OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 7 September 2006 [1]

1. In two proceedings brought against the Comune di Milano (Municipality of Milan), the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court for Lombardy) has referred a number of questions to the Court relating to the interpretation of Article 56 EC. The questions, which are identical in both cases, concern the situation where a public body, which retains a minority shareholding in a privatised company, maintains, as regards the control of that company, a privileged position in relation to the other shareholders. The company at issue in the main proceedings is AEM, in which the Comune di Milano, after selling part of its majority shareholding, has retained a shareholding of 33.4%. It has retained, however, the power to appoint the majority of the members of the board of directors. According to the claimants, this contravenes Article 56 EC, as interpreted by the Court in its case-law on 'golden shares'.

I — Facts, national legal framework and the reference for a preliminary ruling

2. AEM was set up by the Comune di Milano in 1996. It operates in the public service sector as a distributor of gas and electricity. In 1998, on the stock-market flotation of AEM, the city sold a first tranche of shares, while maintaining a shareholding of 51% in the company's capital.

3. By Decision No 4/04 of 17 February 2004, the Comune di Milano decided further to reduce its shareholding in AEM to 33.4%. However, it also decided that this reduction would be conditional on prior amendment of the articles of association of the company.

4. By Decision No 5/04 of 8 March 2004, the Comune di Milano concluded that it was necessary to amend the articles of associ-

1 — Original language: Portuguese.

ation of AEM, in particular as regards the appointment of members of the board of directors, in the light of Law No 474/1994.

5. Article 2 of the consolidated text of Decree Law No 332 of 31 May 1994, which became, after amendment, Law No 474 of 30 July 1994 ('Law No 474/1994'), provides, in so far as relevant:

'1. The President of the Council of Ministers shall ... determine by decree 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 the economy and finance one or more of the following special powers, to be exercised in consultation with the minister for productive activities:

...

(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 ... 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.'

6. Article 4(1) provides, in so far as relevant:

'Companies [such as AEM] ... 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 ... 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.'

7. At an extraordinary general meeting held on 29 April 2004, the members of AEM adopted the resolutions necessary to amend the articles of association. In accordance with Article 4 of Law No 474/1994, the new articles of association included a provision regarding the election of directors on the

basis of list voting. Essentially, certain shareholders, including the Comune di Milano, may propose lists of candidates. In a subsequent general meeting, all shareholders may subsequently vote in favour of a list. The list for which most votes are cast will provide six tenths of the members of the board of directors, while the list for which the next highest number of votes is cast will provide four tenths of the members. Thus, with 33.4% of the shares, the Comune di Milano, being the largest minority shareholder, can always be sure that the list of candidates it has proposed will attract at least enough votes to provide four tenths of the members of the board of directors.

8. In addition, the new articles of association granted the Comune di Milano the right to appoint up to one quarter of the members of the board of directors directly, in accordance with Article 2449 of the Italian Civil Code.

9. The heading of Article 2449 of the Italian Civil Code states that it relates to 'companies in which the State or public bodies participate as shareholders'. It provides:

'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.'

10. The referring court points out that, as a result of the combined effect of the right of direct appointment of up to a quarter of the members of the board of directors and the right to participate in the election of directors by voting on the basis of lists, the Comune di Milano can control an absolute majority of appointments to the board of directors, despite its minority shareholding. The board of directors of AEM consists of 7, 8 or 9 members and, as long as the Comune di Milano retains its 33.4% shareholding, it is entitled to appoint: four members on a board of seven (one by direct appointment); five

members on a board of eight (two by direct appointment); or five members on a board of nine (two by direct appointment). Moreover, this influence on the actual control of the company is effectively permanent. By virtue of its 33.4% shareholding, the Comune di Milano, can, in practice, veto any proposal to amend the provisions of the articles of association relating to the procedure for appointing directors.

11. Federconsumatori and others ('Federconsumatori'; Case C-463/04) and the Associazione Azionariato Diffuso dell'AEM ('ASAD-AEM'; Case C-464/04) have brought proceedings against the Comune di Milano in which they challenge Decisions No 4/04 and No 5/04 of the Comune di Milano before the Tribunale amministrativo regionale per la Lombardia.

12. On 10 June 2004, as it took the view that the system for the appointment of directors seemed in conflict with the Court's case-law on golden shares, the referring court ordered as an interim measure that the implementation of Decision No 5/04 of the Comune di Milano be suspended. On 10 August 2004, the Consiglio di Stato (Council of State) rejected this suspension on appeal, on the ground that the concept of 'share' used in the case-law of the Court was fundamentally different from the special powers at issue, which were granted by virtue of civil law.

13. The referring court remained in doubt as to whether the combined application of Article 2449 of the Italian Civil Code and Article 4 of Law No 474/1994 complied with Article 56 EC. By decision of 29 September 2004, it referred, in both cases, the following questions to the Court of Justice:

'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 Cases C-58/99, C-503/99 and C-483/99, C-98/01 and C-463/00, 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 Cases C-58/99, C-503/99 and C-483/99, C-98/01 and C-463/00, 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 Cases C-58/99, C-503/99 and C-483/99, C-98/01 and C-463/00, 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?'

14. Federconsumatori, ASAD-AEM, the Comune di Milano, the Italian Government, the Polish Government and the Commission have submitted written observations to the Court. On 29 June 2006, the Court heard oral argument from Federconsumatori, ASAD-AEM, the Comune di Milano, AEM and the Commission.

II — Appraisal

15. The referring court essentially invites the Court of Justice to review provisions of national law in order to determine their compatibility with Article 56 EC. However, in proceedings brought under Article 234 EC, it is not for the Court to determine whether national rules are compatible with Community law. The role of the Court is confined to providing an interpretation of Community law in order to enable the national court to make such a determination. [2] I would therefore suggest rephrasing the questions of the national court. In my view, the Court could provide a useful answer to the referring court if the question were to be expressed as follows:

'Does Article 56 EC preclude national rules which enable a public body which retains a

2 — See, for example, Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 12, and Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 43.

minority shareholding (33.4%) in a privatised company to retain the power to appoint an absolute majority of the members of the board of directors?'

16. The Comune di Milano takes the view that Article 56 EC is not applicable, since the system of appointment of directors of AEM results from provisions in the company's articles of association, which were adopted pursuant to the normal application of private company law. The Comune di Milano contends that the powers of appointment arise neither from a legislative measure, nor from any other exercise of State authority. In that regard, the Comune di Milano emphasises that the application of Article 2449 of the Italian Civil Code is not obligatory, but instead follows from a voluntary decision by the shareholders in general meeting, in which the public body at issue acts in its capacity as ordinary shareholder. Hence, the introduction of special powers in the articles of association does not constitute an exercise of *ius imperii*.

17. Similarly, the Italian Government argues that the concept of 'golden shares' refers to situations where, in the framework of the privatisation of a former State-owned company, the State or a public body, by means of a legislative measure or an equivalent administrative act, obtains special rights which are stronger than those which the law generally accords to shareholders. According to the Italian Government, Article 2449 of the Italian Civil Code is consistent with the general rules of Italian company law. Under those rules, the appointment of a majority of directors by a minority shareholder is by no means unacceptable. Italian company law does not require, as a matter of principle, that the right of a shareholder to appoint directors be proportionate to the relative size of its shareholding.

18. These arguments essentially highlight three underlying issues. The first is whether it is of importance that the powers of appointment at issue are, at least in part, based on a provision of private law. The second is whether Article 56 EC applies *ratione personae* to public bodies when they are not exercising their public authority. The third issue involves the question which rights, when held by a public body in the role of shareholder in a company, are 'liable to dissuade investors in other Member States from investing in the capital of [that company]'. [3] I shall discuss each issue in turn.

19. In my opinion, the fact that the powers of appointment of the Comune di Milano are based on a provision of private law does not preclude the application of Article 56 EC. In that regard, it is worth noting that, for the

3 — Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraph 47; Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 61.

purpose of determining whether the free movement of capital is restricted where the State enjoys special powers in an undertaking, it is immaterial how those powers are granted or what legal form they take. The fact that a Member State acts within the framework of its domestic company law does not mean that its special powers cannot constitute a restriction within the meaning of Article 56 EC. [4] Otherwise, Member States would easily be able to avoid the application of Article 56 EC, by using their position as incumbent shareholders to achieve within the framework of their civil laws what they would otherwise have achieved by using their regulatory powers.

20. The present case exemplifies this. The file shows that the Comune di Milano initially proposed that the articles of association should give it a special power to appoint one quarter of the members of the board of directors directly, pursuant to Article 2(d) of Law No 474/1994. Originally, that provision offered a legal basis for conferring on public bodies the special power to appoint a minimum of one or more directors. Article 2 of Law No 474/1994, in its original version, was discussed in Case C-58/99 *Commission* v *Italy*. [5] The Court ruled that, by adopting that provision, Italy had contravened Article 56 EC. Subsequently, the law was amended, in particular as regards the special powers provided for by Article 2. Nevertheless, in its Decision 5/04 of 8 March 2004 the Comune di Milano introduced what is, in effect, the same power of appointment, albeit on the basis of Article 2449 of the Italian Civil Code. Irrespective of what the motives of the Comune di Milano may have been for altering its choice of legal basis, it is clear that it would not be difficult for Member States to avoid the restrictions imposed by Article 56 EC if that provision were deemed not to apply to situations governed by private law.

21. The second issue is whether Article 56 EC applies *ratione personae* to a public body, where its actions, regardless of their legal form, are private in nature and thus are not carried out in the exercise of the public authority of the State. To put the issue more generally: are Member States under a duty to respect the Treaty provisions on the free movement of goods, persons, services and capital when they are not exercising their public authority?

22. In my opinion, they are. Member States are subject to the rules on free movement, which clearly apply to them, not in their capacity as public authority but in their capacity as signatories to the Treaty. [6] As a

4 — See, to the same effect, Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-463/00 *Commission* v *Spain* and Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4581, point 48. See also my Opinion in Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, currently pending before the Court, point 23.

5 — [2000] ECR I-3811.

6 — See, by analogy, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49, and Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 17.

result, the provisions on free movement impose obligations on the national authorities of the Member States, irrespective of whether those authorities act in their capacity as a public authority or as a private entity. Indeed, any entity through which the State acts comes within the scope *ratione personae* of the provisions on free movement. [7] In principle, therefore, a public body such as the Comune di Milano cannot rely on the argument that its actions are essentially private in nature to avoid the application of the Treaty provisions on free movement.

23. None the less, the question whether a public body is in the same position and acts in the same way as a private shareholder is of relevance for the delineation of the scope *ratione materiae* of Article 56 EC. It is a factor in determining which rights, when held by a public body in the role of shareholder in a company, are liable to dissuade investments from other Member States.

24. As with the other freedoms, the purpose of the principle of the free movement of capital is to promote the opening up of national markets through the opportunity afforded to investors and undertakings seeking capital to benefit fully from the Community's internal market. In order to achieve that objective, Member States are required to take into account the effects of their actions as regards investors established in other Member States who wish to exercise their right to the free movement of capital. In that context, Article 56 EC prohibits not only discrimination on grounds of nationality, but also discrimination which, in respect of the exercise of a transnational activity, imposes additional costs or hinders access to the national market for investors established in other Member States either because it has the effect of protecting the position of certain economic operators already established in the market or because it makes intra-Community trade more difficult than internal trade. [8] Any national measure that results in treating transnational situations less favourably than purely national situations constitutes a restriction on free movement. Subject to that reservation, Member States remain free to regulate economic

7 — See, to that effect, Case 222/82 *Apple & Pear Development Council* [1983] ECR 4083, paragraph 17. When a private entity is charged with the carrying out of a public function, it may be concluded that the State is acting through that entity and that, as a consequence, it must respect the free movement rules: see, for instance, Joined Cases 266/87 and 267/87 *Association of Pharmaceutical Importers* [1989] ECR 1295, paragraphs 13 to 16; Case C-16/94 *Dubois* [1995] ECR I-2421, paragraph 20; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; and the Opinion of Advocate General Kokott in Case C-470/03 *AGM-COS.MET*, currently pending before the Court, at point 87.

8 — See also my Opinion in Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, currently pending before the Court, at point 24, and my Opinion in Joined Cases C-158/04 and C-159/04 *Trofo Super-Markets*, currently pending before the Court, at points 40 and 41.

activity in their territories and to participate in the national market. [9]

25. The mere fact that a public body owns shares in a company does not reduce the attractiveness of cross-border investments in that company, as long as investors in other Member States can be sure that the public body concerned will, with a view to maximising its return on investment, respect the normal rules of operation of the market. However, as public bodies are subject to local or national mechanisms of political accountability, they are naturally inclined to adjust their conduct in light of the interests of those who are represented within the framework of those mechanisms. Therefore, when a public body holds shares which give it a privileged position in relation to other shareholders as regards its powers of control in the company concerned, there is a real risk that those powers will be used to grant selective and potentially discriminatory access to the national market. This explains, in my view, the case-law concerning golden shares and the limits imposed on the State when it acts as a participant in the market.

26. In my opinion, this case-law imposes a requirement of consistency upon Member States. The Treaty entitles the Member States to maintain public ownership of certain companies. However, once a Member State decides to open up a particular sector of the market, it must act in a manner which is consistent with that decision and fully respect the principles of openness and non-discrimination enshrined in the rules governing the Community's internal market. In other words, States are not entitled selectively to curtail the access of market operators to that sector of the market. In the case of the privatisation of former State-owned companies, this requirement is particularly important. If the State were entitled to maintain special forms of market control over privatised companies, it could easily frustrate the application of the rules on free movement by granting only selective and potentially discriminatory access to substantial parts of the national market. Such forms of control are accordingly liable to dissuade investments from other Member States.

27. When the State privatises a company, therefore, the rules on the free movement of capital require that the company's economic independence be protected, unless there is a need to safeguard fundamental public interests recognised by Community law. In this way, any State control, outside the normal market mechanisms, of a privatised company must be linked to carrying out the activities of general economic interest associated with that company.

9 — See also my Opinion in Case C-94/04 *Cipolla*, currently pending before the Court, at point 58.

28. The Comune di Milano, AEM, and the Italian Government essentially take the view that, under the general rules of Italian company law, private shareholders could, in principle, obtain the same special rights in a company as the Comune di Milano has in AEM. However, in order to decide whether State control in a company remains within the normal market mechanisms, it is not sufficient merely to determine whether private shareholders could, theoretically, acquire similar forms of control, without taking economic practice into account.

29. Moreover, in the context of the present case, it should be noted that, as the Polish Government rightly emphasised, the special powers of the Comune di Milano result from the application of provisions of national law which, for the particular benefit of the State or public bodies, allow for the introduction of special powers in the articles of association of a privatised company. However, the requirement of consistency is contravened when a Member State adopts legislation in order to allow the State or its organs to occupy a privileged position, as regards the control of a privatised company, in relation to the other shareholders in that company.

30. As a result, rules of national law, from which only the State and public bodies can derive special powers, amount, by definition, to a restriction on the movement of capital for the purposes of Article 56 EC. This holds true not only for legislative measures which confer special powers directly on the State, [10] but also for national rules which, for the particular benefit of the State, allow such powers to be incorporated in the company's articles of association. [11] The application of national rules of that type constitutes a departure from 'the normal operation of company law', [12] since they put the State in a privileged position in relation to other shareholders. In such circumstances, the argument that private shareholders could, in theory, obtain comparable privileges under the general rules of company law, is immaterial. [13]

31. A public body which retains a shareholding of 33.4% in a privatised company, but maintains the power to appoint an absolute majority of the members of the board of directors, is clearly in a privileged position in relation to other shareholders. In fact, as the referring court rightly observes, its powers are even more far-reaching than those conferred by the decree-law which was held to be in breach of Article 56 EC in Case C-58/99 *Commission* v *Italy*. [14]

10 — Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731; Case C-483/99 *Commission* v *France* [2002] ECR I-4781; *Commission* v *Spain*, cited in footnote 3; Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809.

11 — *Commission* v *United Kingdom*, cited in footnote 3.

12 — *Commission* v *United Kingdom*, cited in footnote 3, paragraph 48.

13 — See, to that effect, *Commission* v *United Kingdom*, cited in footnote 3, paragraph 48.

14 — Cited in footnote 5.

32. It follows that national rules which enable a public body to maintain the power to appoint an absolute majority of members of the board of directors in a company in which that public body retains a minority shareholding of 33.4% constitute a restriction on the movement of capital for the purposes of Article 56 EC.

III — Conclusion

33. In the light of the foregoing, I suggest that the Court give the following answer to the questions referred by the Tribunale amministrativo per la Lombardia:

Article 56 EC precludes national rules which enable a public body that retains a shareholding of 33.4% in a privatised company to maintain the power to appoint an absolute majority of the members of the board of directors.