JUDGMENT OF THE COURT (First Chamber)

6 December 2007 *

In Joined Cases C-463/04 and C-464/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decisions of 29 September 2004, received at the Court on 2 November 2004, in the proceedings

Federconsumatori,

Adiconsum,

ADOC,

Ercole Pietro Zucca (C-463/04)

and

Associazione Azionariato Diffuso dell'AEM SpA,

Filippo Cuccia,

Giacomo Fragapane,

Pietro Angelo Puggioni,

* Language of the case: Italian.

Annamaria Sanchirico,

Sandro Sartorio (C-464/04)

v

Comune di Milano,

Interested parties:

AEM SpA (C-463/04 and C-464/04),

Edison SpA (C-463/04),

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 June 2006,

after considering the observations submitted on behalf of:

— Federconsumatori, Adiconsum and ADOC, by V. Angiolini, F. Besostri, R. Maia and P. Saba, avvocati,

— Associazione Azionariato Diffuso dell'AEM SpA, Ms Sanchirico and Messrs Cuccia, Fragapane, Puggioni and Sartorio, by S. Nespor and A.L. De Cesaris, avvocati,

— Comune di Milano, by M. Surano, A. Santa Maria, C. Croff and B. Libonati, avvocati,

— AEM SpA, by C. Croff, avvocato,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by M. Fiorilli, avvocato dello Stato,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by E. Traversa and C. Loggi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 56 EC.

2 Those references were made in proceedings between various associations for the protection of consumers, small shareholders and private shareholders, namely Federconsumatori, Adiconsum, ADOC and Mr Zucca (Case C-463/04) and Associazione Azionariato Diffuso dell'AEM SpA, Ms Sanchirico, Messrs Cuccia, Fragapane, Puggioni and Sartorio (Case C-464/04) respectively, and Comune di Milano concerning a national provision under which the articles of association of a company limited by shares may confer on the State or a public body holding shares in that company the power to appoint directly one or more directors to the board of the latter.

National legislation

3 Article 2449 of the Italian Civil Code ('the Civil Code') provides:

'Companies in which the State or public bodies participate as shareholders

If the State or public bodies hold shares in a company limited by shares, the articles of association may confer on them the power to appoint one or more directors or auditors or members of the supervisory board.

The directors and the auditors or the members of the supervisory board appointed in accordance with the preceding paragraph can be removed only by the bodies by which they have been appointed.

They shall have the same rights and duties as the persons appointed by the company in general meeting. The provisions of special laws shall prevail.'

4 Article 2(1) and (3) of Decree Law No 332 of 31 May 1994, which became, after amendment, Law No 474 of 30 July 1994, as amended by Law No 350 of 24 December 2003 (GURI No 299 of 27 December 2003; 'Law No 474/1994'), provides:

'1. The President of the Council of Ministers shall determine, by decree adopted on a proposal of the Minister for Economic Affairs and Finance, in agreement with the Minister for Productivity and the competent sectoral ministers and after notification to the competent parliamentary committees, those companies controlled directly or indirectly by the State and operating in the defence, transport, telecommunications, energy resources and other public service sectors, the articles of association of which are to stipulate that, prior to the adoption of any measure resulting in a loss of control, there shall be inserted, by resolution to that effect passed at an extraordinary general meeting of the company, a provision conferring on the Minister for Economic Affairs and Finance one or more of the following special powers, to be exercised in consultation with the Minister for Productivity:

...

(d) the appointment of a director without voting rights.

3. The provisions of this article shall also apply to companies controlled, directly or indirectly, by public bodies, local authorities and public economic institutions operating in the transport and other public service sectors and designated by decision of the public body holding shares in such companies, which shall be entitled to exercise the powers set out in paragraph 1.'

5 Article 4(1) of Law No 474/1994, which governs the list system, reads as follows:

'Companies [such as the company in question in the main proceedings] having articles of association which limit the rights of shareholders shall incorporate in their articles a special provision, which shall not be capable of being amended for so long as any such limit is in place, to the effect that directors shall be appointed on the basis of a list system ... The lists may be submitted by the outgoing directors or by members representing at least 1% of the shares carrying voting rights in general meeting. A minimum of one fifth of the directors not appointed pursuant to Article 2(1)(d) shall be appointed from minority lists, and in the event of the number being a fraction of less than a single unit, such number shall be rounded up to the nearest whole number. ...'

The main proceedings and the questions referred for a preliminary ruling

6 AEM SpA (Azienda Elettrica Milanese SpA; 'AEM'), which is a company set up by the Comune di Milano in 1996, operates in the public service sector as a distributor

of gas and electricity, the management of which it was granted by that commune. In 1998 its shares were listed on the stock exchange and a first tranche of shares were sold, after which the Comune di Milano held 51% of the company's capital.

7 Continuing the company's privatisation, by Decision No 4/04 of 17 February 2004 the municipal council of the Comune di Milano ('the municipal council') decided to reduce its shareholding in AEM to 33.4%. However, it made that transfer of shares conditional on the prior amendment of AEM's articles of association.

8 By Decision No 5/04 of 8 March 2004, the municipal council decided 'to designate, as provided for in Article 2(3) of Law No 474/1994, AEM ... as a company subject to privatisation of which the articles of association should be amended in accordance with the requirements of Law No 474/1994'. By the same decision it also decided to amend the articles of association of AEM, in particular the provisions regarding procedures for the appointment of directors to the board of that company.

9 On 29 April 2004, at an extraordinary general meeting AEM's shareholders adopted the measures necessary to amend the articles of association of that company in accordance with Decision No 5/04 of the municipal council, by inserting, in particular, the exclusive right for the Comune di Milano to appoint directly, in proportion to its shareholding, directors pursuant to Article 2449 of the Civil Code, not exceeding one quarter of the members of the board of directors of that company. In addition, the articles of association of AEM confer on the Comune di Milano, in accordance with Article 4 of Law No 474/1994, the right to participate in the election on the basis of lists of directors not directly appointed by it.

10 The combined effect of the right of direct appointment of directors and the right to participate in the election of the other members of the board of directors of AEM by

voting on the basis of lists enables the Comune di Milano, according to the facts as stated by the national court, to retain an absolute majority of appointments to the board of directors, even though it may hold, subsequent to the transfer of shares, only a relative majority in the capital of that company.

11 The appellants in the two main proceedings challenged Decisions Nos 4/04 and 5/04 before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) (Italy) seeking their annulment and suspension of their implementation. They complain in particular that the machinery described in the preceding paragraph discourages investors from purchasing shares in AEM or indeed from controlling it, such deterrent effect having inevitable negative repercussions on their own holdings in that company, which necessarily depreciate as a result.

12 By interim judgment of 10 June 2004, the Tribunale amministrativo regionale per la Lombardia ordered the suspension of the implementation of Decision No 5/04 on the ground that the provisions relating to the machinery for appointing the directors of AEM appeared, as they stood, to be contrary to the case-law of the Court of Justice concerning special powers.

13 By interim judgment of 10 August 2004, the Consiglio di Stato (Council of State) (Italy) reversed that judgment, thereby rejecting the application for suspension of implementation on the ground, inter alia, that the Community case-law on which that decision was based concerns cases relating to 'golden shares', a concept vastly different from that at issue in the cases brought before that court, which concern the special powers which one of the shareholders may have under civil law.

14 None the less, the national court is unsure whether Article 2449 of the Civil Code complies with Article 56 EC, as interpreted by the Court, in so far as its application,

combined with the list system referred to in Article 4 of Law No 474/1994, introduces a severe restriction on the ability to participate effectively in the management and actual control of a company limited by shares outside the scope of lawful exercise of special powers.

15 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following questions, the wording of which is identical in Cases C-463/04 and C-464/04, to the Court of Justice for a preliminary ruling:

'(1) Can Article 2449 of the Civil Code, as applied in the circumstances at issue in this case, be held to be compatible with Article 56 EC as interpreted in the judgments in Case C-58/99 [*Commission* v *Italy*], Case C-503/99 and Case C-483/99 [*Commission* v *Belgium* and *Commission* v *France*], Case C-98/01 and Case C-463/00 [*Commission* v *United Kingdom* and *Commission* v *Spain*], when it is invoked by a public entity which, although it has lost control by operation of law over a company limited by shares, retains a substantial shareholding (33.4%) as a shareholder holding a relative majority of the shares, thereby obtaining a disproportionate power of control?

(2) Can Article 2449 of the Civil Code, applied in conjunction with Article 4 of Decree-Law No 332 of 31 May 1994, which became Law No 474 of 30 July 1994, be held to be compatible with Article 56 EC as interpreted in the judgments of the Court of Justice in Case C-58/99 [*Commission* v *Italy*], Case C-503/99 and Case C-483/99 [*Commission* v *Belgium* and *Commission* v *France*], Case C-98/01 and Case C-463/00 [*Commission* v *United Kingdom* and *Commission* v *Spain*], when it is invoked by a public entity which, although it has lost control by operation of law over a company limited by shares, retains a substantial

shareholding (33.4%) as a shareholder holding a relative majority of the shares, and thereby obtaining a disproportionate power of control?

(3) Can Article 2449 of the Civil Code be held to be compatible with Article 56 EC, as interpreted in the judgments of the Court of Justice in Case C-58/99 [*Commission* v *Italy*], Case C-503/99 and Case C-483/99 [*Commission* v *Belgium* and *Commission* v *France*], Case C-98/01 and Case C-463/00 [*Commission* v *United Kingdom* and *Commission* v *Spain*], inasmuch as, when applied in specific cases, it brings about a result that is contrary to another provision of national law (in particular Article 2(1)(d) of Decree-Law No 332 of 31 May 1994, which became Law No 474 of 30 July 1994) which itself complies with Article 56 EC and consequently reflects, in respect of the conditions on which special powers are exercised and the requirements to which they are subject, the principles established in that connection by the judgments of the Court of Justice cited above?'

16 By order of the President of the Court of 18 January 2005, Cases C-463/04 and C-464/04 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred for a preliminary ruling

17 First of all, it should be stated that the questions referred by the national court are based on the premiss that the rule set out in Article 2449 of the Civil Code, although falling within the scope of the general rules of company law contained in that code, derogates from ordinary company law in so far as the latter does not provide an identical rule applicable to all shareholders, in particular to private shareholders. It is for the Court to give the interpretation sought in the light of that premiss.

18 By its questions, which should be examined together, the national court asks, essentially, whether Article 56 EC must be interpreted as precluding a national provision, such as Article 2449 of the Civil Code, under which the articles of association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or, as in the main proceedings, in conjunction with a provision such as Article 4 of Law No 474/1994, which grants that State or body the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or body to obtain a power of control which is disproportionate to its shareholding in that company.

19 According to settled case-law, Article 56(1) EC lays down a general prohibition on 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, and Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 17).

20 In the absence of a definition in the EC Treaty of 'movement of capital' within the meaning of Article 56(1) EC, the Court has previously recognised the nomenclature annexed 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) as having indicative value. Movements of capital within the meaning of Article 56(1) EC therefore include direct investments, that is to say, as that nomenclature and the related explanatory notes show, investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the person providing the capital and the undertaking to which that capital is made available in order to carry on an economic activity. As regards shareholdings in new or existing undertakings, as those explanatory notes confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares, or in some other way, to participate effectively in the management of that

company or in its control (see *Commission* v *Germany*, paragraph 18, and the case-law cited).

21 Concerning that form 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 of other Member States from investing in their capital (see *Commission* v *Germany*, paragraph 19, and the case-law cited).

22 A national provision such as Article 2449 of the Civil Code is clearly such a restriction.

23 Article 2449 enables public shareholders to participate in a more significant manner in the activity of the board of directors of a company limited by shares than their status as shareholders would normally allow (see, by analogy, *Commission* v *Germany*, paragraph 62).

24 Those public shareholders thereby have an instrument which gives them the possibility of exercising influence which exceeds their levels of investment. As a corollary, the influence of the other shareholders may be reduced below a level commensurate with their own levels of investment (see *Commission* v *Germany*, paragraph 64).

25 It should be noted in particular, as stated by the national court, that Article 2449 of the Civil Code does not provide for any limit as to the number of directors who may be directly appointed by the State or the public body with a shareholding in a company limited by shares.

26 As regards AEM, the fact that the Comune di Milano has the right directly to appoint directors pursuant to that provision only in proportion to its own shareholding in that company and subject to a limit of one quarter of the members of the board of directors of the latter is irrelevant.

27 As the national court correctly points out, that right of direct appointment is added to the Comune di Milano's right, pursuant to Article 4 of Law No 474/1994, to participate in the ordinary way in the election on the basis of lists of the directors not directly appointed by it, so that it can have an absolute majority of appointments to that board, even where, as the orders for reference state, it holds only a relative majority of the shares, namely 33.4%.

28 Accordingly, despite the fact that the right of direct appointment conferred on the Comune di Milano is proportional to the amount of its shareholding in AEM, and even though that right may be exercised only as regards a maximum of one quarter of the members of the board of directors of that company, Article 2449 of the Civil Code, in conjunction with Article 4 of Law No 474/1994, enables the Comune di Milano to ensure that it participates in a more significant manner in the activities of that board than its status as shareholder would normally allow.

29 By giving public shareholders an instrument enabling them to restrict the possibility of the other shareholders participating in the company 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 of that company or in its control, a national provision such as that at issue in the main proceedings is liable to deter direct investors from other Member States from investing in the company's capital (see, to that effect, *Commission* v *Germany*, paragraph 66).

30 The existence of a restriction on the free movement of capital cannot be called in question by the arguments of the Comune di Milano and the Italian Government that, first, Article 2449 of the Civil Code falls within the scope of ordinary company law and, secondly, the right of the Comune di Milano directly to appoint directors was conferred voluntarily upon it by AEM's shareholders in general meeting and pursuant to a normal application of ordinary company law.

31 It should be stated, first, that Article 2449 of the Civil Code enables only the State and public bodies with a shareholding in a company limited by shares to have the right to appoint directly one or more directors under the articles of association of that company. Given that, as stated in paragraph 17 of this judgment, the national court bases its reasoning on the premiss that the rule in Article 2449 of the Civil Code derogates from ordinary company law, there is no need to examine what the situation would be if that right were to give all shareholders, including private shareholders, an identical right of appointment.

32 The mere fact that the national legislature has included in the provisions of the Civil Code governing such companies a measure designed specifically to confer special powers on the State or a public body with a holding in a company limited by shares cannot remove that measure from the scope of application of Article 56 EC.

33 Secondly, although it is true that that right of appointment is not conferred directly upon the State or a public body by Article 2449 of the Civil Code but that, pursuant to that provision, a decision of the general meeting of the shareholders of the company concerned is required, in accordance with the machinery provided for by law for the creation of corporate intent, the fact remains that that does not take away the restrictive character of the legislation in question.

34 Irrespective of whether the public shareholder itself has the majority required to have its right of direct appointment of the company's directors included in the company's articles of association or whether, as appears to be the case in the main proceedings, it can have it included only with the consent of the other shareholders, it must be stated that it is only by virtue of the legislation at issue in the main proceedings, which derogates from ordinary company law, that a public shareholder may, unlike a private shareholder, obtain the right to participate in the activities of the board of directors in a more significant manner than its status as shareholder would normally allow.

35 Although such a right of appointment, provided it appears in the articles of association, need not be permanent since, generally, it may be amended upon a subsequent revision of those articles, it still enjoys a relatively high degree of protection. A public shareholder may benefit from the guarantee of continuity which the articles of association of a company limited by shares provide, since amendment of those articles requires, in general, a qualified majority of shareholders. Accordingly, even if subsequently a public shareholder no longer holds, on its own or with the consent of other shareholders, the majority necessary to be granted a right of direct appointment of the directors, inter alia because it has reduced in the meantime its shareholding in the company concerned, it may nevertheless continue to enjoy such a right.

36 An investor can be certain that it will be able to repeal the right of direct appointment of the directors of a company limited by shares only if the investment it is making is so great that it confers on it the majority necessary to amend that company's articles, which may require an investment well beyond that enabling it, in the absence of inclusion of such a right of appointment in the articles, to participate in the company concerned in order to establish or maintain lasting and direct economic links enabling effective participation in the management or control of that company.

37 In that respect, in the case of AEM, according to the findings of the national court, which were confirmed by the company's submissions at the hearing, it is impossible for an investor to repeal the right of direct appointment of directors conferred on the Comune di Milano as long as the latter retains its 33.4% shareholding.

38 Accordingly, even if, from a formal point of view, it is the decision of AEM's shareholders in general meeting which introduced that right of appointment, that decision must be considered, in circumstances such as those in the main proceedings, to be merely an instrument of which the Comune di Milano has been able to make use only by reason of the existence of the legislation in dispute.

39 The free movement of capital may be restricted, however, by national measures justified on the grounds set out in Article 58 EC or by overriding reasons in the general interest to the extent that there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests (see *Commission* v *Germany*, paragraph 72, and the case-law cited).

40 In the absence of such Community harmonisation, it is generally for the Member States to decide on the degree of protection which they wish to afford to such legitimate interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (*Commission* v *Germany*, paragraph 73, and the case-law cited).

41 In that regard, it should be noted in particular that, according to the case-law of the Court, it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings

that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 66, and the case-law cited).

42 However, as noted by the national court, Article 2449 of the Civil Code clearly does not make inclusion in the articles of association of a company limited by shares of a right for the State or a public body holding shares in that company to appoint directly one or more directors subject to any condition, so that such a provision cannot be considered to be justified.

43 In the light of all the foregoing considerations, the answer to the questions referred must be that Article 56 EC must be interpreted as precluding a national provision, such as Article 2449 of the Civil Code, under which the articles of association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or, as in the main proceedings, in conjunction with a provision such as Article 4 of Law No 474/1994, which grants that State or public body the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or public body to obtain a power of control which is disproportionate to its shareholding in that company.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 56 EC must be interpreted as precluding a national provision, such as Article 2449 of the Italian Civil Code, under which the articles of association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or, as in the main proceedings, in conjunction with a provision such as Article 4 of Decree Law No 332 of 31 May 1994, which became, after amendment, Law No 474 of 30 July 1994, as amended by Law No 350 of 24 December 2003, which grants that State or public body the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or public body to obtain a power of control which is disproportionate to its shareholding in that company.

[Signatures]