JUDGMENT OF THE COURT (First Chamber)

8 July 2010 *

In Case C-171/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 April 2008,

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

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, acting as Agent, and by M. Gorjão Henriques, advogado,

defendant,

* Language of the case: Portuguese.

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, E. Levits, M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 October 2009,

after hearing the Opinion of the Advocate General at the sitting on 2 December 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining special rights for the State and other public sector bodies in Portugal Telecom SGPS SA ('PT'), allocated in connection with the State's privileged ('golden') shares in PT, the Portuguese Republic has failed to fulfil its obligations under Articles 56 EC and 43 EC.

Legal context

National legislation

2 Article 15(3) of the Framework Law on Privatisations (Lei Quadro das Privatizaçoes) of 5 April 1990 (Diáro da República, Series I, No 80 of 5 April 1990) ('LQP') provides for the possibility of creating golden shares in the following terms:

'The legislative instrument referred to in Article 4(1) (approving the articles of association of the undertaking to be privatised or transformed into a public limited company) may also, in exceptional cases, where grounds of national interest so require, provide for the existence of golden shares which are intended to remain the State's property and which, irrespective of their number, confer on the State a right of veto over amendments to the company's statutes and over other decisions in a particular field, duly specified in the articles of association.'

3 Article 20(1) of Decree-Law No 44/95 of 22 February 1995 on the first phase of privatisation provides:

'If [PT]'s statutes provide for the existence of shares with special rights, other than preferred dividend shares, the majority of those shares must be held by the State or other public sector shareholders.'

PT's articles of association

4 It is apparent from the file that, pursuant to Article 4(2) of the articles of association of PT, the share capital of the company is made up of 1 025 800 000 ordinary shares and 500 class A shares.

5 Under Article 5(1) of PT's articles of association, the majority of the class A shares must be held by the State or other public sector shareholders and those shares confer certain privileges, in the form of special rights, provided for in Articles 14(2) and 19(2) of those articles.

6 The latter provisions set out those special rights as follows:

— at least one third of the total number of directors, including the chairman of the board of directors, must be elected by a majority of the votes conferred on class A shares, that is to say, by the votes of the State and the other public sector shareholders;

— among the five or seven members of the executive committee chosen from the board of directors, one or two of those members respectively must be elected by a majority of the votes conferred on class A shares;

— the nomination of at least one of the directors elected to deal specifically with certain management questions must, in order to be approved, obtain a majority of the votes conferred on class A shares;

— no decision of the general meeting on the matters set out below may be approved against a majority of the votes corresponding to the class A shares:

  — the appropriation of net income for the year,

  — alterations to the articles of association and increases in share capital,

  — any limit on or abolition of priority rights,

  — fixing the parameters of increases in share capital,

  — the issue of bonds or other securities and fixing the value of those which the board of directors is entitled to authorise and the limitation or suppression of priority rights in respect of the issue of bonds convertible into shares and the fixing of the parameters by the board of directors for the issue of those types of bonds,

— relocation of its registered office anywhere within the national territory,

— approval of the acquisition of ordinary shares exceeding 10% of the share capital by shareholders engaged in an activity which competes with those carried on by companies controlled by PT, and

— in addition, a majority of the votes corresponding to the class A shares shall be necessary as regards decisions approving the general objectives and fundamental principles of PT's policies or defining the general principles of its policy in respect of the acquisition and disposal of shareholdings in companies or groups, when the general meeting's prior authorisation is required.

Background to the dispute and the pre-litigation procedure

7 From 1992 an extensive process of restructuring took place in the Portuguese telecommunications sector which ended, in 1994, with the creation of PT, a share management holding company which came into being as a result of the merger of several wholly publicly-owned undertakings.

8 The process of privatising PT commenced in 1995. It was carried out in five successive phases, within the framework of the regime established by the LQP.

9 On 4 August 1995, at a time at which the Portuguese State held 54.2% of PT's share capital, the articles of association of that company were adopted.

10 On conclusion of the fifth phase of privatisation, all of the public shareholdings in PT were sold except for 500 class A shares, to which, pursuant to Article 5(1) of PT's articles of association, special rights are attached and, in accordance with Article 20(1) of Decree-Law No 44/95, the majority of which are allocated to the State or other public sector shareholders.

11 On 19 December 2005, the Commission sent a letter of formal notice to the Portuguese Republic accusing it of having failed to fulfil its obligations under Articles 56 EC and 43 EC on the ground that the State and other public sector shareholders held golden shares with special rights in the share capital of PT.

12 Since it was not satisfied with the Portuguese Republic's response in its letter of 21 February 2006, on 10 April 2006 the Commission sent it a reasoned opinion inviting it to comply with that opinion within two months of its receipt. The Portuguese Republic replied by letter of 24 July 2006 disputing the alleged failure to fulfil its obligations.

13 Since it considered that the Portuguese Republic had not adopted the measures necessary to comply with the reasoned opinion, the Commission decided to bring the present action.

The action

Admissibility of the action

Arguments of the parties

14 In its defence, the Portuguese Republic disputes, at the outset, the admissibility of the action on two grounds. First, it submits that, since the Commission has not placed in the file either the legislative texts or PT's articles of association containing the provisions which embody the alleged infringement, it has not complied with the rules on the burden of proof and, therefore, has based its action on mere presumptions.

15 Second, it submits that the action is in part inadmissible in so far as, in its application, the Commission made new claims which did not form part of the reasoned opinion and, in doing so, extended the subject-matter of the proceedings, as defined in the pre-litigation procedure. In that regard, the Portuguese Republic refers, in particular, to the rules in the articles of association on the basis of which the State has a greater influence over the choice of the members of the executive committee or holds special powers such as a right of veto over decisions relating to the sale of substantial assets, mergers with other companies and changes in the ownership of the company.

16 The Commission rejects all those contentions.

17 First, as regards the burden of proof, the Commission essentially submits that, in so far as it is the Portuguese Republic which is accused of the infringement and not PT, proof of the infringement needs to relate to the conduct of the Portuguese State rather than PT's articles of association. Thus, it is not necessary for the Commission to produce those articles of association to prove the alleged infringement. In any event, the Portuguese Republic itself admitted, in its response to the letter of formal notice, that the provisions of those articles existed as well as the special rights of the State laid down therein, and it contested the infringement which it is alleged to have committed specifically on the basis of those provisions.

18 Second, as regards the alleged extension of the subject-matter of the proceedings, the Commission submits that the investigation phase of the infringement procedure seeks to identify factual and legal material which is sufficient to support its suspicions of an infringement and not to deal with all of the elements constituting the infringement in an exhaustive and detailed manner. The Commission thus considers that, in the pre-litigation procedure, it was entitled to restrict itself to making a general reference to the special powers of the State in PT and then to state the content of its claims in the application.

Findings of the Court

19 In relation to the first plea of inadmissibility, it should be noted at the outset that, in accordance with established case-law, in proceedings for failure to fulfil an obligation under Article 226 EC it is for the Commission, which must prove the existence of the alleged infringement, to provide the Court with the evidence necessary for it to establish that the obligation has not been fulfilled, and, in so doing, the Commission may not rely on any presumption (see, inter alia, Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21, and Case C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 23).

20 Although it is true that the Commission did not annex to its application the full text of the relevant national legislation or PT's articles of association, the fact none the less remains that, both in the application and the reasoned opinion annexed thereto, the Commission reproduced and explained on several occasions the content of the provisions of that legislation and the articles of association on which it based its action for failure to fulfil obligations.

21 In addition, as noted by the Advocate General in point 27 of his Opinion, the Portuguese Government has never denied either the existence of those provisions or their content, as described by the Commission both during the pre-litigation phase and in the proceedings before the Court. On the contrary, the Portuguese Government confirmed that, precisely on the basis of those texts, the Portuguese State held golden shares in PT with the special rights indicated by the Commission.

22 Moreover, reading the full text of PT's articles of association, submitted by the parties in response to an express request by the Court, has made it possible to confirm the truth of the Commission's claims in relation to the content of the provisions of those articles of association and the special rights held by the State.

23 In those circumstances, it cannot be considered that the Commission based its action on mere presumptions without providing the evidence necessary to enable the Court to assess the infringement which the Portuguese Republic is alleged to have committed.

24 Accordingly, the first plea of inadmissibility must be rejected as unfounded.

25 As regards the second plea of inadmissibility, it should be noted that, in accordance with settled case-law, the subject-matter of an action under Article 226 EC for failure to fulfil obligations is determined by the Commission's reasoned opinion, so that the action must be based on the same grounds and pleas as that opinion (see Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 36 and case-law cited).

26 However, that requirement cannot be stretched so far as to mean that in every case the statement of the objections expressly set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28, and Case C-484/04 *Commission* v *United Kingdom* [2006] ECR I-7471, paragraph 25).

27 It should be pointed out in this instance that the Commission neither extended nor altered the subject-matter of the proceedings as defined in the reasoned opinion.

28 In that regard, it is sufficient to note that, both in the operative part of the reasoned opinion and in the form of order sought in the application, the Commission clearly stated that it was accusing the Portuguese Republic of having failed to fulfil its obligations under Articles 43 EC and 56 EC on the ground that the State and other public sector shareholders held golden shares with special rights in PT.

29 Therefore, the fact that, in its application, the Commission set out in detail the complaints it had already made more generally in the letter of formal notice and the reasoned opinion, by referring to other special rights held by the Portuguese State in PT, did not alter the subject of the alleged infringement, and has thus had no effect on the scope of the proceedings (see, to that effect, Case C-185/00 *Commission* v *Finland* [2003] ECR I-14189, paragraphs 84 to 87).

30 In the light of the above, the second plea of inadmissibility raised by the Portuguese Republic must also be rejected and, consequently, the Commission's action must be declared admissible.

The failure to fulfil the obligations under Articles 56 EC and 43 EC

Arguments of the parties

31 First of all, in the Commission's submission, the creation of golden shares in PT is not a result of the normal application of company law and constitutes, in any event, a State measure which falls within the scope of Article 56(1) EC.

32 In that regard, the Commission submits that, contrary to the claims of the Portuguese authorities, the golden shares at issue cannot be regarded as being purely of a private nature. Although the special rights attached to them are provided for only in PT's articles of association, not only were those articles adopted at a time when the Portuguese State held control of the company, but they should also be considered in the light of the relevant provisions of the LQP and Decree-Law No 44/95. It is apparent from that legislation that the majority of the golden shares must be allocated to the State and remain the property of the State, since they are not transferable, unlike preferred shares under private law.

33 The Commission also submits that the allocation of golden shares to the State cannot fall outside the scope of Articles 56 EC and 43 EC, in accordance with Article 295 EC, which provides that the EC Treaty is in no way to prejudice the rules in Member States governing the system of property ownership. According to settled case-law (see, in particular, Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 48, and Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38), the Member States cannot plead their own systems of property ownership by way of justification for obstacles to the fundamental freedoms guaranteed by the Treaty, resulting from a system of administrative authorisation relating to privatised undertakings. Since the special rights at issue confer on their holders rights of veto in respect of numerous decisions which PT is required to adopt, they establish such a system of administrative authorisation.

34 Next, the Commission essentially claims that the fact that the Portuguese State holds special rights in PT obstructs both direct and portfolio investments in that company and, consequently, constitutes a restriction on the free movement of capital and the freedom of establishment.

35 In particular, those special rights restrict the possibility for shareholders to participate effectively in the management and control of that company in proportion to the value of the shares which they hold and deprives them of the power to adopt strategic decisions, such as those concerning, inter alia, the sale of substantial assets, significant amendments to the articles of association, mergers with other companies and changes in the ownership of the undertaking. Moreover, such special rights are liable to impede the acquisition of controlling shareholdings in PT, which is also incompatible with Article 43 EC.

36 Moreover, the Commission also states that the restrictions resulting from the special rights held by the Portuguese Republic in PT cannot be justified by any of the objectives invoked by the national authorities.

37 In the first place, as regards the need invoked by the Portuguese authorities to ensure the availability of the telecommunications network in the event of crisis, war or terrorism, the Commission considers that, contrary to the requirements of the case-law and, in particular, Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 71 and 72, those authorities have not shown the existence of a 'genuine and sufficiently serious threat to a fundamental interest of society' capable of justifying the shares at issue on grounds of public security and public policy.

38 In the second place, the Commission disputes the arguments of the Portuguese Republic that, since PT retained the management of the cable and copper-fibre networks as well as all wholesale and retail activities, the State's holding of special rights in PT is necessary to ensure a certain degree of competition on the telecommunications market. In the Commission's submission, if such an argument were to be followed, it would lead to the paradoxical situation of having to justify one infringement of Community competition law by another infringement of that law, in this case, namely that of relying on the contested restrictions to the fundamental freedoms guaranteed by the Treaty.

39 In the third place, given that the Portuguese Republic also makes reference to the need to avoid disruptions on the capital market, the Commission cites the case-law, and in particular *Commission* v *Portugal* (paragraph 52), according to which economic grounds cannot serve as justification for obstacles prohibited by the Treaty.

40 Finally, the Commission submits that, in any event, the restrictions in question contravene the principle of proportionality. The exercise of the special rights attached to the class A shares is not subject to any condition, except that such rights must be used solely where grounds of national interest so require. Even if the objectives invoked

by that Member State were lawful, granting it such discretionary powers would go beyond what is necessary to attain them.

41 The Portuguese Republic disputes the alleged infringement by submitting, first of all, that the shares at issue are merely preferred shares under private law which cannot be assimilated to golden shares. Decree-Law No 44/95 merely envisages the possibility of providing for golden shares in PT's articles of association, without requiring that they actually be created. Consequently, the existence of those shares can be attributed only to the will of the company itself and not that of the State.

42 Next, the Portuguese authorities claim that the holding of special rights by shareholders constitutes a fundamental right, which is characteristic of private law or of the law of commercial companies, which also has a basis in Article 295 EC. The Court is entrusted with the task of safeguarding those rights, even when their holders are public sector bodies. In support of that argument, those authorities recall that, in accordance with the Court's case-law, the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law (Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 91 to 93).

43 Moreover, the Portuguese Republic submits, in the alternative, that, even supposing that the existence of the golden shares at issue were attributable to the State, it cannot however constitute a prohibited restriction for the purposes of Articles 56 EC and 43 EC, in the light of the fact that those shares do not constitute a State measure which seeks to regulate trade or to impede the free movement of services or capital. That Member State thus invites the Court to consider the application to the present case of the logic underlying the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. Given that the present case concerns non-discriminatory rules for the management of shareholdings in the company and not rules for

acquiring those shareholdings, it is not possible for there to be an infringement of the free movement of capital or of the freedom of establishment.

44 The Portuguese authorities also point out that, even supposing that the existence of special rights in PT constitutes a restriction on the fundamental freedoms guaranteed by the Treaty and invoked by the Commission, such a restriction is justified.

45 In their submission, that justification is based, first, on the fact that PT owns the major part of the infrastructure for transmitting and distributing telecommunications, which thus renders the holding of those special rights necessary on grounds of public security and public policy so as to safeguard the provision of telecommunications services in case of crisis, war, terrorism, natural disasters and other types of threat. In this regard, that Member State submits that, contrary to the Commission's reading of the judgment in *Commission* v *Spain*, the justification related to such grounds is not dependent on the existence of a current threat to a fundamental interest of society.

46 Second, the restriction in question is also justified by the need to ensure a certain degree of competition on the telecommunications market, and the need to prevent a possible disruption of the capital market, which constitute overriding reasons in the public interest.

47 Finally, according to the Portuguese Republic, the special rights allocated to the State are proportionate in the light of the objectives which they are intended to attain. Those rights are limited to particular situations defined in advance and are no different from a regime of retrospective opposition. Consequently, a regime has been put in place which is comparable to the one at issue in Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, which the Court declared compatible with the Treaty.

Findings of the Court

– The failure to fulfil obligations under Article 56 EC

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

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

management and control of the undertaking (see *Commission* v *Netherlands*, paragraph 19 and case-law cited).

50 Concerning those two forms of investment, the Court has stated that national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC if they are likely 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 *Portugal*, paragraphs 45 and 46; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 40; *Commission* v *Spain*, paragraphs 61 and 62; Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 47 and 49; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31; and *Commission* v *Netherlands*, paragraph 20).

51 In the present case, the Portuguese Republic disputes the classification of the contested measure as a national measure within the meaning of the case-law cited in the preceding paragraph, by maintaining that the preferred shares at issue are private in nature and that their introduction into PT's articles of association resulted solely from the will of the company and not that of the State.

52 In that regard, it is admittedly established that the LQP and Decree-Law No 44/95 merely allow for the possibility of providing for golden shares in PT's statutes, and that it is precisely in accordance with the provisions of the articles of association of that company, adopted pursuant to that legislation, that those shares were introduced and allocated to the State.

53 However, the fact remains that, as was confirmed at the hearing by the Portuguese authorities themselves, those provisions were adopted on 4 April 1995, namely not only immediately after the adoption of the decree-law, but in particular at a time when the Portuguese Republic had a majority holding in PT's share capital and thus exercised control over that company.

54 In those circumstances, it must be found that it is the Portuguese Republic itself which, first, in its capacity as legislature, authorised the creation of golden shares within PT and, second, in its capacity as a public authority, decided, pursuant to Article 15(3) of the LQP and Article 20(1) of Decree-Law No 44/95, to introduce golden shares in PT, to allocate them to the State and to define the special rights which they confer.

55 In addition, as stated by the Advocate General in point 62 of his Opinion, the creation of those golden shares is not the result of a normal application of company law since, in derogation from the Portuguese Commercial Companies Code, the golden shares provided for in PT are intended to remain the property of the State and are thus not transferable.

56 Therefore, the creation of those golden shares must be regarded as being attributable to the State and, consequently, falls within the scope of Article 56(1) EC.

57 Next, as regards the restrictive nature of the system whereby golden shares in PT are held by the State, which is provided for in the national legislation in conjunction with the articles of association of that company, such a system is liable to dissuade operators from other Member States from investing in the capital of that company.

58 Under that system, the approval of a considerable number of important decisions concerning PT, listed in paragraph 6 above and concerning both the acquisition of shareholdings exceeding 10% of PT's share capital and the management of the company, depends on the agreement of the Portuguese State given that, pursuant to PT's articles of association, those decisions cannot be approved without the majority of the votes conferred on class A shares.

59 In that regard, it is also necessary to point out that such a majority is required, in particular, for any decision amending PT's articles of association, with the result that the influence of the Portuguese State on PT can be weakened only with the consent of the State itself.

60 Thus, the Portuguese State's holding of those golden shares, in so far as it confers on that State an influence on the management of PT which is not justified by the size of its shareholding in that company, is liable to discourage operators from other Member States from making direct investments in PT since they could not be involved in the management and control of that company in proportion to the value of their shareholdings (see, inter alia, Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraphs 50 to 52).

61 Similarly, the structuring of the special shares at issue may have a deterrent effect on portfolio investments in PT in so far as a possible refusal by the Portuguese State to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, is in fact capable of depressing the value of the shares of that company and thus reduces the attractiveness of an investment in such shares (see, to that effect, *Commission* v *Netherlands*, paragraph 27).

62 In those circumstances, it must be found that the Portuguese State's holding of the golden shares at issue constitutes a restriction on the free movement of capital for the purposes of Article 56(1) EC.

63 Such a finding cannot be undermined by the arguments raised by the Portuguese authorities that Article 295 EC and the alleged logic underlying the judgment in *Keck and Mithouard* are applicable to the present case.

64 First, as regards Article 295 EC, which states that '[the] Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it is sufficient to note that, in accordance with settled case-law, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty and cannot, therefore, be relied on by way of justification for obstacles, resulting from privileges attached to the position of Member States as shareholders in privatised undertakings, to the exercise of the freedoms laid down in the Treaty (see *Commission* v *Spain*, paragraph 67 and case-law cited).

65 Second, as regards the judgment in *Keck and Mithouard*, it should be noted that the measures at issue are not comparable to the rules concerning selling arrangements which were found in that judgment not to fall within the scope of Article 28 EC.

66 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, second, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The

reason is that the application of such provisions is not such as to prevent access by the latter products to the market of the Member State of importation or to impede such access more than it impedes access by domestic products (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).

67 In the present case, although the restrictions at issue apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market (see *Commission* v *Spain*, paragraph 61 and case-law cited).

68 That said, it therefore needs to be examined whether and, if so, under what conditions the restriction at issue may be allowed on the basis of the justifications relied on by the Portuguese Republic.

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

70 First of all, as regards the justifications based on overriding interests in the public interest, raised by the Portuguese authorities, it should be noted that the Court has already held that, an interest in ensuring the conditions of competition on a particular market cannot constitute valid justification for restrictions on the free movement of

capital (*Commission* v *Italy*, paragraphs 36 and 37, and judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 44).

71 Similarly, as regards the need to prevent a possible disruption of the capital market, it is sufficient to note, as the Commission does, that this objective constitutes an economic ground which, in accordance with settled case-law, cannot justify a restriction on the free movement of capital (see, inter alia, *Commission* v *Portugal*, paragraph 52).

72 Next, as regards the derogations permitted under Article 58 EC, it cannot be denied that the objective invoked by the Portuguese authorities to ensure the security of the availability of the telecommunications network in case of crisis, war or terrorism may constitute a ground of public security (see, by analogy, in relation to energy supply, Case C-274/06 *Commission* v *Spain*, paragraph 38) and possibly justify an obstacle to the free movement of capital.

73 However, it is established that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17).

74 Given that the Portuguese Republic merely raised that ground without stating why it considers that the State's holding of golden shares would make it possible to prevent

such an interference with a fundamental interest of society, a justification based on public security cannot be upheld in the present case.

75 For the sake of completeness, as regards the proportionality of the restriction at issue, it should be noted that, contrary to the claims of the national authorities, the exercise of the special rights which the holding of golden shares in PT confers on the Portuguese State is not subject to any specific and objective condition or circumstances.

76 Although Article 15(3) of the LQP states that the creation of golden shares in PT which confer special powers on the State is subject to the condition, which, moreover, is formulated in a rather general and imprecise manner, that grounds of national interest must so require, the fact, none the less remains that neither that law nor PT's articles of association lay down any criteria determining when those special powers may be exercised.

77 Thus, such uncertainty constitutes serious interference with the free movement of capital in that it confers on the national authorities, as regards the use of such powers, a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued (see, to that effect, Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraphs 51 and 52).

78 It must consequently be declared that, by maintaining in PT special rights, such as those provided for in its articles of association for the State and other public sector bodies, allocated in connection with the State's golden shares in PT, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC.

– The failure to fulfil obligations under Article 43 EC

79 The Commission also seeks a declaration that the Portuguese Republic failed to fulfil its obligations under Article 43 EC, on the ground that the State's holding of golden shares in PT is liable to impede the acquisition of controlling shareholdings in that company.

80 In that regard, it is sufficient to note that, in accordance with settled case-law, in so far as the national measures at issue entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Consequently, since an infringement of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment (see, inter alia, *Commission* v *Netherlands*, paragraph 43).

Costs

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

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

1. **Declares that, by maintaining in Portugal Telecom SGPS SA special rights, such as those provided for in that company's articles of association for the State and other public sector bodies, allocated in connection with the State's golden shares in Portugal Telecom SGPS SA, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC;**

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

[Signatures]