JUDGMENT OF THE COURT (First Chamber)

28 September 2006 *

In Joined Cases C-282/04 and C-283/04,

ACTIONS for failure to fulfil obligations pursuant to Article 226 EC, brought on 30 June and 1 July 2004 respectively,

Commission of the European Communities, represented by H. Støvlbæk, A. Nijenhuis and S. Noë, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H. G. Sevenster, J. van Bakel and M. M. de Grave, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, K. Schiemann, N. Colneric, K. Lenaerts and E. Juhász, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having heard the Opinion of the Advocate General at the sitting on 6 April 2006,

gives the following

Judgment

1 By its actions, the Commission of the European Communities asks the Court to hold that, by maintaining in the memorandum and articles of association of Koninklijke KPN NV and TPG NV certain provisions providing that the capital of those companies is to include a special share held by the Netherlands State, which confers on the latter special rights to approve certain decisions of the competent organs of those companies, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 56 EC and 43 EC.

Legal context

2 Under Article 2:8 of the Netherlands Civil Code (Burgerlijk Wetboek; 'the Burgerlijk Wetboek'), the exercise of the rights held by the holder of a special share is governed by the principles of reason and fairness. According to that provision:

'1. A legal person and those involved in its organisation by virtue of the law or its memorandum or articles of association must act towards each other in accordance with the requirements of the principles of reason and fairness.

2. A rule applicable between them by virtue of the law, custom, the memorandum or articles of association of the legal person, regulations or a decree shall have no effect in so far as, taking account of the circumstances, that would be unacceptable having regard to the criteria of reason and fairness.'

3 Article 2:92 of the Burgerlijk Wetboek provides:

'1. Save where otherwise provided in the company's memorandum or articles of association, all shares confer the same rights and obligations in proportion to their nominal value.

...

3. The memorandum or articles of association may provide that certain shares shall confer special rights described therein concerning the control of the company.'

Facts and pre-litigation procedure

4 In 1989, the Netherlands State undertaking for post, telegraph and telephone was transformed into a limited liability company called Koninklijke PTT Nederland NV ('PTT').

5 On the occasion of the partial privatisation of PTT, by the sale in 1994 of a first tranche of shares representing 30% of its capital and in 1995 of a second tranche representing a further 20%, the articles of association of the company were amended in order to introduce a special share, called a 'golden share', for the benefit of the Netherlands State.

6 In 1998, PTT was divided into two limited liability companies, namely Koninklijke KPN NV ('KPN') for telecommunications services and TNT Post Groep NV, which subsequently became TPG NV ('TPG'), for postal services.

7 On that division, the Netherlands State's special share in PTT was amended to give the State a special share in each of the two new companies ('the special shares at issue').

8 In principle, the Netherlands State could transfer its special shares to the company concerned or to another acquirer. In the latter case, the transfer would, under Article 17 of the articles of association of KPN and TPG, have to be approved by the board of directors and the supervisory board of that company.

9 The special shares at issue gives the Netherlands State special rights of prior approval of decisions of the organs of those two companies concerning the following points:

— the issuing of shares in the company (Article 12(1)(2) and (4) of the articles of association of KPN and TPG);

— the restriction or removal of any priority right of ordinary shareholders (Article 13(3) of the articles of association of KPN and TPG);

— the acquisition or disposal by the company of shares in its own capital representing more than 1% of the ordinary shares subscribed (Article 15(3) of the articles of association of KPN and TPG);

— the withdrawal of the special share (Article 16(3) of the articles of association of KPN and TPG);

— the exercise of voting rights attached to shares held in KPN Telecom BV or PTT Post Holdings BV (or in another legal person within the meaning of Article 4(1) of the Postal Law (Postwet) concerning proposals for dissolution, merger or demerger, the acquisition of shares in the company's own capital and amendment of the memorandum or articles of association concerning the powers of the general assembly of those companies in the areas mentioned above (Article 25(3)(a) of the articles of association of KPN and TPG);

— investments resulting in the company's own capital, calculated on a consolidated basis, representing less than 30% of the total resources of KPN (Article 25(3)(b) of the articles of association of KPN) or 15% of the total resources of TPG (Article 25(3)(b) of the articles of association of TPG);

— the distribution of dividends in shares of the company and/or a dividend from reserves (Article 36 of the articles of association of KPN and TPG);

— merger or demerger (Article 47(2)(a) of the articles of association of KPN and TPG);

— dissolution of the company (Article 47(2)(b) of the articles of association of KPN and TPG);

— amendment of the memorandum or articles of association of the company (Article 47(2)(c) of the articles of association of KPN and TPG) concerning in particular:

  — the company's objects, in so far as the amendment concerns the operation of concessions or authorisations;

  — the company's capital and the types of share in the company, where it is proposed to create a new type of shares, coupons or other rights over the results and/or the assets of the company or to cancel the special share or B preference shares;

— the transfer of the special share, and

— modification of the rights attached to the special share by virtue of Articles 12, 13, 15(3), 25(3), 36 and 47(2) of the articles of association of KPN and TPG, and,

— generally, any amendment prejudicial or contrary to the rights connected with the special share.

10 By the 'Afspraken op Hoofdlijnen KPN en TPG' (agreement with KPN and TPG), the Netherlands State undertook, first, to use the special share in KPN only if its interests as a major shareholder so required and, secondly, to use its special share in TPG only in the same circumstances or if protection of the general interest in the guarantee of universal postal service so required. The State also undertook not to use its rights derived from those special shares to shield the companies concerned against hostile takeover bids.

11 Between 1998 and the time-limit set in the reasoned opinion, namely 6 April 2003, the ordinary shareholding of the Netherlands State was progressively reduced to about 20% in KPN and 35% in TPG.

12 Having given the Kingdom of the Netherlands an opportunity to submit its observations, the Commission sent it two reasoned opinions on 6 February 2003, stating that the special shares held by the Netherlands State in KPN and TPG appeared to the Commission to be incompatible with Articles 56(1) EC and 43 EC. The Commission set the Netherlands a time-limit of two months within which to

adopt the measures necessary in order to comply with the reasoned opinions. Being dissatisfied with the replies of the Netherlands Government in its letters of 28 April 2003, the Commission brought these actions.

13 By order of the President of the First Chamber of 23 November 2005, Cases C-282/04 and C-283/04 were joined for the purposes of the oral procedure and judgment.

The actions

14 In support of each of its actions, the Commission makes two complaints, essentially claiming infringement of Articles 56(1) EC and 43 EC, on the ground that the Kingdom of the Netherlands holds the two special shares at issue in KPN and TPG, reserving to itself special rights of prior approval of certain management decisions of the organs of those two companies.

The complaints alleging infringement of Article 56(1) EC

Arguments of the parties

15 The Commission argues that the special shares at issue constitute obstacles to the free movement of capital for the purposes of Article 56(1) EC and that the special rights attached to those shares, even where intended to protect the general interest, are in any case disproportionate.

16 The Netherlands Government replies that those shares do not constitute obstacles to the free movement of capital. They cannot be described as 'State measures' falling within the scope of Article 56(1) EC. Moreover, they have an impact not on the acquisition of shares in the companies in question but only on certain questions concerning the management of those companies. They are not likely to deter investors from acquiring shares in those companies and have not in fact discouraged investment in any way. Even if a link were to be established between the special shares at issue and the decision to invest, such a link would be so uncertain and indirect that it could not be regarded as constituting an obstacle to the free movement of capital.

17 In the alternative, the Netherlands Government argues that the special share in TPG is in any event justified by an overriding reason in the general interest, namely the guarantee of universal postal service.

Findings of the Court

— The existence of obstacles

18 According to consistent case-law, Article 56(1) EC generally prohibits restrictions on movements of capital between Member States (see, to that effect, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 35 and 40, and Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 38 and 43).

19 In the absence of a definition in the EC Treaty of 'movements of capital' for the purposes of Article 56(1) EC, the Court has recognised the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (an article repealed by the Treaty of Amsterdam) (JO 1988 L 178, p. 5) as having indicative value. Movements of capital for the purposes of Article 56(1) EC thus include in particular direct 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 ('direct' investments) and 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 ('portfolio' investments) (see, to that effect, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; *Commission* v *France*, paragraphs 36 and 37, and *Commission* v *United Kingdom*, paragraphs 39 and 40).

20 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 to that effect, in particular, *Commission* v *France*, paragraph 41; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31; and Case C-265/04 *Bouanich* [2006] ECR I-923, paragraphs 34 and 35).

21 In the present case, the Court finds that the special shares at issue constitute restrictions on the free movement of capital provided for in Article 56(1) EC.

22 First of all, the introduction of the special shares at issue into the memorandum and articles of association of KPN and TPG is the result of decisions taken by the Netherlands State in the course of the privatisation of those two companies with a

view to reserving a certain number of special rights under the companies' statutes. In those circumstances, contrary to what the Netherlands Government argues, those shares must be regarded as State measures falling within the scope of Article 56(1) EC.

23 The Court further finds that the special shares at issue are likely to deter investors of other Member States from investing in KPN and TPG.

24 By virtue of those special shares, a series of very important management decisions of the organs of KPN and TPG, concerning both the activities of those two companies and their very structure (in particular questions of merger, demerger and dissolution), depend on prior approval by the Netherlands State. Thus, in the first place, as the Commission has rightly pointed out, those special shares confer on the Netherlands State an influence over the management of KPN and TPG which is not justified by the size of its investment and is significantly greater than that which its ordinary shareholding in those companies would normally allow it to obtain. Moreover, those shares limit the influence of other shareholders in relation to the size of their holding in KPN and TPG.

25 Furthermore, those special shares can be withdrawn only with the consent of the Netherlands State.

26 By making decisions of such importance subject to the prior approval of the Netherlands State and thereby limiting the possibility of other shareholders participating effectively in the management of the company concerned, the existence of those shares may have a negative influence on direct investments.

27 Similarly, the special shares at issue may have a deterrent effect on portfolio investments in KPN and TPG. A possible refusal by the Netherlands State to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, would be capable of depressing the (stock market) value of the shares of that company and thus reduces the attractiveness of an investment in such shares.

28 Thus, the risk that the Netherlands State might exercise its special rights in order to pursue interests which do not coincide with the economic interests of the company concerned might discourage direct or portfolio investments in that company.

29 Finally, contrary to what the Netherlands Government argues, the Court does not find those restrictive effects to be either too uncertain or too indirect to constitute an obstacle to the free movement of capital.

30 The possibility cannot be excluded that, in certain particular circumstances, the Netherlands State might exercise its special rights in order to defend general interests, which might be contrary to the economic interests of the company concerned. The special shares at issue thus entail the real risk that decisions recommended by the organs of those companies as being in the economic interests of the latter may be blocked by that State.

31 Given the above, the special shares at issue constitute restrictions within the meaning of Article 56(1) EC.

— Possible justification for the obstacles

32 The free movement of capital may, however, be restricted by national measures justified on the grounds set out in Article 58 EC or by overriding reasons in the general interest (see, to that effect, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29), to the extent that there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests (see, to that effect, in the context of the freedom to provide services, Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 43, and case-law cited).

33 In the absence of such Community harmonisation, it is in principle for the Member States to decide on the degree of protection which they wish to afford to such legitimate interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, to that effect, Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 45).

34 In this case, therefore, in order to assess whether the Commission's complaints are well founded, the Court needs to examine whether the special shares at issue, implying special rights of prior approval of certain management decisions of the organs of KPN and TPG, may be justified having regard to one of the reasons referred to in paragraph 32 of this judgment and whether those measures are proportionate to the objectives pursued.

35 With regard to the special share held in KPN, the Netherlands Government does not adduce any objective in the general interest capable of providing justification.

36 In those circumstances, the first complaint raised in Case C-282/04, claiming infringement of Article 56(1) EC, must be upheld.

37 Concerning the special share held in TPG, the Netherlands Government argues that it is necessary in order to guarantee universal postal service and, more particularly, in order to protect the solvency and continuity of TPG, which is the only undertaking currently capable in the Netherlands of providing that universal service at the level required by statute.

38 In that regard, the Court acknowledges that the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital (see, by analogy, Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 44).

39 However, the special share at issue goes beyond what is necessary in order to safeguard the solvency and continuity of the provider of the universal postal service.

40 As the Advocate General has rightly pointed out in points 38 and 39 of his Opinion, it should be noted, first, that the special rights of the Netherlands State in TPG are not limited to that company's activities as provider of a universal postal service. Moreover, the exercise of those special rights is not based on any precise criterion and does not have to be backed by any statement of reasons, which makes any effective judicial review impossible.

41 Having regard to the whole of the above, the first complaint in Case C-283/04, claiming infringement of Article 56(1) EC, must be upheld.

The complaints alleging infringement of Article 43 EC

42 The Commission also requests that the Kingdom of the Netherlands be held in breach of its obligations under Article 43 EC, on freedom of establishment, on the ground that the special shares at issue not only hinder direct and portfolio investments in KPN or TPG, but are also likely to hinder the taking of controlling holdings in those two companies, that is to say investments which confer a definite influence over the management and control of those companies (see, to that effect, Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 77 and case-law cited).

43 As the Advocate General has pointed out in point 41 of his Opinion, in so far as the special shares 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, in particular, Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 86).

44 Given the whole of the above, the Court finds that, by maintaining in the memorandum and articles of association of KPN and TPG certain provisions, providing that the capital of those companies is to include a special share held by the Netherlands State, which confers on the latter special rights to approve certain management decisions of the organs of those companies, which are not limited to cases where the intervention of that State is necessary for overriding reasons in the general interest recognised by the Court and, in the case of TPG in particular for ensuring the maintenance of universal postal service, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 56(1) EC.

Costs

45 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 Kingdom of the Netherlands has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

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

1. **By maintaining in the memorandum and articles of association of Koninklijke KPN NV and TPG NV certain provisions, providing that the capital of those companies is to include a special share held by the Netherlands State, which confers on the latter special rights to approve certain management decisions of the organs of those companies, which are not limited to cases where the intervention of that State is necessary for overriding reasons in the general interest recognised by the Court and, in the case of TPG NV in particular for ensuring the maintenance of universal postal service, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 56(1) EC.**

2. **The Kingdom of the Netherlands is ordered to pay the costs.**

[Signatures]