OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 6 February 2003 [1]

I — Introduction

1. These actions for infringement of the Treaty question the compatibility with Community law of rules which make certain kinds of operations affecting the existence, object or share-structure of privatised companies in strategically important parts of the economy subject to prior administrative approval. Despite their legal nature, these State powers are commonly referred to as 'golden shares'.

2. The area has recently been delimited by the Court of Justice in its judgments of 4 June 2002 in *Commission* v *Portugal*, *Commission* v *France* and *Commission* v *Belgium*, [2] in which the Court accepted that rules of this kind may be consonant with the requirements of Community law, provided that certain safeguards exist.

II — Legal framework and facts

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3. In Spain, Law 5/1995 of 23 March on the legal arrangements for disposal of public shareholdings in certain undertakings (BOE No 72) lays down the rules concerning the privatisation of various public-sector undertakings.

1 — Original language: Spanish.

2 — Cases C-367/98 [2002] ECR I-4731, C-483/99 [2002] ECR I-4781 and C-503/99 [2002] ECR I-4809.

4. The Law provides:

'Article 1. Substantive scope

This Law shall apply to:

1. Commercial undertakings in which, on the date on which this Law enters into force, the State holds, directly or indirectly, more than 25% of the share capital and which are controlled by the State member in any of the ways laid down by the applicable commercial legislation, provided that, as regards the activity carried out by the undertaking, on its own account or as a result of a holding in other companies, any of the following conditions are met:

(a) essential services or public services formally defined as such are supplied;

(b) activities are carried out which by law and for reasons of public interest are subject to specific administrative review procedures, applying particularly to the persons carrying out the activities;

(c) the activity is exempt in whole or in part from the rules on competition under Article 90 of the Treaty Establishing the European Economic Community.

2. Commercial undertakings which are part of a group, as defined in Article 4 of Law 24/1998 of 28 July on the Stock Market, in which any of the undertakings falling within paragraph (1) above has a dominant position, provided that they meet any of the conditions referred to in subparagraphs (a), (b) or (c) of paragraph (1).

Article 2. Conditions for application

The system of prior administrative approval set out in Article 3 et seq. of this Law shall apply where the public holding of the State member of the undertakings referred to in the preceding article falls within either of the following cases:

1. Where, in one transaction, or a series of transactions, the holding is disposed of in such a way that it is reduced by a percentage equal to, or greater than, 10% of the share capital, provided that the resulting direct or indirect State holding in that capital is less than 50%.

2. Where as the direct or indirect consequence of any act or transaction the holding is reduced to less than 15% of the share capital.

Article 3. Prior administrative approval

1. Where one of the conditions for application referred to in the preceding article has arisen and as established in the Royal Decree referred to in Article 4 of this Law, decisions on the following matters by the managing organs of the undertakings mentioned in Article 1 of this Law may be subject to prior administrative approval:

(a) the voluntary winding-up, demerger or merger of the undertaking;

(b) any kind of disposal or charging, under any name whatsoever, of the assets or shareholdings necessary for the attainment of the undertaking's object and which are defined as such;

(c) a change in the undertakings's object.

2. Likewise, where one of the conditions for application set out in Article 2 of this Law has arisen, and as provided in the Royal Decree referred to in the following article, the following transactions may be subject to prior administrative approval:

(a) operations consisting in dealing in the share capital which result, following one transaction or a series of transactions, in the State's shareholding, as regards the undertaking subject to the special regime laid down by this Law, being reduced by a percentage equal to or greater than 10%;

(b) the direct or indirect acquisition, including through a trustee or other third party, of shares or other securities capable of conferring a right, directly or indirectly, to subscribe for or acquire shares or securities, where the acquisition results in a holding of at least 10% of the share capital.

...

Article 4. System of administrative approval

1. The system of prior administrative approval shall be established by Royal Decree made in the Council of Ministers

on a proposal from the Minister competent in the relevant sphere and following an opinion from the Council of State.

2. The Royal Decree establishing the system to which this article refers shall enter into force prior to the transactions mentioned in Article 2 and shall specify:

(a) its substantive scope;

(b) those of the transactions mentioned in Article 3 which are specifically to be subject to prior administrative approval;

(c) the authority which is competent to grant approval;

(d) the period throughout which the system of prior administrative approval is to apply.

3. Except in the case mentioned in paragraph (2)(d) above, the procedures laid down in paragraph (1) of this article shall apply if the system of prior administrative approval is modified or withdrawn.'

5. The documents before the Court show that since 1996 the system of prior administrative approval introduced by Law 5/1995 has been applied by means of various Royal Decrees. The Commission's complaints relate to the following privatisation programmes:

— Royal Decree 3/1996, of 15 January, concerning Repsol (petroleum and energy);

— Royal Decree 8/1997, of 10 January, concerning Telefónica de España (telecommunications);

— Royal Decree 40/1998, of 16 January, concerning Corporación Bancaria de España (Argentaria) (banking);

— Royal Decree 552/1998, of 2 April, concerning Tabacalera (tobacco);

— Royal Decree 929/1998, of 14 May, concerning Endesa (electricity).

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6. Under the Airports Act 1986, the public authority which used to own and operate the United Kingdom's international airports (British Airports Authority) was privatised and its assets were transferred to the private company BAA plc ('BAA').

BAA's Articles of Association, dated 7 July 1987, created a special one pound share which was allocated to the Secretary of State for Transport.

7. Article 10 of BAA's Articles of Association describe the special share. Its holder must be a member of the government or a person acting on behalf of the Crown (paragraph 1). Pursuant to Article 10(2), the Special Shareholder's consent in writing is required, *inter alia*, for:

— any amendment of the articles which alters the State's special powers within the company (including the powers in Article 10 itself and those in Article 40);

— the company ceasing to control a subsidiary operating a designated airport (Gatwick, Heathrow and Stansted);

— the winding-up or dissolution of the company or of any subsidiary operating a designated airport, other than in the case of a scheme of reconstruction;

— the disposal of a designated airport, or any part thereof, or of the operation of such an airport.

8. The Special Shareholder is entitled to receive notice of general meetings or meetings of a similar kind but does not have a right to vote or any other right apart from the power to give his consent as mentioned above.

9. Article 40(1) of the Articles of Association provides:

'The purpose of this article is to prevent any person (other than a *Permitted Person*) being, or being deemed or appearing to the directors to be, interested in shares of the *Company* which carry (or may in accord-

ance with their terms in certain circumstances carry) the right to more than 15% of the votes which could be cast on any resolution at any general meeting of the *Company* (whether or not the votes could be cast in relation to all resolutions at all general meetings).'

The articles go on to explain how the directors can ensure that no one person owns more than 15% of the voting capital and confer power on the directors to require the shareholders concerned to transfer their surplus shares and, if need be, to resolve of their own motion that the surplus shares be transferred.

III — Administrative procedure

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10. By letter of 26 October 1999, the Commission informed the Spanish Government that the system of prior administrative approval established by Law 5/1995 and the Royal Decrees implementing it might infringe the provisions of the EC Treaty on free movement of capital and freedom of establishment and asked it to submit its observations within two months.

11. The Spanish Government replied on 27 January 1999, contending that the measures at issue were compatible with Community law. The government explained its point of view in a further letter of 18 March 1999.

12. Since it was not convinced by the reasons put forward, the Commission sent the government a reasoned opinion on 2 August 1999, requiring it to comply with it within a two-month period.

13. The Spanish Government replied on 3 November 1999, giving a detailed explanation of the regime for the privatisation of certain undertakings operating in the public sector and reiterating its view that the measures at issue were compatible with Community law, in particular with Articles 43 EC, 56 EC and 295 EC.

14. The Commission was unconvinced by those explanations and brought the present action before the Court of Justice.

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15. By letter of 3 February 1999, the Commission informed the United Kingdom Government that the State's special powers laid down in BAA's Articles of Association might infringe the provisions of the EC Treaty on the free movement of capital and the freedom of establishment and granted the government a two-month period in which to submit its observations.

16. The United Kingdom Government did not reply to the letter of formal notice, so the Commission therefore sent it a reasoned opinion on 6 August 1999 requiring it to comply therewith within two months.

17. The United Kingdom Government responded on 5 November 1999, maintaining that Member States are competent to define, within the framework of their national company law, the essential characteristics of shares in private companies, which are available on the market, and that such a measure does not deny access to the market in those shares. Furthermore, it contended that in the course of a privatisation programme, special measures may be needed to protect the public interest.

18. The Commission was unconvinced by that reply and brought the present action before the Court of Justice.

IV — Procedure before the Court of Justice

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19. The Commission's application was lodged at the Registry of the Court of Justice on 21 December 2000. Following the written procedure, the Court decided to retain the case before the full Court and to open the oral procedure. The United Kingdom Government also entered an appearance as intervener in support of the defendant.

20. The Commission claims that the Court should:

(1) declare incompatible with Article 43 EC (ex Article 52 of the EC Treaty) and Article 56 EC (ex Article 73b of the EC Treaty) Article 2 and Article 3(1) and (2) of Law 5/1995 of 23 March on the legal arrangements for disposal of public shareholdings in certain undertakings, together with Article 1 thereof and the implementing Royal Decrees enacted under Article 4 thereof (Royal Decrees No 3/1996 of 15 January 1996 concerning Repsol, No 8/1997 of 10 January 1997 concerning Telefónica de España, No 40/1998 of 16 January 1998 concerning Argentaria, No 562/1998 of 2 April 1998 concerning Tabacalera and No 929/1998 of 14 May 1998 concerning Endesa), in so

far as they implement a system of prior administrative approval

— which is not justified by overriding requirements relating to the general interest,

— which does not lay down objective and stable criteria which have been made public, and

— which does not comply with the principle of proportionality;

(2) order the Kingdom of Spain to pay the costs.

21. The Spanish Government contends that the Court should dismiss the action and order the Commission to pay the costs.

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22. The Commission's application was lodged at the Court Registry on 27 February 2001. Following the written procedure, the Court decided to retain the case before the full Court and to open the oral procedure.

23. The Commission claims that the Court should:

(1) declare that the provisions setting a limitation in interests in voting shares in BAA (Article 40 of the Articles of Association), as well as the authorisation procedure on the disposal of assets of the company or control in subsidiaries and winding up (Article 10 of the Articles of Association) are incompatible with Articles 43 EC and 56 EC;

(2) order the United Kingdom to pay the costs.

24. The United Kingdom Government contends that the Court should dismiss the action and order the Commission to pay the costs.

V — Analysis of the action

Admissibility

25. The Spanish Government submits that the action against it is inadmissible.

Specifically, the action is inadmissible in so far as it relates to Royal Decrees 40/1998 (Argentaria) and 552/1998 (Tabacalera), because the special powers provided for in those measures expired on 17 February 2001 and 5 October 2000 [3] respectively and, in so far as it concerns Royal Decrees 3/1996 (Repsol), 8/1997 (Telefónica) and 929/1998 (Endesa), because there is a disparity between the disputed legal provisions and the terms of the application. In the last three cases, the system of prior approval had been established under Article 1(2) of Law 5/1995, because it was aimed at groups of undertakings, but in the letter of formal notice, the reasoned opinion and the application itself, the Commission refers to Article 1(1).

26. It must be borne in mind, first, that in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period allowed by the Commission in its reasoned opinion, in this instance 2 October 1999. The two dates advanced by the Spanish Government are later than that.

27. Second, as regards the alleged disparity and without its being necessary to adjudicate on whether it actually exists, it is sufficient merely to read the documents before the Court to establish that the Spanish Government had sufficiently accurate information about the nature of the infringements imputed to it and that its claim cannot therefore succeed.

28. I therefore propose that the action against Spain be declared admissible in its entirety.

The principles established by the judgments of 4 June 2002

29. It seems doubtful that on this occasion the Court of Justice followed the advice given by Don Quixote to Sancho Panza before he set out to govern the island of Barataria: 'Never make your whim the measure of the law... Let the poor man's

3 — Following the amendment made by Royal Decree 67/2000 of 21 January 2000.

tears move you to greater compassion, but not to greater justice, than the rich man's allegations. Try to discover the truth... Whenever leniency can and should play its part, do not apply the full rigour of the law..., for the cruel judge does not enjoy a better renown than the compassionate one.' [4]

30. Some indication of the way in which the Court of Justice carries out its assessment can be gleaned from the judgments of 4 June 2002:

(a) The Court examines the various national rules on intervention, essentially, in the light of the principles relating to free movement of capital: failure to observe those principles may, as an ancillary matter, give rise to an infringement of the principle of freedom of establishment.

(b) In so far as such rules are capable of impeding the acquisition of shares in the companies concerned and of deterring investors from other Member States, they amount to restrictions on the free movement of capital.

(c) Article 295 EC has no practical effect in this sphere.

(d) The free movement of capital may lawfully be restricted only by measures which, without being discriminatory on grounds of nationality, are a response to overriding requirements relating to the general interest and are suitable and proportionate to the objective which they pursue. Such measures, which must be adopted *ex post facto*, must be based on objective criteria which are known in advance to those concerned, to whom a legal remedy must be available.

31. Applying those principles, the Court of Justice held that the Portuguese legislation which prohibited the acquisition by investors from other Member States of more than a given number of shares in certain undertakings was incompatible with the Treaty. That scheme was clearly discriminatory in nature, and the undertaking which the Portuguese Government had given that, purely as a matter of policy, it would not enforce the restriction vis-à-vis Community operators, was not sufficient to remedy the infringement. [5]

32. Likewise, on the basis of the same principles, the Court held that rules which applied without distinction, namely (i) the

4 — Cervantes y Saavedra, M. de: *The Ingenious Hidalgo Don Quixote de la Mancha*, Part II, Chapter 42. Translated by John Rutherford, Penguin Books (Penguin Classics) 2000, p. 769.

5 — Paragraphs 40 to 42 of *Commission* v *Portugal*.

Portuguese and French rules which made acquisition of a shareholding above a certain level in certain undertakings subject to prior administrative authorisation and (ii) the French legislation which enabled representatives of the State to oppose decisions to transfer the assets of various companies or use them as security constituted an infringement.

In its defence, the Portuguese Government had contended that it was necessary to pursue certain economic policy objectives, such as choosing a strategic partner, strengthening the competitive structure of the market and modernising and improving the efficiency of the means of production.

The French Government, for its part, had argued that it was in the public interest to ensure that supplies of petroleum products were safeguarded in the event of a crisis.

The Court of Justice decided, in the first case, that economic grounds cannot serve as justification for obstacles prohibited by the Treaty and, in the second case, that the legislation did not include sufficiently precise and objective criteria and therefore went beyond what was necessary in order to attain the objective indicated.

33. The Belgian regime, however, merited different treatment. Under that regime, the Belgian State could oppose any transfer, any use as security, or any change in the intended destination of lines and conduits of energy products or of certain other strategic assets, as well as certain management decisions considered contrary to the guidelines for the country's energy policy.

The Court of Justice took into account (i) the *ex post facto* nature of the powers of intervention and the strict time-limits within which they were to be exercised under the Belgian regime and (ii) the limited nature of the measures which could be taken (veto in respect of decisions concerning strategic assets and specific management decisions) and which, furthermore, were only permissible when the objectives of the energy policy might be compromised, were to be supported by a formal statement of reasons and could be the subject of an effective review by the courts.

34. The Advocate General's duty, as defined in Article 222 EC, is, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it. His primary duty is to suggest to the Court of Justice a solution which is legally accurate and takes into account the logical principles of reasoned and coherent argument without which a judicial decision would be perceived as no more than an arbitrary and unpersuasive exercise.

35. In performing this important task, I must point out to the Court of Justice the weak points of the reasoning in its judgments of 4 June 2002, aware as I am of the risks involved if its case-law is viewed with unqualified admiration, in an unreal light which, casting no shadows, ultimately robs that case-law of any contrast. [6] There are in essence three points: I shall deal with them with the utmost care and concision.

36. First, I continue to hold the view that the natural and appropriate framework within which to consider the various restrictions deriving from what can, very imprecisely, be described as 'golden shares' is freedom of establishment. In each case, what the defendant Member State is seeking to control, using powers of intervention as regards share structure, transfer of assets or certain management decisions, is the formation of the privatised company's corporate will (either by intervening in the composition of the membership or by influencing specific management decisions), an aspect which has little to do with the free movement of capital referred to in Article 56 EC. Such powers may affect the right to freedom of establishment and make it less attractive, either directly where they impinge on access to share capital, or indirectly, where they reduce its allure by restricting the powers of the board of directors relating to the ownership or management of the company. Contrary to the Court of Justice's finding, [7] the resulting restriction of the free movement of capital is incidental, rather than inevitable. If that is the case as regards measures affecting the composition of the membership, it is even more true as regards measures restricting the adoption of company resolutions (change of company object, disposal of assets). In the latter cases, the link with the free movement of capital is hypothetical or very tenuous.

In addition, in order to give substance to the terms 'movements of capital' and 'payments', the Court of Justice must turn to the hallowed techniques of interpretation. To my mind it is particularly inappropriate to use secondary legislation for the purposes of ascertaining the meaning of one of the fundamental freedoms laid down in the Treaty. [8] Nor is it of any relevance, for the purposes of determining the legal classification of a restriction, that the defendant State (or an intervener!) accepts or rejects that classification. [9]

6 — Boulois, J.: 'Nouvelles réflexions à propos du caractère préjudicielle de la compétence de la Cour de justice des Communautés européennes statuant sur renvoi des juridictions nationales', *Études de droit des Communautés européennes — Mélanges offerts à Pierre-Henri Teitgen*, ed. A. Pedone, Paris, 1984, p. 25.

7 — Paragraph 56 of *Commission* v *Portugal* and of *Commission* v *France*, cited above.

8 — As the Spanish Government points out, it is significant that the proposal for a Directive on takeover bids is based solely on the provision of the Treaty that recognises freedom of establishment.

9 — Although that is what occurs at paragraphs 40 and 41 of *Commission* v *Belgium*. In considering whether the Belgian legislation was capable of constituting a restriction on free movement of capital, the Court of Justice merely stated that Directive 88/361 'could be used' for definition purposes and noted that the Belgian Government did not deny in principle that the legislation restricted free movement of capital, whilst the United Kingdom Government, intervener, conceded 'at least partially' that it did. Those criteria are scarcely relevant and in any event do not suffice to underpin an assessment of this kind.

I shall not delve any deeper into what I consider an incorrect legal classification of the alleged infringement, which is of no further consequence, since the Court of Justice subjects both Community freedoms to similar scrutiny. [10]

37. Second, despite the fundamental importance ascribed to it by the Treaty establishing the Community, the judgments of 4 June 2002 appear to render devoid of all practical effect Article 295 EC, which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'. According to the judgments, that precept cannot be pleaded by way of justification for obstacles to the exercise of the freedoms provided for by the Treaty. Citing a decision based on very different facts, [11] the Court of Justice observed that 'that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty'.

My main difficulty in dealing with golden shares was, and continues to be, the uncontested recognition that the public shareholding in and ownership of undertakings in Member States is compatible, *per se*, with Community law. That principle is based, as the Commission accepted in the three decided cases, on the premiss of neutrality inherent in Article 295 EC. There is no doubt, however, that public ownership of undertakings does entail, for economic operators from other Member States, a clear restriction on freedom of establishment (or, if you prefer, free movement of capital). Similar restrictions can result merely because public bodies have holdings (regardless of their size) in the capital of private companies. In that case other restrictions would ensue where public bodies, via their representatives, influenced certain company resolutions, such as, for example, those which prevent foreigners from owning shares or which in any other way render direct cross-border investment less attractive.

So, if Article 295 EC does not, in relation to the systems of property ownership in the Member States, allow the fundamental rules of the Treaty to be applied less rigorously, creating a *presumption of legality*, the State's involvement in companies must be justified in each case in accordance with the established case-law of the Court, which it applied in the three decided cases. That entails placing reliance on overriding requirements relating to the general interest and showing that the State's involvement is appropriate to the end pursued. The judgments of 4 June 2002 thus mark the end of

10 — It is appropriate to deal with all the fundamental freedoms from a uniform perspective. Precisely because of that, it would have been desirable, in relation to regimes for privatised companies, for the Court to temper the rigour with which it applied its principles on restrictions applicable without distinction, as it did, in regard to the free movement of goods, in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

11 — Namely, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38.

free State intervention in companies as it has hitherto been understood. I am not sure that the Court sought that result but it cannot be avoided if its principles are taken to their logical conclusion.

In any event, the judgments, without stating why, ignore the question of the application and scope of Article 295 EC. That cannot be done with impunity, even in the name of the fundamental freedoms, since in the scheme of the Treaty Article 295 EC is as important as they are.

38. The third major criticism concerns the exception made by the Court of Justice in the Belgian case. To make my explanation clearer, I shall concentrate on the powers which Article 3 of the Royal Decrees of 10 and 16 June 1994 confer on the Minister to oppose the transfer, the use as security, or any change in the intended destination, of the company's strategic assets.

The careful wording of the judgment in that case does not succeed in obscuring the absence of any relevant discrepancies with the French regime for opposing the transfer, or the use as security, of the assets of the overseas subsidiaries of the French company Elf-Aquitaine. The Court found against that regime because, on account of a lack of 'any precise, objective criteria, the legislation in issue goes beyond what is necessary in order to attain the objective indicated'. [12] However, under that legislation the holder of the special share was entitled to oppose the transfer, or the use as security, of assets capable of *adversely affecting the national interest.* [13] The Belgian legislation, which enables the Minister to oppose disposals of strategic assets when he considers that they may adversely affect *the national interest in the energy sector,* [14] is scarcely any more specific.

39. Nor are the procedural differences between the rules very revealing. Both provide for intervention after the event, with an obligation to give prior notice. That statement must be qualified. It is by no means a question of pure *ex post facto* intervention of the kind which affects the validity of an act which is, of itself, effective. On the contrary, it is clear from the general scheme of the national legislation that, where neither the Minister nor

12 — Paragraph 53 of *Commission* v *France*.

13 — Article 1 of Decree No 93-1296, to which Article 2(2) of Decree No 93-1298 refers.

14 — Curiously, at paragraph 51 of *Commission* v *Belgium* it is stated that 'the Minister may intervene pursuant to Articles 3 and 4 of the Royal Decrees of 10 and 16 June 1994 only where there is a threat that the objectives of the energy policy may be compromised'. That stricter wording is not drawn from the legislation. As is apparent from paragraphs 9 and 10 of the same judgment, the Royal Decrees provide, at Article 3, that the Minister may oppose the transfer or use as security of certain assets if he considers that the 'operation in question adversely affects the national interest in the energy sector', and, only in Article 4, that the representatives of the government may challenge any decision 'which they regard as contrary to the guidelines for the country's energy policy, including the government's objectives concerning the country's energy supply'.

the competent authority has responded within the period allowed, the disposal or agreement to transfer, although legally perfect, is ineffective. If that were not the case, it would be possible to circumvent administrative intervention by quickly selling on to a third party, against whom the special powers could not be used. Looked at from that perspective, the situation is comparable to a regime which subjects the same acts to prior administrative approval, which is deemed to be granted once a certain period has expired ('positive administrative silence').

Both powers are subject to relatively short time-limits (21 days in the Belgian case; one month, which may be extended by a further 15 days, in the French case). Finally the Court took into account the Belgian Government's contention, based on general administrative regulations, that the Minister's intervention was to be supported by a formal statement of reasons and could be the subject of effective review by the courts. I find it hard to believe that the French regime did not contain similar safeguards.

40. In the light of those factors, the only relevant difference between those sets of national rules is the different nature of the assets which may be the subject of State opposition or, if you prefer, their substantive scope: the Belgian case concerned the lines and conduits constituting major infrastructures for the domestic conveyance of energy products; the French case concerned the majority of the capital of Elf-Aquitaine's subsidiaries. Even supposing that that difference influences the assessment of the restriction, it is obvious that it has no effect at all on *the objectivity or precision of the criteria.*

The specific application of those principles to the present cases

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41. If Case C-463/00 (*Commission* v *Spain*) is viewed in the light of the situations considered by the Court in its judgments of 4 June 2002 in the actions against Portugal and France, the regime set up by Law 5/1995 and its various implementing Royal Decrees might not be compatible with Community law. Prior administrative approval, which is required both for the adoption of decisions affecting the pursuit of the company object (the company's winding-up, demerger or merger; the transfer, or use as security, of certain essential assets; a change of the company object) [15] and for transactions entailing

15 — Article 3(1) of Law 5/1995.

some change in the share structure (reduction of the State's shareholding or significant disposal of shares), [16] is not subject to any condition, although there is a general reference in the preamble to Law 5/1995 to the need to ensure continuity in the company providing the service. It is thus questionable whether it is possible for individuals to ascertain with sufficient precision the extent of their rights, in which case the regime would therefore be inconsistent with the principle of legal certainty.

42. That is not necessarily so if the Belgian regime for opposing the transfer of assets is taken as a yardstick for compatibility with Community law. As I pointed out above, the Court, in dismissing the infringement action, had emphasised various aspects of the regime: the *ex post facto* nature of the intervention, the imposition of strict time-limits, the limitation both of the decisions which may be affected and of the reasons which may be relied on to use the veto, the formal statement of reasons for the decision and effective review by the courts.

43. I have already explained [17] that if the Belgian regime is looked at closely, it does not provide for *ex post facto* intervention, since a measure has no *practical* legal effect until expiry of the period within which the Minister may exercise his right of opposition or such earlier waiver of that right. In that sense, it is not that different from the Spanish regime which, as the Spanish Government argues, may benefit from the administration's tacit consent.

Nor is the difference in the period within which the right of opposition must be exercised decisive: 21 days in the Belgian case; one month, which may exceptionally be extended by a further 15 days, in the Spanish case.

Furthermore, as the Spanish Government contended at the hearing, without being contradicted on the point by the Commission, [18] the refusal of approval must, as an administrative act, be supported by reasons and is, for that very reason, subject to effective judicial review. There is no reason to believe that such review is less effective in Spain than in Belgium.

Contrary to the Commission's submission, there is no good reason to doubt that the Spanish regime on prior approval was established with the aim of ensuring, within

16 — Article 3(2) of Law 5/1995.

17 — See point 40 above.

18 — I am paraphrasing the words used in paragraph 51 of *Commission* v *Belgium*, although I am not convinced that, in order to establish the provisions of national law, the mere agreement of the parties or the acquiescence of the other side is sufficient.

a privatisation procedure, 'the continuity in the company necessary for supplying the service provided by the company', as is stated perfectly clearly in the preamble to Law 5/1995. If, in accordance with the Spanish Government's submission, such continuity is construed as a concern to secure supplies, economic and social stability and protection of consumers' interests, the regime is obviously pursuing overriding requirements relating to the general interest, as opposed to any purely economic objective. Moreover, I do not believe that it is any less precise than the mere reference to 'the national interest in the energy sector' found in the Belgian case. [19]

In short, the only relevant difference between the Belgian and Spanish rules is again the different nature of the operations for which approval is required. And again, the ineluctable conclusion is that, even though the Spanish rules cover a wider range of matters, given that, as well as covering various decisions concerning changes in the company or the transfer of assets, they also extend to the acquisition of 10% of the share capital, such differences in scope in no way affect the objectivity or precision of the criteria to which authorisation is subject. The fact that there are more instances of approval can be explained by the difference in the objective pursued.

44. The Spanish regime also has a feature which sets it apart from other similar cases before the Court, namely its expressly transitional nature. Thus each of the Royal Decrees sets an expiry date (generally 10 years after the occurrence of the triggering event). The fact that those Decrees are to apply only for a limited time confirms that this is an exceptional regime devised to go hand in hand with a privatisation procedure. It seems to be consonant with the objective of opening up markets, whilst not wholly relinquishing the State's powers in strategically important parts of the economy. As the Court stated: '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'. [20] I would add that those concerns are more readily justifiable when they are precisely delineated in time and serve to prevent the risks involved in what amounts to a

19 — I stress the fact that, in spite of the wording of paragraph 51 of *Commission* v *Belgium*, which refers to situations where 'there is a threat that the objectives of the energy policy may be compromised', the reality of the legal provisions is that the Minister may oppose the transfer, the use as security, or any change in the destination, of certain strategic assets if the operation 'adversely affect[s] the national interest in the energy sector' (Article 3(1) of the Royal Decree of 10 June 1994). In another sphere, it should be recalled that the Commission also uses imprecise terms to restrict rights. For example, it pleads 'lack of Community interest' to avoid investigating a complaint relating to competition law and thus to limit the access of individuals to administrative and, where appropriate, judicial review.

20 — See *Commission* v *Portugal*, paragraph 47; *Commission* v *France*, paragraph 43; and *Commission* v *Belgium*, paragraph 43.

fundamental change in the status of companies in sensitive areas of the economy.

45. If account is taken of the novelty of the privatisation of companies whose ownership or control by the State had seemed legitimate for many years, there is justification for the variety of measures subject to approval and for the relative lack of precision in the objective put forward: continuity in the company providing the service. Given the unforeseeable nature of possible difficulties, it is understandable that the State should retain a certain discretion. If, in addition, account is taken of the temporal limitation which it involves, the Spanish regime does not go beyond what is necessary to attain the objective which it pursues.

46. All those considerations, viewed in the light of the judgments of 4 June 2002 and the general principle of the neutrality of Community law vis-à-vis the State's entrepreneurial initiatives, enshrined in Article 295 EC, lead me to think that the potential restrictions on the free movement of capital are justified and that they are appropriate and proportionate in relation to the objective which they pursue; and that the Commission's action against the Kingdom of Spain should therefore be dismissed. The same solution prevails in relation to freedom of establishment. [21]

Case C-98/01 Commission *v* United Kingdom

47. The legal situation reflected in Case C-98/01 (*Commission* v *United Kingdom*) does not appear to be compatible with the principles of the case-law recently restated in this new area.

48. First, it is of no significance that the powers of intervention which may be exercised by the State derive from the company's Articles of Association (rather than from a legislative provision) or that the phenomenon of non-voting shares conferring special powers is permitted under domestic law. Whilst such a case falls squarely within the established category of 'systems of property ownership', it is nevertheless the case that such systems do not fall outside the scope of the fundamental rules of the Treaty, the Court not drawing any distinction (and it is not appropriate to do so) by reference to the exact nature of a given system. For the purposes of classifying the restriction, the decisive factor is the economic consequences of the system, not the technical details of each set of rules. Were that not so, it would be sufficient, in the future, for Member States to convert all kinds of

21 — See, by analogy, paragraph 59 of *Commission* v *Belgium*.

public-law prerogatives into powers conferred by the Articles of Association in order to put them beyond the reach of the Treaty.

49. Second, the United Kingdom has argued very persuasively that the powers which it enjoys under Articles 10 and 40 of BAA's Articles of Association do not amount to prohibited restrictions, because they do not restrict access to its share capital and cannot be applied in such a way as to discriminate on grounds of nationality. Since they do not constitute obstacles to fundamental freedoms, it is not necessary to justify them or to make their exercise subject to objective and precise criteria.

In spite of appearances, the United Kingdom rules are essentially no different from the French rules.

50. Under Article 10 of BAA's Articles of Association, the (public) owner of the special share may oppose the winding-up of the company, the winding-up or disposal of a subsidiary which owns one of the designated airports and the total or partial disposal of an airport or the management thereof. That right is not subject to any conditions or to review by the courts, since it entails an ordinary operation on the part of a shareholder. The French legislation (Article 2(3) of Decree No 93-1298) provided that decisions to transfer assets, or to use them as security, could be vetoed and the Court of Justice found that a wide discretion 'regarding controls on the identity of the holders of the assets of the subsidiary companies' was incompatible with the Treaty. The United Kingdom Government has submitted that it does not construe Article 10 in such a way that it allows it to refuse consent on grounds of the identity of any purchaser or transferee but only in such a way as to decide whether it is expedient to carry out the disposal. That assertion is unconvincing, since it is not based on the Articles of Association: still less is it accompanied by the measures necessary to ensure that the government acts in accordance with it.

51. Article 40 of BAA's Articles of Association in practice restricts the holding of any one person or undertaking in the company to 15% of the voting shares. The United Kingdom Government asserts on the basis of that percentage that access to the market is not obstructed. In the French case (Article 2(1) of Decree No 93-1298), approval was required once the ceiling of one tenth, one fifth or one third of the

capital of, or voting rights in, the company was exceeded. I do not think that the minimum 5% difference between those rules calls for different assessments. Furthermore, although it is the case that the United Kingdom rule applies automatically and never *intuitu personae*, it is also the case that the Special Shareholder may at any time relinquish the Special Share or agree to an amendment of the Articles of Association which will allow a particular investor to acquire a larger proportion of the capital, without that operation being subject to review by the courts.

52. Since the United Kingdom regime does not include any of the guarantees taken into account by the Court of Justice when it considered the Belgian legislation, in particular the imposition of objective criteria which are subject to review by the courts, it is not appropriate to apply the decision in *Commission* v *Belgium* to the United Kingdom regime.

53. In those circumstances, the regime established in Articles 10 and 40 of BAA's Articles of Association must be considered, in accordance with the judgments of 4 June 2002, to be contrary to the free movement of capital, and there is no need for a separate examination of the measures at issue in the light of the rules concerning freedom of establishment. [22]

22 — Paragraph 56 of *Commission* v *Portugal* and of *Commission* v *France*.

The solution with regard to the premiss in Article 295 EC

54. However, for the reasons which I set out in my Opinion of 3 July 2001 and which I invite the Court to reconsider, I remain convinced that the principle of neutrality of Article 295 EC applies in any event to a regime with these characteristics. Only if that provision is correctly evaluated is it possible to avoid the inconsistency where the Court, on the one hand, finds against a Member State which, whilst retaining certain prerogatives for itself, has agreed to dispose of its shareholding in certain strategic undertakings, facilitating the interpenetration of national markets sought by the Treaties, and, on the other, allows, without the least explanation, another Member State to prevent or restrict such integration as a result of those same undertakings being publicly owned.

55. The judgments of 4 June 2002 hold that Article 295 EC, which emphatically lays down that the EC Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership' does not exempt those systems from the fundamental rules of the Treaty. To restate a principle in this way without more amounts to begging the question, the practical result of which is that a provision of fundamental importance, which the

authors of the Treaty took care to emphasise,[23] is rendered nugatory.

56. A historical and teleological analysis reveals that the expression 'system of property ownership' contained in Article 295 EC refers not to the civil rules concerning property relationships — an aspect which is, furthermore, wholly alien to the purposes of the Treaties — but to the ideal body of rules of every kind, deriving from both private and public law, which are capable of granting economic rights in respect of an undertaking: in other words, rules which allow the person vested with such ownership to exercise decisive influence on the definition and implementation of all or some of its economic objectives. At the same time it may be inferred from a purposive interpretation that the distinction between public and private undertakings, for the purposes of the Treaty, cannot be based merely on the identity of its various shareholders, but depends on the opportunity available to the State to impose specific economic policies other than the pursuit of the greatest financial gain which characterises private business.

57. In short, the Treaty's observance, enshrined in Article 295 EC, of the system of property ownership in the Member States must extend to any measure which, through intervention in the public sector, understood in the economic sense, allows the State to contribute to the organisation of the nation's economic activity. It implies that those measures should not be considered *per se* as incompatible with the Treaty; therefore they are covered by the presumption of validity conferred on them by the legitimacy of Article 295 EC.

For these purposes, it is particularly enlightening that the reservation in Article 295 EC is worded as a prohibition against 'prejudicing'. If the Treaty 'in no way prejudices', this means, at the very least, that a national measure concerning the public sector system for adopting decisions must be judged compatible with the Treaty, *unless it is proved otherwise*. And 'prejudice' is specifically what is involved when it is assumed that a measure which is in itself not discriminatory will be used in an unjustifiably discriminatory manner.

58. I conclude that on the basis of those factors the action against Spain should be dismissed, which also seems to be the solution if the judgments of 4 June 2002 are applied.

The United Kingdom provisions would also be able to benefit from that presumption of legality if the United Kingdom Government were required to adopt reasoned decisions when exercising the powers conferred on it by the Special Share and if such decisions could be subject to review by the courts. Failing those guarantees, the BAA regime does not comply with the requirements of the Treaty.

23 — On account of its key position, its forceful and unconditional wording and the fact that it derives its authority directly from the Schuman Declaration of 9 May 1950, as I pointed out in my Opinion of 3 July 2001.

VI — Costs

59. In Case C-463/00 (*Commission* v *Spain*), the applicant must be ordered to pay the costs under Article 69(2) of the Rules of Procedure.

60. In Case C-98/01 (*Commission* v *United Kingdom*), the United Kingdom must be ordered to pay the costs in accordance with the criteria employed by the case-law.

61. The intervener is to bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

VII — Conclusion

62. In the light of the foregoing considerations, I propose that the Court of Justice should:

— dismiss the action against the Kingdom of Spain in Case C-463/00 and order the Commission to pay the costs. The United Kingdom, intervener, is to bear its own costs.

— uphold the action against the United Kingdom in Case C-98/01 and order it to pay the costs.