JUDGMENT OF THE COURT

23 May 2000 *

In Case C-58/99,

Commission of the European Communities, represented by A. Aresu and M. Patakia, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, and I.M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994 (GURI No 126 of 1 June 1994), converted, after amendment, into Law No 474 of 30 July 1994,

* Language of the case: Italian.

providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies (GURI No 177 of 30 July 1994), and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward, L. Sevón and R. Schintgen, Presidents of Chambers, P.J.G. Kapteyn (Rapporteur), A. La Pergola, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 February 2000, at which the Italian Republic was represented by I.M. Braguglia and the Commission by E. Traversa, Legal Adviser, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 February 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 February 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994 (GURI No 126 of 1 June 1994), converted, after amendment, into Law No 474 of 30 July 1994, providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies (GURI No 177 of 30 July 1994, hereinafter 'the consolidated legislation'), and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC).

2 Article 1 of the consolidated legislation sets out the detailed rules for the sale of shares held by the State and public bodies. Article 1(5) states that the competent ministerial authorities may — for the purpose of preparation and implementation of the transactions under which capital is subscribed — entrust certain tasks (studies, advice, appraisal, assistance, administration and management) to 'national or foreign companies of proven experience and operational ability and professional persons who have been registered as provided for by law for at least five years'.

3 Article 2 of the consolidated legislation is concerned with the 'special powers' reserved for the State and public bodies. Article 2(1) provides that the President of the Council of Ministers is to determine by decree which companies controlled directly or indirectly by the State and operating in the defence, transport, telecommunications, energy resources and other public service sectors in whose

statutes, before the adoption of any measure resulting in the loss of control, a provision must be inserted, by decision taken at an extraordinary general meeting, conferring on the Minister for the Treasury one or more 'special powers'. Those powers, which are set out in Article 2(1), include a power to grant express approvals, a power to appoint a minimum of one or several directors and an auditor, and a right to veto certain decisions.

4 It is apparent from the documents before the Court that the 'special powers' must be exercised 'having regard to national economic and industrial policy objectives'. The content of the clause conferring 'special powers' is defined by a decree of the Minister for the Treasury (Article 2(1a)). Article 2 of that decree also applies to companies controlled, directly or indirectly, by public bodies operating in the transport and other public service sectors; in that case, those bodies assume the role of the Minister for the Treasury in determining which companies are covered by 'special powers', the extent of the powers and the manner in which they are exercised (Article 2(3)).

5 On 5 October 1995, by decree of the President of the Council of Ministers, the Italian Government inserted in the statutes of ENI SpA (which operates in the energy and petrochemical sectors) the 'special powers' provided for in Article 2 of the consolidated legislation.

6 On 21 March 1997 a decree of the President of the Council of Ministers established that STET SpA and Telecom Italia SpA (respectively holding and operating company in the telecommunications sector) should have included the 'special powers' in their statutes before they were privatised. STET SpA and Telecom Italia SpA subsequently merged. On 24 March 1997 two decrees of the Minister for the Treasury were published; one laid down the content of the 'special powers', while the other set the relevant percentage for the purposes of the exercise of the special power of approval conferred on the Minister for the Treasury at 3% of the voting rights.

7 By letter of formal notice of 3 February 1998, the Commission informed the Italian Government pursuant to Article 169 of the Treaty that the national provisions referred to above were incompatible with Articles 52, 59 and 73b of the Treaty.

8 The Italian Government replied by letter of 13 May 1998. Since the Commission was not convinced by the arguments put forward, on 10 August 1998 it sent the Italian Government a reasoned opinion requiring the Italian Republic to comply therewith within two months from its notification.

9 By note of 22 October 1998 the Italian Government replied to the reasoned opinion and undertook to comply with it by the enactment of a draft law amending the provisions in question.

10 While the Commission took note of the Italian Government's undertaking, it found that the delay in giving effect to it was becoming a cause for concern because the draft law still had not been submitted to the Italian Parliament.

11 In those circumstances the Commission decided, in accordance with the procedure set out in the second paragraph of Article 169 of the Treaty, to bring the present application before the Court.

12 The Commission observes that Article 1(5) of the consolidated legislation prohibits all professional persons who are lawfully pursuing their activities in other Member States or are recently established in Italy from performing certain tasks, contrary to Articles 52 and 59 of the Treaty.

13 With regard to the 'special powers' conferred on the Treasury Ministry under Article 2 of the consolidated legislation, the Commission essentially argues that

powers of that kind, which are liable to hinder or render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty, must satisfy four conditions: they must apply in a non-discriminatory manner, be justified by overriding considerations in the general interest, be appropriate for ensuring that the objective which they pursue is achieved and not go beyond what is necessary in order to achieve that objective. Since there is no indication whatever that those conditions are satisfied in the present case and the 'special powers' thus confer on the Italian authorities a potential to discriminate which may be used in an arbitrary manner, the Commission considers that those 'special powers' are incompatible with Articles 52 and 73b of the Treaty.

14 In its defence, the Italian Government did not deny that the national provisions at issue are incompatible with Community law. It merely confirmed its intention to comply with the reasoned opinion of 10 August 1998 and added that the draft law prepared by it for that purpose had been approved by the Council of Ministers on 18 December 1998 and submitted to Parliament.

15 At the hearing, the Italian Government set out the aims of the legislation relating to the exercise of the 'special powers', which had been adopted by decree of the President of the Council of Ministers of 4 May 1999 (GURI 1999, No 109) and communicated to the Commission.

16 The Italian Government also stated at the hearing that the decree of 4 May 1999 had been transposed in Article 66 of Finance Law No 488 of 23 December 1999

relating to the year 2000 (GURI No 302 of 27 December 1999) so as to satisfy the requirements of law and of legal certainty pleaded by the Commission.

17 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, in particular, Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20, and Case C-302/95 *Commission* v *Italy* [1996] ECR I-6765, paragraph 13).

18 In the present case, that period came to an end two months after notification of the reasoned opinion of 10 August 1998.

19 It follows that the laws or regulations adopted after that period cannot be taken into account.

20 Accordingly, by adopting Articles 1(5) and 2 of the consolidated legislation and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52, 59 and 73b of the Treaty.

Costs

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

On those grounds,

THE COURT

hereby:

1. **Declares that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994, converted, after amendment, into Law No 474 of 30 July 1994, providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies, and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC);**

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

Rodríguez Iglesias Edward Sevón

Schintgen Kapteyn

La Pergola Puissochet Hirsch

Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 23 May 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President