or component type-approval in respect of certain types of vehicle covered by the directive. Article 1(1) and (2) thereof provide as follows:

‘1. This Directive applies to all two or three-wheel motor vehicles, twin-wheeled or otherwise, intended to travel on the road, and to the components or separate technical units of such vehicles.

...

2. The vehicles referred to in paragraph 1 shall be subdivided into:

- moped[s], i.e. two or three-wheel vehicles fitted with an engine having a cylinder capacity not exceeding 50 cm<sup>3</sup> if of the internal combustion type and a maximum design speed of not more than 45 km/h,
- motorcycles, i.e. two-wheel vehicles with or without sidecar, fitted with an engine having a cylinder capacity of more than 50 cm<sup>3</sup> if of the internal combustion type and/or having a maximum design speed of more than 45 km/h,

- motor tricycles, i.e. vehicles with three symmetrically arranged wheels fitted with an engine having a cylinder capacity of more than 50 cm<sup>3</sup> if of the internal combustion type and/or a maximum design speed of more than 45 km/h.'

<sup>3</sup> It is apparent from Article 1(3) that Directive 92/61 also applied to motor vehicles with four wheels, namely 'quadricycles', which were to be considered to be mopeds or motor tricycles depending on their technical characteristics.

<sup>4</sup> The sixth recital in Council Directive 93/93/EEC of 29 October 1993 on the masses and dimensions of two or three-wheel motor vehicles (OJ 1993 L 311, p. 76), which is intended to harmonise imperative technical requirements in order to enable the type-approval and component type-approval procedures laid down in Directive 92/61 to be applied, states the following:

'Whereas the provisions of this Directive should not oblige those Member States which do not allow two-wheel motor vehicles on their territory to tow a trailer to amend their rules'.

- 5 The purpose of Directive 97/24/EC of the European Parliament and of the Council of 17 June 1997 on certain components and characteristics of two or three-wheel motor vehicles (OJ 1997 L 226, p. 1) is to further harmonise certain technical requirements of such vehicles, including coupling devices and attachments. The 12th recital in this directive states as follows:

‘Whereas ... the object of the requirements of this Directive should not be to oblige those Member States which do not allow two or three-wheel motor vehicles in their territory to tow a trailer to amend their rules’.

### *National legislation*

- 6 In Italy, Article 53 of Legislative Decree No 285 of 30 April 1992 (GURI, ordinary supplement, No 114 of 18 May 1992, ‘the Highway Code’) defines motorcycles as motor vehicles with two, three or four wheels. Only four-wheeled vehicles may be called ‘motor quadricycles’.
- 7 Pursuant to Article 54 of the Highway Code, automobiles (‘autoveicoli’) are motor vehicles with at least four wheels, excluding the vehicles defined in Article 53 of the Code.
- 8 Pursuant to Article 56 of the Highway Code, only automobiles, trolleybuses (vehicles with an electric motor not travelling on rails which take their energy from an overhead

contact line) and automobile tractors (three wheeled motor vehicles intended to tow semi-trailers) are allowed to tow trailers.

### **The pre-litigation procedure**

- 9 As a result of a complaint lodged by an individual concerning the Italian Republic and an informal inquiry by the Commission, the latter, on 3 April 2003, sent a formal notice to the Member State in which it argued that the prohibition on motorcycles towing trailers constituted a failure to fulfil obligations under Article 28 EC.
- 10 In a letter of 13 June 2003, the Italian Republic gave a commitment to make the requisite changes to the national rules and to remove the obstacle to imports raised in the formal notice mentioned above.
- 11 Since it received no further communication concerning the making of such changes, the Commission, on 19 December 2003, sent a reasoned opinion to the Italian Republic calling on it to submit its observations within a period of two months as from receipt of that notice.

- 12 Having received no reply to that notice, the Commission decided to institute the present proceedings.

### **Procedure before the Court**

- 13 By decision of 11 July 2006, the Court assigned the case to the Third Chamber. Since none of the parties applied to submit oral arguments, the Court decided to rule without holding a hearing. Advocate General Léger delivered his Opinion on 5 October 2006, after which the oral procedure was closed.
- 14 Pursuant to Article 44(4) of the Rules of Procedure, the Third Chamber, on 9 November 2006, decided to refer the case back to the Court in order that it might be reassigned to a formation composed of a greater number of judges.
- 15 By order of 7 March 2007, the Court ordered the re-opening of the oral procedure and the holding of a hearing. The parties to the case and, pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice, the Member States other than the Italian Republic were invited to answer the question of the extent to which and the conditions under which national provisions which govern not the characteristics of goods but their use, and which apply without distinction to domestic and imported goods, are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC.

## The action

### *Observations submitted on the Court's question*

- <sup>16</sup> The parties to the case as well as the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Kingdom of the Netherlands and the Kingdom of Sweden submitted written or oral observations to the Court on the question.
- <sup>17</sup> In the Commission's view, it is possible to identify two categories of rules concerning the use of a product, namely, first, those which make use of the product subject to compliance with certain conditions specific to the product or which limit that use in space or time and, second, those which lay down absolute, or almost absolute, prohibitions of the use of the product.
- <sup>18</sup> The Commission proposes to apply to the first category of rules the criteria set out in paragraph 5 of the judgment in Case 8/74 *Dassonville* [1974] ECR 837 and to consider each case separately. With regard to the second category of rules, once they impose an absolute prohibition on the use of a certain product or a prohibition which permits only limited or exceptional use of it, they constitute, by definition, measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC. The Commission considers that it is neither appropriate nor necessary to extend the criteria set out in paragraphs 16 and 17 of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 to rules concerning the use of a product and thereby create an additional category of measures which are not within the scope of Article 28 EC.

- 19 The Italian Republic argues that a rule concerning use is covered by Article 28 EC only if it prohibits all uses of a product or its only use, if the product only has one. On the other hand, if there is a discretion as to the possible uses of the product, the situation no longer falls under Article 28 EC.
- 20 The Czech Republic argues that it is inappropriate to draw rigid distinctions between different categories of measures and to apply different legal criteria depending on the category into which they fall because the introduction of any new category of measures inevitably implies difficulties in regard to its definition.
- 21 Like the Commission, that Member State points out that the criteria introduced by *Keck and Mithouard*, for selling arrangements for products should not be extended to rules concerning the use of products because the application of those criteria has not been without difficulty in the Court's case-law and they have not really been necessary. Indeed, the provisions declared to govern selling arrangements could have been defended by the national authorities even in the absence of the criteria laid down in that judgment.
- 22 On the other hand, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Cyprus and the Kingdom of Sweden consider that the case-law commencing with *Keck and Mithouard*, should be applied by analogy to a national provision which restricts or prohibits certain forms of use of a product. They therefore propose that a national provision should not fall under Article 28 EC in so far as it is not connected with the product, it applies to all economic operators concerned who pursue their activities in the national territory and it affects in the same manner, in law and in fact, national products and those coming from other Member States.

- 23 By contrast, those same Member States point out that a derogation from those criteria would be necessary if it was established that restrictive national provisions simply prohibited the use of a particular product or permitted only a limited use thereof, thereby restricting its access to the market.
- 24 In the view of the Kingdom of Denmark, it is important to note that national rules which limit the freedom of action of an individual or an undertaking in regard to a particular product are not all prohibited. With regard to the criterion that a national rule may not prevent a product's access to the market, it considers that it is difficult to determine from what point a restriction on the use of a product may be regarded as so restrictive that it hinders such access. It is of the opinion that it is for the national courts to decide to what extent the person who challenges such a rule has established that access to the market has been hindered by the application thereof.
- 25 The Federal Republic of Germany considers that rules concerning the use of a product constitute the other side of those concerning selling arrangements in the sense that some of the forms of use may be regarded as selling arrangements and vice versa. In its view, the principles flowing from *Keck and Mithouard*, should apply in the same fashion to rules concerning the use of a product in so far as those rules do not involve discrimination, ensure equal opportunity in regard to competition between products manufactured in the Member State having laid down such rules and those coming from other Member States and not hinder, completely or almost completely, access to the market of the said Member State for those products.
- 26 The Hellenic Republic considers that the use of a product is not, in itself, apt to hinder intra-Community trade. If, however, use is a relevant factor inherent in placing the product in circulation, a matter which must be considered in each individual case, the obstacle to its use would fall within the scope of Article 28 EC.

- 27 The French Republic considers that national rules concerning the use of a product and those concerning selling arrangements for that product are comparable in regard to both the nature and the degree of their effect on intra-Community trade inasmuch as those rules give rise to effects, in principle, only after the importation of the product and by way of consumer behaviour. The same criteria must therefore apply to both types of provision.
- 28 The Republic of Cyprus, although sharing the reserves expressed by other Member States concerning the introduction of a new, essentially economic, criterion, argues that if the case-law flowing from *Keck and Mithouard*, is not extended to measures governing the use of a product, any measure concerning use could be assimilated to a prohibition under the rule laid down in *Dassonville*. In its view, the Court's analysis should concentrate on the question whether the measure at issue is likely to preclude, in whole or in part, access of goods to the national market.
- 29 The Kingdom of Sweden considers that a national measure which prohibits a form of use of a product comes within the scope of Article 28 EC if the measure is drawn up in such a way as to prevent, in practice, the product's access to the market.
- 30 The Kingdom of the Netherlands argues that national measures must be examined first in regard to the question whether their repercussions on the free movement of goods are not too uncertain and too indirect. In other words, it must be asked whether there is a causal link between the measures and the effect on intra-Community trade. Many rules concerning the use of a product could be upheld under this first test, which constitutes a filter permitting them to avoid the scope of Article 28 EC.

31 With regard to the extension of the case-law commencing with *Keck and Mithouard*, to rules concerning the use of a product, the Kingdom of the Netherlands puts forward arguments both for and against such an extension. On the positive side, such an approach would first of all allow all rules intended to protect interests of a non-economic nature to fall outside the scope of Article 28 EC. Secondly, such an approach would follow the Court's earlier case-law and permit the national courts to make a reasonably abstract application which would increase legal certainty and promote consistency in the case-law. Finally, it would prevent misuse of the exception flowing from *Keck and Mithouard* in the case of rules which lead to a prohibition of the use of a product or permit it only to a limited extent.

32 With regard to arguments against extension of the said case-law to rules concerning the use of a product, it considers, first, that it is difficult to define forms of use of a product clearly as a category. It also considers that a new category of exceptions could create confusion for the national courts because different criteria apply depending on the category into which a given provision falls. Finally, it argues that there are still exceptions among rules concerning the use of a product, namely the cases in which a measure fulfils the criteria for the exception even though it will have serious repercussions on trade between the Member States.

### *Preliminary observations*

33 It should be recalled that, according to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 28 EC (see, in particular, *Dassonville*, paragraph 5).

34 It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 26; Case 120/78 *Rewe-Zentral* (*'Cassis de Dijon'*) [1979] ECR 649, paragraphs 6, 14 and 15; and *Keck and Mithouard*, paragraphs 16 and 17).

35 Hence, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike (see, to that effect, *'Cassis de Dijon'*, paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67).

36 By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from *Dassonville*, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see *Keck and Mithouard*, paragraphs 16 and 17).

37 Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as

measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.

### *The failure to fulfil obligations*

- <sup>38</sup> The Commission's complaints concerning Article 56 of the Highway Code must be considered in the light of the principles set out in paragraphs 33 to 37 of the present judgment.

### Arguments of the parties

- <sup>39</sup> In support of its action, the Commission claims that the effect of the prohibition laid down in Article 56 of the Highway Code is to prevent the use of trailers lawfully produced and marketed in the Member States where there is no such prohibition and to hinder their importation into, and sale in, Italy.

- <sup>40</sup> Therefore, that prohibition constitutes, in the Commission's view, an obstacle to imports within the meaning of Article 28 EC and may be regarded as compatible with the EC Treaty only if justified under Article 30 EC or by an overriding reason relating to the public interest. However, the Italian Republic put forward no justification nor any overriding reason relating to the public interest during the pre-litigation procedure. On

the contrary, the Member State admitted the existence of the prohibition and the obstacle to imports which flowed from it and undertook to remove it.

41 The Italian Republic points out, in regard to the alleged obstacle to imports, that the infringement complained of refers to a prohibition on motorcycles registered in Italy towing a trailer and not the refusal to register such a vehicle or a trailer manufactured in another Member State and intended to be marketed in Italy. It considers that the Commission is confusing the legal conditions for circulation, in Italy, of a vehicle specifically type-approved in another Member State or in a non-member country with the marketing of the same vehicle in Italy.

42 The Italian Republic also contends that the Commission's conclusion is based on an erroneous premise. Article 56 of the Highway Code is a means of exercising a power of derogation expressly granted to the Member States in the sixth recital in Directive 93/93. Until there has been harmonisation at Community level both of the technical requirements for type-approval of trailers and the rules concerning registration and circulation of them on the road, mutual recognition of such trailers remains at the discretion of the Member States.

43 In its reply, the Commission submits that the recitals in a directive are not binding and that it is neither the purpose nor the effect of the sixth recital in Directive 93/93 to declare compatible with Community law national provisions such as those in Article 56 of the Highway Code. That recital determines the scope of Directive 93/93 by excluding therefrom rules concerning trailers intended to be towed by two-wheeled vehicles, without stating whether or not any prohibition which might be laid down is compatible with the rules in the Treaty. The Commission also draws attention to the principle of the primacy of the provisions of the Treaty over secondary legislation, which the Court has recognised on several occasions.

44 In addition, the Commission observes that the absence of harmonised rules in no way justifies the infringement of a fundamental freedom guaranteed by the Treaty.

45 In its rejoinder, the Italian Republic contends that, given the possibilities for using motorcycles and trailers, which may be used separately, those products cannot be regarded as the subject of quantitative restrictions on imports within the meaning of Article 28 EC.

46 Moreover, the prohibition at issue affects only the product as such, irrespective of the place of production and the nationality of the manufacturer, and does not therefore constitute a means of protecting Italian products or rules which discriminate against products manufactured in the other Member States. In Italy, no motorcycle can obtain type-approval to tow a trailer and no trailer to be towed by a motorcycle. Since the consequence of the prohibition on using such vehicles and trailers together is that Italian undertakings have no interest in manufacturing motorcycles equipped to tow trailers or trailers intended solely to be towed by such vehicles, the effect of the prohibition is to exclude products with such characteristics from the Italian market.

47 The Italian Republic refers to the Convention on Road Traffic, concluded in Vienna on 8 November 1968, which provides, in point 3(a) of Annex I thereto, that 'Contracting Parties may refuse to admit to their territories in international traffic the following combinations of vehicles in so far as the use of such combinations is prohibited by their domestic legislations: ... Motor cycles with trailers'. However, it makes clear that it did not avail itself of that possibility and that motorcycles that are registered in other Member States are allowed to tow a trailer in Italian territory since they are considered to be in international traffic within the meaning of the said Convention.

48 The Italian Republic also refers to the 12th recital in Directive 97/24, which has essentially the same content as the 6th recital in Directive 93/93. It points out that the reservation granted to the Member States in that recital corresponds to the fact that, by reason of the different contours of the national territories, the technical characteristics of vehicles are important from the point of view of road safety. In the Member State's view, in the absence of rules for type-approval of the two products used together (towing vehicle and trailer), there are no safety conditions necessary for road traffic.

### Findings of the Court

49 In order to assess whether the Commission's complaint is well founded, it should be pointed out that, although Article 56 of the Highway Code concerns a prohibition on using a motorcycle and a trailer together in Italy, the national provision must be considered, in particular, from the angle of the restriction that it could represent for free movement of trailers. Although it is not disputed that motorcycles can easily be used without a trailer, the fact remains that the latter is of little use without a motor vehicle that may tow it.

50 It is common ground that Article 56 of the Highway Code applies without regard to the origin of trailers.

51 The Commission has not specified whether its action concerns solely trailers which are specially designed for motorcycles or if it also covers other types of trailers. Those two types of trailers must therefore be distinguished when assessing the alleged failure to fulfil obligations.

- 52 With regard, first, to trailers not specially designed for motorcycles but intended to be towed by automobiles or other types of vehicle, it should be noted that the Commission has not established that the prohibition laid down in Article 56 of the Highway Code hinders access to the market for that type of trailer.
- 53 The Commission's action must therefore be dismissed in so far as it concerns trailers which are not specially designed to be towed by motorcycles and are legally produced and marketed in Member States other than the Italian Republic.
- 54 Secondly, the failure to fulfil obligations alleged by the Commission in regard to trailers which are specially designed to be towed by motorcycles and are legally produced and marketed in Member States other than the Italian Republic remains to be examined.
- 55 In its reply to the Court's written question, the Commission claimed, without being contradicted by the Italian Republic, that, in the case of trailers specially designed for motorcycles, the possibilities for their use other than with motorcycles are very limited. It considers that, although it is not inconceivable that they could, in certain circumstances, be towed by other vehicles, in particular, by automobiles, such use is inappropriate and remains at least insignificant, if not hypothetical.
- 56 It should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.

57 Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer (see, by analogy, Case C-265/06 *Commission v Portugal* [2008] ECR I-2245, paragraph 33, concerning the affixing of tinted film to the windows of motor vehicles). Thus, Article 56 of the Highway Code prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation.

58 It follows that the prohibition laid down in Article 56 of the Highway Code, to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, unless it can be justified objectively.

59 Such a prohibition may be justified on one of the public interest grounds set out in Article 30 EC or in order to meet imperative requirements (see, in particular Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 29, and Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 21). In either case, the national provision must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it (Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 38, and Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467, paragraph 75).

60 In the present case, the justification put forward by the Italian Republic relates to the need to ensure road safety, which, according to the case-law, constitutes an overriding reason relating to the public interest capable of justifying a hindrance to the free

movement of goods (see, in particular, Case C-55/93 *van Schaik* [1994] ECR I-4837, paragraph 19; Case C-314/98 *Snellers* [2000] ECR I-8633, paragraph 55; *Commission v Finland*, paragraph 40, *Commission v Netherlands*, paragraph 77, *Commission v Portugal*, paragraph 38; and judgment of 5 June 2008 in Case C-170/07 *Commission v Poland*, paragraph 49).

- <sup>61</sup> In the absence of fully harmonising provisions at Community level, it is for the Member States to decide upon the level at which they wish to ensure road safety in their territory, whilst taking account of the requirements of the free movement of goods within the European Community (see, to that effect, Case 50/83 *Commission v Italy* [1984] ECR 1633, paragraph 12, and, by analogy, Case C-131/93 *Commission v Germany* [1994] ECR I-3303, paragraph 16).
- <sup>62</sup> According to settled case-law, it is for the competent national authorities to show that their rules fulfil the criteria set out in paragraph 59 of the present judgment (see, to that effect, *Commission v Netherlands*, paragraph 76, *Commission v Portugal*, paragraph 39, and judgment of 24 April 2008 in Case C-286/07 *Commission v Luxembourg*, paragraph 37).
- <sup>63</sup> With regard, first, to whether the prohibition laid down in Article 56 of the Highway Code is appropriate, the Italian Republic contends that it introduced the measure because there were no type-approval rules, whether at Community level or national level, to ensure that use of a motorcycle with a trailer was not dangerous. In the absence of such a prohibition, circulation of a combination composed of a motorcycle and an unapproved trailer could be dangerous both for the driver of the vehicle and for other vehicles on the road, because the stability of the combination and its braking capacity would be affected.

64 In that regard, it must be held that the prohibition in question is appropriate for the purpose of ensuring road safety.

65 With regard, second, to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case-law of the Court referred to in paragraph 61 of the present judgment, in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (see, by analogy, Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 37, and Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paragraph 51).

66 In the present case, the Italian Republic contends, without being contradicted on this point by the Commission, that the circulation of a combination composed of a motorcycle and a trailer is a danger to road safety. Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, by analogy, Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 58).

67 Although it is possible, in the present case, to envisage that measures other than the prohibition laid down in Article 56 of the Highway Code could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, such as those mentioned in point 170 of the Advocate General's Opinion, the fact remains that Member States cannot be denied the possibility of attaining an objective

such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.

68 Moreover, it should be noted that neither the terms of the International Convention on Road Traffic nor those of the recitals in Directives 93/93 and 97/24, referred to by the Italian Republic, allow the presumption that road safety could be ensured at the same level as envisaged by the Italian Republic by a partial prohibition of the circulation of such a combination or by a road traffic authorisation issued subject to compliance with certain conditions.

69 In the light of those factors, it must be held that the prohibition on motorcycles towing trailers specially designed for them and lawfully produced and marketed in Member States other than the Italian Republic must be regarded as justified by reasons relating to the protection of road safety.

70 The Commission's action must therefore be dismissed.

## **Costs**

71 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the Commission of the European Communities to pay the costs.**

[Signatures]