# JUDGMENT OF THE COURT (First Chamber)

10 November 2011 *

In Case C-212/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 June 2009,

**European Commission,** represented by G. Braun, M. Teles Romão and P. Guerra e Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Portuguese Republic,** represented by L. Inez Fernandes, acting as Agent, and by C. Botelho Moniz, M. Rosado da Fonseca and P. Gouveia e Melo, advogados,

defendant,

* Language of the case: Portuguese.

THE COURT (First Chamber),

composed of M. Safjan, President of the Fifth Chamber, acting as President of the First Chamber, A. Borg Barthet, E. Levits, J.-J. Kasel and M. Berger (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 January 2011,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining special rights for the Portuguese State and for other public entities or public sector bodies in GALP Energia SGPS SA ('GALP'),

allocated in connection with privileged ('golden') shares held by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Articles 43 EC and 56 EC.

## Legal context

### *National legislation*

2 Article 15(1) of Law No 11/90 of 5 April 1990 concerning the Framework Law on Privatisations (Lei No 11/90, Lei Quadro das Privatizações) (*Diário da República* I, Series A, No 80 of 5 April 1990) (the 'LQP') provides:

'In exceptional circumstances, and where grounds of national interest so require, the legislative measure adopting the articles of association of the company to be privatised may provide, in order to protect the public interest, that resolutions relating to certain matters must be approved by a director appointed by the State.'

3 Article 15(3) of the LQP provides, in the following terms, for the possibility of creating golden shares:

'The instrument [approving the articles of association of the undertaking to be privatised or converted into a public limited company] referred to in Article 4(1) may also, in exceptional cases, where grounds of national interest so require, provide for the

existence of golden shares, which are intended to remain the property of the State and which, irrespective of their number, confer on the State a right of veto over amendments to the articles of association and over other resolutions relating to certain matters duly specified in the articles of association.'

4 In pursuance of Article 15 of the LQP, Article 4(1) of Decree-Law No 261-A/99 approving the first phase of the privatisation of the share capital of GALP – Petróleos e Gás de Portugal, SGPS SA (Decreto-Lei nº 261-A/99 aprova a 1.ª fase do processo de privatização do capital social da GALP – Petróleos e Gás de Portugal, SGPS, SA), of 7 July 1999 (*Diário da República* I, Series A, No 156, of 7 July 1999) ('Decree-Law No 261-A/99') provides for the possibility of 'creating golden shares through the conversion of ordinary shares'.

5 Under Article 4(2) of that Decree-Law, golden shares may not represent a proportion of GALP's share capital which is greater than 10 %, before the increase in capital, and the majority of those shares must be held by public bodies.

6 According to Article 4(3) of the same Decree-Law, the golden shares confer a right of veto with regard to the appointment of a number of directors not exceeding one third of the total. They confer the same right in respect of resolutions amending the company's articles of association, resolutions authorising the conclusion of certain contracts concerning the structure and control of groups of companies and those that might in any way jeopardise the country's supply of oil or gas, or of products derived therefrom.

7 Article 391(2) of the Portuguese Commercial Companies Code ('the CSC') provides:

'The articles of association of a company may state that the election of directors must be approved by a number of votes corresponding to a specified proportion of the share capital, or that the election of some of the directors, not exceeding one third of the total number, must also be approved by a majority of the votes attaching to certain shares, although the right to appoint directors cannot be attached to certain categories of shares.'

*The articles of association of GALP*

8 Decree-Law No 137-A/99 of 22 April 1999 (*Diário da República* I, Series A, No 94, of 22 April 1999), by which GALP was established, contains, in its annex, the text of that company's articles of association.

9 Under Article 4(1) of GALP's articles of association, the company's share capital is made up of 40 million Class A shares and approximately 789 million Class B shares.

10 Article 4(3) of GALP's articles of association provides that certain special rights attach to Class A shares:

'(a) the election of the chairman of the Board of Directors shall require a majority of the votes attaching to Class A shares;

(b) resolutions on the conclusion of contracts concerning the structure and control of groups of companies, and those that might in any way jeopardise the country's supply of oil, gas, electricity or products derived therefrom shall require a majority of the votes attaching to Class A shares.

...'

11 Furthermore, Article 18(1)(b) of GALP's articles of association provides that the adoption of resolutions of GALP's Board of Directors in certain areas is to require the approval of a qualified majority of two thirds of the directors, which must include a vote in favour by the chairman of the Board of Directors; those areas include: strategic disinvestment; share acquisitions in sectors not relating to the company's main activities; choice of strategic partners; adoption and amendment of strategic guidelines, of the strategic plan and of related areas of activity; definition of the basic management and organisational structure; definition of the degree of managerial autonomy of the companies controlled by GALP; operations for the division, merger or winding-up of companies controlled by GALP; and distribution of dividends by companies controlled by GALP.

*GALP shareholders' agreement*

12 On 4 October 2006, a shareholders'agreement was concluded between a number of GALP's shareholders, namely, Amorim Energia, ENI and Caixa Geral de Depósitos SA ('CGD), which is a State bank. That agreement was subsequently amended several times.

13 Under that agreement, inter alia, CGD is to appoint a director, who is required to be the chairman of the Board of Directors.

**Background to the dispute and pre-litigation procedure**

14 Since 1999, the Portuguese energy sector, in particular that of oil and natural gas, has undergone extensive restructuring, which culminated, through the adoption of Decree-Law No 137-A/99 of 22 April 1999, in the formation of GALP, a publicly-owned holding company for the State's direct shareholdings in certain public companies.

15 The process of privatising GALP began with its formation and progressed over five successive phases, in accordance with the framework laid down by the LQP. The State currently owns 8 % of the share capital of GALP, 7 % through Parpública and 1 % through CGD.

16 It is apparent from the documents before the Court that GALP is currently the main integrated group for oil and natural gas products in Portugal.

17 On 18 October 2006, the Commission sent a letter of formal notice to the Portuguese Republic accusing it of failing to fulfil its obligations under Articles 43 EC and 56 EC, on the ground that, as part of the privatisation of GALP, golden shares had been created for the Portuguese State, to which special rights attached, in particular the right to appoint the chairman of the company's Board of Directors and the right of veto with regard to certain important decisions of the company.

18 As it took the view that the reply given by the Portuguese Republic on 18 December 2006 was inadequate, the Commission issued a reasoned opinion on 29 June 2007 restating the content of the letter of formal notice and calling on the Portuguese Republic to comply with that opinion within two months of its receipt.

19 The Portuguese authorities replied to that reasoned opinion by letter of 30 October 2007. The Commission was not satisfied with that reply and accordingly decided to bring the present action.

**Admissibility of the action**

*Arguments of the parties*

20 In its observations, the Portuguese Republic disputes the admissibility of the action, contending that it is inadmissible in part in so far as, in its application, the Commission made new claims which were not contained in the reasoned opinion and, by so doing, extended the subject-matter of the proceedings, as defined in the pre-litigation phase of the procedure.

21 The Portuguese Republic refers first, in that regard, to the State's right to make decisions of the Board of Directors concerning GALP's management conditional upon approval by the Board's chairman, who is appointed by the State itself, and to the right of the chairman to veto certain resolutions of the Board of Directors listed in Article 18(1)(b) of GALP's articles of association, which must be approved by a qualified majority of two thirds of the directors. It also maintains that the Commission is accusing it of failing to comply with the principle of non-discrimination on grounds of

nationality, set out in Article 12 EC, in that it acted in a discriminatory manner during the various phases of the privatisation of GALP and the negotiation of the shareholders' agreement concluded in 2006.

22 According to the Portuguese Republic, since these are new pleas as compared with those contained in the reasoned opinion, they must be declared inadmissible.

23 The Commission rejects all of those contentions, stating that the present action relates to the right to appoint the chairman of GALP's Board of Directors and the right to veto amendments to the articles of association and other decisions concerning certain matters defined in the articles of association. Those special powers stem from Portuguese legislation, namely the LQP, in particular Articles 3 and 15 thereof, and from Decree-Law No 261-A/99, in particular Article 4(3) thereof.

24 According to the Commission, the new arguments, put forward in the application and considered to be inadmissible by the Portuguese Republic, are, first, clarifications relating to the powers of the State-appointed director; these are relevant for the purpose of classification of the situation constituted by that appointment as a measure taken by the State that does not result from the normal application of company law. Secondly, according to the Commission, it is clear from the application that, in simply describing an action by the Portuguese Republic, it was not relying on Article 12 EC but was criticising the creation of special rights for the State by means of general provisions applicable without distinction, and the application of those provisions in a discriminatory manner by means of private-law instruments. Moreover, the Commission explained in its reply that it did not wish to overstate that approach, which was intended to put the subject-matter of the proceedings into context.

25 Therefore, according to the Commission, those considerations are not new pleas in relation to those contained in the reasoned opinion.

*Findings of the Court*

26 It must be recalled, first of all, that in accordance with settled case-law, the subject-matter of an action under Article 258 TFEU for failure to fulfil obligations is determined by the Commission's reasoned opinion, with the result that the action must be based on the same grounds and pleas as that opinion (see Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 36; Case C-236/05 *Commission* v *United Kingdom* [2006] ECR I-10819, paragraph 10; and Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 25).

27 However, that requirement cannot be stretched so far as to mean that in every case the statement of objections expressly set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28; Case C-236/05 *Commission* v *United Kingdom*, paragraph 11; Case C-171/08 *Commission* v *Portugal*, paragraph 26; and Case C-458/08 *Commission* v *Portugal* [2010] ECR I-1159, paragraph 44).

28 It must be held that in the present case the Commission has neither extended nor altered the subject-matter of the proceedings as defined in the reasoned opinion.

29 In that regard, it is sufficient to note that, in the operative part of the reasoned opinion and in the form of order sought in the application initiating the proceedings, the Commission stated clearly that the complaint directed to the Portuguese Republic concerned the fact that the Portuguese State and other public shareholders held golden shares which conferred special rights in the share capital of GALP, namely the right to appoint the chairman of the Board of Directors having the power to endorse management decisions of the organs of the company and the right of veto in respect of important decisions of the company. By referring also to the obligations incumbent

on Member States under Articles 43 EC and 56 EC with which the Portuguese Republic allegedly failed to comply, the Commission thus defined in sufficiently precise terms the subject-matter of the dispute.

30 It is, admittedly, only in the application that the Commission criticised the Portuguese Republic for discriminating during the various phases of the privatisation of GALP and the negotiation of the shareholders' agreement, and also invoked, for the first time, certain national provisions, in particular Article 18 of GALP's articles of association and the rights provided for in that provision. However, it is clear from the documents before the Court that, contrary to what the Portuguese Republic argues, the Commission did not contend in its application that the Portuguese State possessed new special powers, but that the Commission made reference, by way of further arguments intended to illustrate the validity of its complaints, not only to other national provisions implementing the LQP and Decree-Law No 261-A/99, which provide the basis for the special powers held by the State, but also to the origins of the shareholders' agreement.

31 Therefore, the fact that the Commission set out in detail the complaints that it had already made in more general terms in the reasoned opinion did not alter the subject-matter of the alleged infringement, and thus had no effect on the scope of the proceedings (see, to that effect, Case C-185/00 *Commission* v *Finland* [2003] ECR I-14189, paragraphs 84 to 87; Case C-171/08 *Commission* v *Portugal*, paragraph 29; and Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 23).

32 In the light of the foregoing, the plea of inadmissibility raised by the Portuguese Republic must be rejected..

**Substance**

*The existence of restrictions*

Arguments of the parties

33 The Commission claims, inter alia, that the fact that the Portuguese State holds special rights in GALP, namely the right to appoint the chairman of the Board of Directors having the power to endorse management decisions of the organs of the company, confirmed by the clauses of the shareholders' agreement negotiated by the Portuguese State through the CGD, and the right of veto in respect of important decisions of that company, obstructs both direct and portfolio investments in the share capital of that company and, consequently, constitutes a restriction on the free movement of capital and freedom of establishment.

34 In the view of the Commission, such special rights restrict the possibility for shareholders to participate effectively in the management and control of the company concerned in proportion to the value of the shares which they hold and also deter investors from other Member States from buying shares in that company.

35 The Commission states, in this regard, that the creation of special rights attaching to golden shares is not the result of a normal application of company law, but constitutes a State measure which falls within the scope of Articles 43 EC and 56(1) EC. GALP's articles of association, which provide for the special rights in question, were drawn up

by legislation at a time when the Portuguese State held all the capital of that company, and they cannot be amended without the consent of that State.

36 First of all, the Portuguese Republic contends, by reference to the judgment in Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 39, that the national provisions challenged by the Commission must be examined solely in the light of Article 43 EC, since, as in that case, both the right of veto and the right to appoint the chairman of GALP's Board of Directors relate to decisions within the scope of the management of the company and therefore concern only those shareholders capable of exerting a definite influence on the company.

37 The Portuguese Republic further contends that, in any event, the national provisions affording special rights to the State do not come within the scope of Articles 43 EC and 56 EC inasmuch as they do not constitute a restriction on the fundamental freedoms in question. The effects which the national measures concerned have on market access are, according to the case-law of the Court on freedom of establishment, purely hypothetical and, in any event, totally uncertain and indirect (Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, paragraph 32). Those national measures can constitute restrictive measures under Articles 43 EC and 56 EC only if they impose direct and substantial conditions on the access of investors to the market. The Portuguese Republic calls on the Court in this regard to interpret the concept of a 'restriction' on the free movement of capital and on freedom of establishment in the light of, inter alia, the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, which concerned selling arrangements in relation to the free movement of goods.

38 Moreover, the Portuguese Republic submits, in the light of GALP's shareholder structure and the way in which it has evolved since 1999, it is clear that the existence of special rights for the State in that company has not had any negative effect on either direct investments or portfolio investments in that company's share capital.

39 With regard to the issue of whether the right to appoint the chairman of GALP's Board of Directors, which is provided for in that company's articles of association and in the shareholders' agreement, is a State measure, the Portuguese Republic claims, lastly, that that right does not constitute a State measure, but is rather an act governed by private law which is outside the scope of Articles 43 EC and 56 EC.

40 In reply to those arguments the Commission contends, with regard to the Portuguese Republic's reference to Case C-326/07 *Commission* v *Italy*, that both the right of veto and the right to appoint the chairman of the Board of Directors confer on the State special powers over particular decisions of the general meeting which affect all shareholders and potential investors and not just those exerting a definite influence over decisions of the company concerned. The Portuguese Republic cannot therefore contest the application of Article 56 EC in the present case.

Findings of the Court

— The applicability of Articles 43 EC and 56 EC

41 As regards the question whether national legislation falls within the scope of one or other of the fundamental freedoms, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, inter alia, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22; Case C-326/07 *Commission* v *Italy*, paragraph 33; and Case C-543/08 *Commission* v *Portugal*, paragraph 40).

42 Provisions of national law which apply to the possession by nationals of one Member State of holdings in the capital of a company established in another Member State, allowing them to exert a definite influence on that company's decisions and to determine its activities, fall within the scope *ratione materiae* of Article 43 EC on freedom of establishment (see, inter alia, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; Case C-326/07 *Commission* v *Italy*, paragraph 34; and Case C-543/08 *Commission* v *Portugal*, paragraph 41).

43 Direct investments, that is to say, investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the company to which that capital is made available in order to carry out an economic activity, fall within the scope of Article 56 EC on the free movement of capital. That object presupposes that the shares held by the shareholder enable the latter to participate effectively in the management or control of that company (see, inter alia, Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 18 and the case-law cited; Case C-326/07 *Commission* v *Italy*, paragraph 35; and Case C-543/08 *Commission* v *Portugal*, paragraph 42).

44 National legislation not intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the scope of both Article 43 EC and Article 56 EC (Case C-326/07 *Commission* v *Italy*, paragraph 36, and Case C-543/08 *Commission* v *Portugal*, paragraph 43).

45 It must be stated that, in the present action for failure to fulfil obligations, it is not inconceivable that the national provisions at issue might affect all shareholders and

potential investors and not solely those shareholders capable of exerting a definite influence on the management and control of GALP. Consequently, the contested provisions must be examined in the light of both Article 43 EC and Article 56 EC.

— Failure to fulfil obligations under Article 56 EC

46 It should be noted at the outset that, according to consistent case-law, Article 56(1) EC generally prohibits restrictions on movements of capital between Member States (see, inter alia, Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 18 and the case-law cited; Case C-112/05 *Commission* v *Germany*, paragraph 17; Case C-171/08 *Commission* v *Portugal*, paragraph 48; and Case C-543/08 *Commission* v *Portugal*, paragraph 45).

47 In the absence of an EC-Treaty definition of 'movements of capital' within the meaning of Article 56(1) EC, the Court has acknowledged the indicative value of the nomenclature of movements of capital set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article [67] of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5). Thus, the Court has held that movements of capital within the meaning of Article 56(1) EC include, in particular, 'direct' investments, that is to say, investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, that is to say, investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (see Joined Cases C-282/04

and C-283/04 *Commission* v *Netherlands*, paragraph 19 and the case-law cited; Case C-112/05 *Commission* v *Germany*, paragraph 18; Case C-171/08 *Commission* v *Portugal*, paragraph 49; and Case C-543/08 *Commission* v *Portugal*, paragraph 46).

48 Concerning those two forms of investment, the Court has stated that national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other Member States from investing in their capital (see Case C-543/08 *Commission* v *Portugal*, paragraph 47 and the case-law cited).

49 The Portuguese Republic disputes the classification of Article 4(3) of GALP's articles of association and the relevant clauses of the shareholders' agreement as a national measure. It further maintains, inter alia, that under that agreement the right of the State to appoint the chairman of GALP's Board of Directors is exercised by CGD and not by the Portuguese State, and that the provision at issue therefore does not constitute a State measure and is consequently outside the scope of Articles 43 EC and 56 EC.

50 In that regard, it should be noted, first, that, as is clear from the documents before the Court, GALP's articles of association were drawn up before the end of the first phase of GALP's privatisation, in other words, at a time when the Portuguese State held the majority of GALP's share capital. At the same time, a specific right of veto for that State, which is exercised, inter alia, in respect of decisions to amend that company's articles of association, was also provided for by statute. Thus, the clause relating to the right to appoint the chairman of GALP's Board of Directors can now no longer be removed by the shareholders without the consent of the State.

51 Secondly, with regard to the Portuguese Republic's argument in that context concerning the appointment of the chairman of the Board of Directors by CGD, suffice it to state that, since the latter is a bank in which the State is the sole shareholder, the State exercises its rights through the intermediary of CGD. Consequently, as regards the private nature of the shareholders' agreement, the Portuguese State acts, through the intermediary of CGD, together with the reference shareholders whom it has selected in order to maintain its influence over the composition and management of GALP.

52 In those circumstances, it must be held that it was the Portuguese Republic itself which, first, through the intermediary of the national legislature, authorised the creation of golden shares in the share capital of GALP and, secondly, in its capacity as a public authority, decided, pursuant to Article 15(3) of the LQP, to introduce golden shares into GALP's share capital, to allocate them to the State and to define the special rights which they confer.

53 Moreover, it must also be stated that the creation of the right of the State to appoint the chairman of GALP's Board of Directors is not the result of a normal application of company law. While the CSC expressly precludes the right to appoint certain directors being attached to certain categories of shares, Decree-Law No 261-A/99 and GALP's articles of association provide, on the contrary, that approval of the choice of chairman of the Board of Directors is a right inherent in the shares specific to the State. This therefore constitutes a specific right, which derogates from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities (see, to that effect, Case C-112/05 *Commission* v *Germany*, paragraphs 59 to 61).

54 Consequently, the right of the State to appoint the chairman of GALP's Board of Directors must be regarded as being attributable to the Portuguese Republic and for that reason comes within the scope of Article 56(1) EC.

55 As regards the restrictive nature of the Portuguese State's holding of golden shares in the share capital of GALP to which special rights attach, as provided for by the national legislation – in part, in conjunction with GALP's articles of association –, it must be held that such shares are liable to deter traders from other Member States from investing in the capital of that company.

56 In relation to the right of veto, it is clear from Article 4(3) of Decree-Law No 261-A/99 that the adoption of a large number of significant resolutions relating to GALP is subject to the approval of the Portuguese State. In that regard, it must be pointed out that the State's vote in favour is required for, inter alia, any resolution involving an amendment of GALP's articles of association, with the result that the influence of the Portuguese State over GALP cannot be reduced except with the consent of that State itself.

57 Consequently, that right of veto, in so far as it confers on the Portuguese State an influence over the management and control of GALP which is not justified by the size of its shareholding in that company, is liable to discourage traders from other Member States from making direct investments in GALP's share capital since it would not be possible for them to be involved in the management and control of that company in proportion to the value of their shareholdings (see, inter alia, Case C-112/05 *Commission* v *Germany*, paragraphs 50 to 52; Case C-171/08 *Commission* v *Portugal*, paragraph 60; and Case C-543/08 *Commission* v *Portugal*, paragraph 56).

58 Similarly, the right of veto at issue may have a deterrent effect on portfolio investments in GALP's share capital in so far as a possible refusal by the Portuguese State to approve an important decision, proposed by the organs of that company as being in the company's interests, is in fact liable to depress the value of the shares of that company and thus reduce the attractiveness of an investment in such shares (see, to that effect, Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 27; Case

C-171/08 *Commission* v *Portugal*, paragraph 61; and Case C-543/08 *Commission* v *Portugal*, paragraph 57).

59 As regards the right to appoint the chairman of the Board of Directors, this amounts to a restriction on the free movement of capital since such a specific right constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities (see Case C-112/05 *Commission* v *Germany*, paragraph 61, and Case C-543/08 *Commission* v *Portugal*, paragraph 62). While it is true that that facility can be conferred by legislation as a right of a qualified minority, it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the State.

60 By restricting the opportunity for shareholders other than the Portuguese State to participate in GALP's share capital with a view to establishing or maintaining lasting and direct economic links with it such as to enable them to participate effectively in the management or control of that company, the right to appoint a director, provided for in Article 15(1) of the LQP and Article 4(3) of Decree-Law No 261-A/99, is liable to deter direct investors from other Member States from investing in the share capital of that company.

61 It follows that the right of veto with regard to certain resolutions of GALP's general meeting and the right to appoint the chairman of the Board of Directors constitute restrictions on the free movement of capital within the terms of Article 56(1) EC.

62 Such a finding cannot, moreover, be brought into question by the argument put forward by the Portuguese Republic that the logic allegedly underlying the judgment in *Keck and Mithouard* is applicable to the present case.

63 In that regard, it should be noted that the national measures here at issue are not comparable to the rules concerning selling arrangements which, as the Court found in *Keck and Mithouard*, did not come within the scope of Article 28 EC.

64 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements, within the Member State of importation, is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter products to the market of the Member State of importation or to impede such access more than it impedes access by domestic products (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).

65 In the present case, while it is true that the national provisions at issue apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market (see Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 61 and the case-law cited; Case C-171/08 *Commission* v *Portugal*, paragraph 67; and Case C-543/08 *Commission* v *Portugal*, paragraph 68).

66 Furthermore, the finding that those national provisions constitute restrictions on the free movement of capital cannot be called into question by the Portuguese Republic's argument that the special rights at issue have no effect on either direct investments

or portfolio investments in GALP's share capital given that a large number of that company's shares are in the hands of investors from other Member States.

67 It is clear, as has been stated in paragraphs 58 and 61 of the present judgment, that the national provisions at issue, to the extent to which they create instruments liable to limit the ability of investors to participate in the share capital of GALP with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management or control of that company, reduce the interest in acquiring a stake in that capital (see, to that effect, Case C-112/05 *Commission* v *Germany*, paragraph 54, and Case C-543/08 *Commission* v *Portugal*, paragraph 70).

68 That finding is not affected by the fact that GALP's shareholders include direct investors. That circumstance is not such as to cast doubt, in the present case, on the fact that, because of the provisions of national law at issue, direct investors from other Member States, whether actual or potential, may have been deterred from acquiring a stake in the capital of that company in order to participate in it with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management or control of that company, even though they were entitled to benefit from the principle of the free movement of capital and from the protection which that principle affords them (see, to that effect, Case C-112/05 *Commission* v *Germany*, paragraph 55, and Case C-543/08 *Commission* v *Portugal*, paragraph 71).

69 In the light of the foregoing, it must be held that the Portuguese State's holding of golden shares, in conjunction with the special rights which such shares confer on their holder, constitutes a restriction on the free movement of capital within he terms of Article 56(1) EC.

*Whether the restrictions are justified*

Arguments of the parties

70 The Commission contends that the restrictions arising from the special rights held by the Portuguese State in GALP cannot be justified by any of the objectives relied on by the Portuguese Republic and, in any event, infringe the principle of proportionality.

71 It maintains that the State's special rights in GALP cannot be justified on grounds of public security, in this case the security of Portugal's energy supply. As is apparent from Decree-Law No 31/2006 establishing the general bases for the organisation and functioning of the national petroleum system (*Diário da República* I, Series A, No 33, of 15 February 2006), and from Decree-Law No 30/2006 laying down the general bases for the organisation and functioning of the natural gas system (*Diário da República* I, Series A, No 33, of 15 February 2006), it is for the State, and not for GALP, to ensure security of oil and natural gas supplies.

72 With regard to the principle of proportionality, the Commission contends that the special rights held by the State in GALP are not adequate to ensure the proper functioning of the gas distribution network and GALP's retail selling of petroleum products. The rights in question are, in reality, instruments designed to pursue the private interest of the company and not the national interest. Moreover, contrary to the requirements of the case-law of the Court in this area (see, inter alia, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 50 to 53), since no precise and

objective criteria have been laid down regulating the exercise of those rights, application of them is, in practice, entirely a matter of discretion.

73 Nor, in the view of the Commission, is there any basis for the State to have special rights in GALP under European Union secondary law.

74 Under Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), public responsibility for ensuring security of the natural gas supply may require external intervention by the State in its capacity as regulator and not intervention by the State from within in its capacity as a privileged shareholder of undertakings operating on the market.

75 With regard to the oil sector, the Commission points out that, under Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (OJ 2006 L 217, p. 8), public responsibility lies also with the State, and not with private undertakings, to ensure security of supply for petroleum products.

76 Lastly, the Commission takes issue with the Portuguese Republic's argument that Article 86 EC applies to the measures at issue since, first, that provision is addressed to a particular category of undertakings and not to the Member States and, secondly, the subject-matter of the present proceedings is not special rights which the State has granted to GALP, but rather the State's special rights within that company.

77 The Portuguese Republic contends that, even if it is accepted that the national measures at issue do constitute restrictions on freedom of establishment and on the free movement of capital, they are none the less justified with regard to Articles 46 EC and 58 EC in that they are necessary in order to guarantee the country's security of supply for oil and natural gas and to enable this to be done in an appropriate way, given, inter alia, the absence of suitable instruments at European Union level.

78 The Portuguese Republic also points out that the exercise of the special rights in question may be the subject of effective judicial review. Thus, if the State were to exercise those rights otherwise than on grounds of a genuine and serious threat to the security of supply it would be committing an infringement in respect of which any of GALP's shareholders could seek redress before the national courts, both administrative and civil.

79 Moreover, in asserting that the contested provisions comply with the principle of proportionality, the Portuguese Republic argues that, in any event, the Commission has not adduced evidence that there are less restrictive measures which would allow the State to react swiftly and effectively in the event of a genuine and serious threat to the security of supply.

80 Lastly, the Portuguese Republic contends that the national provisions at issue are none the less compatible with European Union law, under Article 86(2) EC, since they are required in order to enable GALP to carry out appropriately its tasks of managing services of general economic interest entrusted to it by the State.

Findings of the Court

81 According to well-established case-law, national measures which restrict the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see Case C-112/05 *Commission* v *Germany*, paragraphs 72 and 73 and the case-law cited; Case C-171/08 *Commission* v *Portugal*, paragraph 69; and Case C-543/08 *Commission* v *Portugal*, paragraph 83).

82 As regards the derogations permitted under Article 58 EC, it cannot be denied that the objective invoked by the Portuguese Republic of safeguarding a secure energy supply in that Member State in case of crisis, war or terrorism may constitute a ground of public security (see judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 38; Case C-171/08 *Commission* v *Portugal*, paragraph 72; and Case C-543/08 *Commission* v *Portugal*, paragraph 84) and may possibly justify an obstacle to the free movement of capital. The importance attached by Member States and the European Union to the protection of a secure energy supply can, moreover, be seen, for example, with regard to oil, in Directive 2006/67 and, with regard to the natural gas sector, in Directive 2003/55.

83 However, it is common ground that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, with the result that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case C-54/99 *Église de*

*scientologie* [2000] ECR I-1335, paragraph 17; Case C-171/08 *Commission* v *Portugal*, paragraph 73; and Case C-543/08 *Commission* v *Portugal*, paragraph 85).

84 In this regard, the Portuguese Republic points out, inter alia, that at the present time concerns exist about certain investments made particularly by sovereign wealth funds, or investments that might be linked to terrorist organisations, in undertakings in strategic sectors, which constitute a threat of that nature in relation to energy supply. Given that a Member State is under an obligation to guarantee the security of a regular and uninterrupted supply of oil and natural gas, that State can legitimately equip itself with the means required to guarantee the fundamental interest of security of supply in the event of a crisis and it is the duty of the State concerned to ensure that adequate mechanisms are put in place which will enable it to react rapidly and effectively to guarantee that the security of that supply is not interrupted.

85 However, as the Portuguese Republic has done no more than put forward the ground relating to the security of the energy supply, without stating clearly the exact reasons why it considers that the special rights at issue, considered either individually or as a whole, would make it possible to prevent such interference with a fundamental interest such as energy supply, a justification based on public security cannot be upheld in the present case.

86 Furthermore, the Portuguese Republic's argument that European Union law, as it currently stands, does not adequately guarantee the security of energy supply in Member States, a circumstance which compels the Portuguese Republic to adopt national measures which are sufficient to guarantee the protection of that fundamental interest of society, cannot be upheld.

87 Even if it is accepted that, pursuant to provisions of European Union secondary legislation, a Member State has an obligation to guarantee the supply of energy within

its territory, as is claimed by the Portuguese Republic, compliance with such an obligation cannot be relied on to justify any measure which is contrary in principle to a fundamental freedom (see Case C-543/08 *Commission* v *Portugal*, paragraph 89).

88 For the sake of completeness, as regards the proportionality of the provisions of national law at issue, it should be noted that, as has correctly been pointed out by the Commission, the exercise of the special rights which the holding of golden shares in GALP's share capital confers on the Portuguese State is not subject to any specific and objective condition or circumstance, contrary to what is claimed by the Portuguese Republic.

89 Although Article 15(3) of the LQP states that the creation in the share capital of GALP of golden shares which confer special rights on the Portuguese State is subject to the condition – which, it may be added, is formulated in a rather general and imprecise manner – that grounds of national interest must so require, the fact nevertheless remains that neither that law nor GALP's articles of association lay down any criteria for determining the specific circumstances in which those special rights may be exercised (see Case C-326/07 *Commission* v *Italy*, paragraph 51, and Case C-543/08 *Commission* v *Portugal*, paragraph 91). The same finding applies to Article 15(1) of the LQP, in that, under that provision, the State's appointment of a director is subject to the condition, also formulated in a rather general and imprecise manner, of safeguarding the public interest.

90 Thus, such uncertainty constitutes serious interference with the free movement of capital in that it confers on the national authorities, as regards the use of such rights, a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued (see, to that effect, Case C-326/07 *Commission* v *Italy*, paragraph 52, and Case C-543/08 *Commission* v *Portugal*, point 92).

91 Lastly, as regards the justification based on Article 86(2) EC, it must be stated that that provision, in conjunction with Article 86(1) EC, may be relied on to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to the provisions of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the European Union (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 52; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, paragraph 78; and Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 44).

92 In the present case, it is clear, however, that that is not the purpose of the provisions laid down in the national legislation which is at issue in the infringement proceedings brought against the Portuguese Republic.

93 As the Commission correctly states, those provisions do not involve the granting of special or exclusive rights to GALP or the classification of GALP's activities as services of general economic interest, but are concerned with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares which it holds in the share capital of GALP.

94 In any event, since a Member State must set out in detail the reasons why, 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 (Case C-463/00 *Commission* v *Spain*, paragraph 82), the Portuguese Republic has given no explanation whatsoever as to why that is the case here.

95 It follows that Article 86(2) EC is not applicable to a situation such as that in the present case and cannot, therefore, be relied on by the Portuguese Republic as justification for the national provisions at issue inasmuch as they constitute restrictions on the free movement of capital which is enshrined in the Treaty.

96 The argument based on Article 86(2) EC must therefore also be rejected.

97 It must consequently be declared that, by maintaining in favour of the Portuguese State and other public bodies special rights in GALP, such as those provided for in the present case by the LQP, Decree-Law No 261-A/99 and the company's articles of association, granted in connection with the Portuguese State's golden shares in the share capital of GALP, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC.

*Failure to fulfil obligations under Article 43 EC*

98 With regard to the Commission's application for a declaration that the Portuguese Republic has failed to fulfil its obligations under Article 43 EC, suffice it to note that, in accordance with settled case-law, since the national measures at issue involve restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Consequently, since a breach of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment (see, inter alia, Case C-463/00 *Commission* v *Spain*, paragraph 86; Joined Cases C-282/04 and C-283/04

*Commission* v *Netherlands*, paragraph 43; Case C-171/08 *Commission* v *Portugal*, paragraph 80; and Case C-543/08 *Commission* v *Portugal*, paragraph 99).

**Costs**

99 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 Commission has applied for the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

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

1. **Declares that, by maintaining in favour of the Portuguese State and other public bodies special rights in GALP Energia SGPS SA, such as those provided for in the present case by Law No 11/90 of 5 April 1990 concerning the Framework Law on Privatisations (Lei No 11/90, Lei Quadro das Privatizações), by Decree-Law No 261-A/99 of 7 July 1999 approving the first phase of the privatisation of the share capital of GALP – Petróleos e Gás de Portugal SGPS SA (Decreto-Lei nº 261-A/99 aprova a 1.ª fase do processo de privatização do capital social da GALP – Petróleos e Gás de Portugal, SGPS, SA), and by the articles of association of that company, granted in connection with the Portuguese State's golden shares in the share capital of that company, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]