Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

8 November 2012*

(Failure of a Member State to fulfil obligations — Articles 43 EC and 56 EC — Scheme under which prior authorisation is required for the acquisition of voting rights representing 20% or more of the share capital in certain 'strategic public limited companies' — Arrangements for ex post control of certain decisions taken by those companies)

In Case C-244/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 20 May 2011,

European Commission, represented by E. Montaguti and G. Zavvos, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by P. Mylonopoulos and K. Boskovits, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Greek.

Judgment

1 By its application, the European Commission requests the Court to declare that, by setting out the requirements referred to in Article 11(1), read in conjunction with Article 11(2), and those referred to in Article 11(3) of Law 3631/2008 on the creation of a national fund for social cohesion (FEK A' 6/29.1.2008), the Hellenic Republic has failed to fulfil its obligations under Articles 63 TFEU and 49 TFEU relating to, respectively, the free movement of capital and the freedom of establishment.

Legal context

2 Article 11 of Law 3631/2008 provides:

'1. In respect of strategic public limited undertakings having, or having had, a monopoly, in particular with regard to companies owning, operating or managing national infrastructure networks, the acquisition by a shareholder other than the Greek State or by companies related to that shareholder … or by shareholders acting jointly and in a concerted manner of voting rights representing more than 20% of the total share capital shall be subject to prior authorisation by the Inter-ministerial Privatisation Committee established by Law 3049/2002, in accordance with the procedure laid down thereby.

2. Authorisation shall be granted on condition that the general interest criteria for ensuring the continuity of the services provided and the operation of the networks are met. For indicative purposes, the evaluation criteria taken into account are the following: (a) the experience of third-party shareholders in the field of activity of the companies above, (b) their solvency, (c) information relating to their investment strategies, (d) the transparency of their transactions, (e) their detailed business plans, (f) the size and type of their investment programme, (g) their system of ownership, (h) preservation of jobs, (i) the structure of their share capital and, in particular, the holdings of funds established outside the European Union, under the principle of transparency and reciprocity, (j) the decision-making procedure.

3. The decisions of those strategic undertakings relating to the abovementioned subjects shall be subject to authorisation by the Minister for Finance for purposes of general interest:

(a) dissolution of the undertaking, its placing in liquidation and the designation of liquidators;

(b) restructuring the abovementioned undertakings: conversion, merger with another company, merger with the creation of a new public limited company, break-up in any form whatsoever or break-up of one or more divisions liable to place in jeopardy the supply of services in the sectors of strategic importance;

(c) transfer, transformation or conversion, disposal, supply as a guarantee, as well as transformation or alteration of the allocation of strategic elements of the assets of the abovementioned undertakings and of the basic networks and infrastructure necessary for the economic and social life of the country as well as its security.

4. The authorisation referred to in the preceding paragraph shall be granted by ministerial decree published within thirty (30) days from the date of delivery of the decision to the Minister. Lack of a response within that period shall be deemed to amount to a granting of the required authorisation.

…' .

Pre-litigation procedure

3 On 8 May 2008, the Commission sent the Hellenic Republic a formal letter of notice claiming that paragraphs (1) and (3) of Article 11 of Law 3631/2008 are contrary to Articles 43 EC and 56 EC.

4 As it took the view that the reply given by the Hellenic Republic was inadequate, the Commission sent a reasoned opinion to that Member State by letter dated 1 December 2008.

5 By letter dated 28 January 2009, the Hellenic Republic responded to that reasoned opinion, maintaining its position that the national provisions at issue are not contrary to the Treaty provisions on the free movement of capital and the freedom of establishment.

6 The Commission decided to bring the present action since it considered that the failures to fulfil obligations had not been remedied within the time-limit set for the system of prior authorisation and the arrangements for *ex post* control, provided for by the national provisions at issue.

The action

The existence of restrictions on the fundamental freedoms

Arguments of the parties

7 The Commission claims that the prior authorisation scheme provided for in Article 11(1) of Law 3631/2008 as well as the arrangements for *ex post* control provided for in paragraph 3 of that same article constitute restrictions on the free movement of capital and on the freedom of establishment.

8 Since private investors may purchase shares in the strategic companies at issue which are traded on a stock exchange, the Commission contends that the prior authorisation scheme applies to companies which have already been partially privatised. Such a scheme does not therefore fall outside the fundamental rules of the EC Treaty under Article 295 EC.

9 As regards, firstly, the Treaty rules on the free movement of capital, it is not disputed that that scheme falls within the scope of those rules since it applies to what are known as 'direct' investments, in particular in the form of participation in an undertaking by means of a shareholding which confers the possibility of effective participation in its management and control.

10 As regards the arrangements for *ex post* control provided for in Article 11(3) of Law 3631/2008, the Commission considers that this has the effect of restricting the actual participation of shareholders in the management and control of the undertakings concerned and is liable to deter traders established in other Member States from investing in the capital of the companies at issue.

11 Secondly, the Commission claims that the prior authorisation scheme and the arrangements for *ex post* control also constitute restrictions on the freedom of establishment within the meaning of Article 49 TFEU.

12 The Hellenic Republic contends that Article 11 of Law 3631/2008 does not constitute a restriction on the free movement of capital or, moreover, on the freedom of establishment.

13 It claims that those provisions do not apply in the context of undertakings that have already been privatised in which the State maintains special privileges, commonly known as 'golden shares', but rather to that of strategic undertakings that have not yet been privatised, namely undertakings in

which the State had not, at the time of the entry into force of that law, shed its strategic holding in the share capital which enabled it to exercise a determinant influence in shaping the will of the undertaking's organs.

14 However, according to the Hellenic Republic, by virtue of Article 295 EC, the measures taken by a Member State for the purposes of the privatisation of those strategic undertakings controlled by the State fall outside of the scope of the fundamental freedoms enshrined in the Treaty, on condition that the privatisation scheme is based on objective non-discriminatory criteria which are known in advance to the undertakings concerned and that it provides for legal remedies.

Findings of the Court

15 As regards, firstly, the Hellenic Republic's argument regarding 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 should be recalled that the Court has already held that that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 37).

16 In particular, the Court has held that, although Article 295 EC does not call into question the Member States' right to establish a system for the acquisition of immovable property, such a system remains subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital (Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24 and the case-law cited).

17 It follows, as regards Article 11 of Law 3631/2008, which, as the Hellenic Republic stated, is part of the national legislation on the privatisation of certain strategic public limited companies controlled by that Member State, that, although Article 295 EC does not call into question the power of a Member State to establish such a privatisation scheme, that scheme must observe the fundamental rules of the Treaty, which include, in particular, the fundamental freedoms referred to in the present case.

18 Moreover, if a State decides to transform public undertakings into public limited companies whose shares are quoted on a stock exchange and may, in principle, be purchased freely on the market, allowing a non-State shareholder to establish itself in a significant way within those companies, as is the case of the strategic public limited companies at issue, it cannot be accepted that Article 295 EC may be invoked by a Member State in order to remove such acquisitions from the ambit of the fundamental freedoms guaranteed by the Treaty by making those acquisitions subject to a prior authorisation scheme, as an unjustified lacuna in the system of protection of those fundamental freedoms will otherwise be created.

19 The Commission submits, next, that the prior authorisation scheme and the arrangements for *ex post* control provided for in Article 11 of Law 3631/2008 fall within both Article 43 EC, on the freedom of establishment, and Article 56 EC, on the free movement of capital.

20 However, as the Hellenic Republic has rightly argued, that point of view cannot be accepted.

21 As regards, in the first place, the prior authorisation scheme at issue, it must be borne in mind that, according to settled case-law, the national of a Member State with a holding in the capital of a company established in another Member State, allowing him to exert a definite influence on that company's decisions and to determine its activities, is exercising his right of establishment (see, inter alia, Case C-212/09 *Commission* v *Portugal* [2011] ECR I-10889, paragraph 42 and the case-law cited).

22 The Court has also held that national legislation not intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the scope of both Article 43 EC and Article 56 EC (see, inter alia, *Commission* v *Portugal*, paragraph 44).

23 In the present case, it must be stated that the prior authorisation scheme at issue covers only the acquisition of holdings in a strategic public limited company which grant voting rights representing 20% or more of the total share capital, with the result that only those shareholders who are able to exert a definite influence over the management and control of such a company are affected.

24 In that regard, it must be noted that the Commission maintained, without being contradicted by the Hellenic Republic, that, by fixing at 20% of the share capital the threshold of the acquisitions subject to the prior authorisation scheme, that scheme prevents investors from reaching the level required to control and manage a strategic company and influence its decisions.

25 It follows that Article 43 EC alone applies to the prior authorisation scheme at issue.

26 The Hellenic Republic, however, disputes the applicability of that fundamental freedom on the ground that the prior authorisation scheme provided for in Article 11(1) of Law 3631/2008 is intended primarily to control speculative hostile acquisitions by sovereign wealth funds established in non-member countries.

27 In that regard, suffice it to note that, as the Commission also did without being contradicted by the Hellenic Republic, Article 11(1) of Law 3631/2008 applies to all potential investors, including those established in the EU Member States, and not only to investors established in non-member countries. The Hellenic Republic, moreover, has not identified any other legislative provision from which it follows that the scope of that scheme applies only to investors established in non-member countries.

28 Finally, the Hellenic Republic's argument that the prior authorisation scheme provided for in Article 11(1) of Law 3631/2008 does not limit the acquisition of shareholdings as such and therefore does not, for that reason, constitute a restriction on the freedom of establishment, since it relates only to the voting rights relating to those shareholdings, must be rejected.

29 The Court has already held that such a restriction exists if a prior authorisation scheme has the effect of preventing or restricting the exercise of voting rights attached to shares held since these constitute one of the principal means for the shareholder to participate actively in the management of an undertaking or in its control (see, to that effect, as regards the rules on the free movement of capital, judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraphs 21 to 24).

30 In the second place, as regards the arrangements for *ex post* control, the Court has already held that such a scheme must be assessed only under Article 43 EC since it relates to decisions within the scope of the management of the company and therefore concerns only those shareholders capable of exerting a definite influence on it. Moreover, even if the effects of such a scheme are restrictive of the free movement of capital, those effects would be the unavoidable consequence of any restriction on freedom of establishment and would not warrant independent examination in the light of Article 56 EC (Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 39).

31 Therefore, Article 43 EC alone applies to those control arrangements.

Whether the restrictions are justified

Arguments of the parties

32 In the first place, so far as the objectives pursued by Article 11 of Law 3631/2008 are concerned, the Commission claims that that provision seeks not only to ensure the continuity of services supplied and of the operation of networks, as is apparent from paragraph 2 of that article, but also pursues two other objectives, namely that of guaranteeing, in a context of transparency, the privatisation of undertakings which are strategic for the national economy and that of enabling the State to chose a strategic investor for those undertakings as well as to increase their competitiveness.

33 According to the Commission, although the first objective may be invoked to justify a restriction on the freedom of establishment, it follows from the case-law that requirements of public policy and public security must be interpreted strictly and 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). However, it submits, the Hellenic Republic does not explain why a holding of 20% of the capital of those undertakings could adversely affect a fundamental interest of society.

34 Moreover, the Commission claims that the scope of Article 11 of Law 3631/2008 is not clearly defined. It is not certain that it covers only the public sectors and services to which the case-law refers or also other sectors.

35 As for the second objective, the Commission points out that, in order for a prior authorisation scheme, such as that at issue, which derogates from a fundamental freedom, to be justified, it must be based on objective non-discriminatory criteria known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them (see, inter alia, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 38, and Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 69).

36 However, the criteria laid down in Article 11 of Law 3631/2008 are not defined in advance in a detailed and precise manner. Therefore, the criteria adopted allow the authorities a broad interpretative discretion which is tantamount to a discretionary power. Such a legislative framework deprives potential investors of the legal certainty required and discourages them since they cannot know in advance the authorisation or rejection criteria governing their investments.

37 Finally, as regards the third objective which the national measure at issue pursues, this is, according to the Commission, economic in nature and cannot, in accordance with settled case-law, serve as justification for obstacles to fundamental freedoms (see, inter alia, Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 52).

38 The Hellenic Republic replies that the national provisions at issue have only a single objective which is, moreover, expressly indicated in Article 11(2) of Law 3631/2008, namely to guarantee the continuity of basic services and the operation of networks considered to be necessary to the economic and social life of a country, in particular that country's necessary energy and water supply and the provision of telecommunications services.

39 Accordingly, the measures at issue are intended to preserve the general interest, in particular public policy, public security and public health, grounds which, in accordance with the Treaty and settled case-law, may justify restrictions on fundamental freedoms, as the Court has, inter alia, held in the context of the security of supply in the petroleum, telecommunications and energy sectors (see, inter alia, Case C-326/07 *Commission* v *Italy*, paragraph 69 and the case-law cited).

40 As regards the scope of the prior authorisation scheme, the Hellenic Republic claims that it is clearly defined by general criteria and by objectives laid down in the national legislation, in particular by a reading of Article 11(1) of Law 3631/2008, which refers to public limited companies 'having, or having had, a monopoly, in particular with regard to companies owning, operating or managing national infrastructure networks', in conjunction with Article 11(2), which provides that authorisation is to be granted in the general interest and solely with the aim of 'ensuring the continuity of the services provided and the operation of the networks.'

41 It follows, the Hellenic Republic submits, from the wording of Law 3631/2008 as well as from its explanatory statement that that *ex ante* scheme applies to a closed circle of undertakings, namely companies controlled by the State which own, operate or manage networks and basic infrastructure. It is therefore not necessary for them to be listed in that law.

42 In fact, when that law was adopted, it concerned only six undertakings. Questioned on this point during the hearing, the Hellenic Republic explained that it concerned more specifically the undertaking holding the telecommunications monopoly, which has in the meantime been privatised and to which Law 3631/2008 no longer applies, the former monopoly in electricity supply, the undertakings providing drinking water in Athens (Greece) and Thessaloniki (Greece) and the public bodies for managing the ports of Piraeus (Greece) and Thessaloniki.

43 Likewise, it could be inferred from Law 3631/2008 that the *ex post* measure applies only to strategic companies which own, operate or manage networks and basic infrastructure and that it concerns only transformations or alterations to the use made of parts of the assets of those undertakings and, in particular, as is apparent from Article 11(3)(c) of that law, the management decisions of those companies relating to 'the networks and basic infrastructure necessary to the economic and social life of the company as well as its security.'

44 In the second place, the Commission maintains that the objective of the national measure at issue, namely to ensure the supply of basic services and the continued operation of the networks, may be achieved by less restrictive regulatory measures than a prior authorisation scheme for certain equity holdings in strategic companies or arrangements for *ex post* control of certain management decisions taken by those companies.

45 As regards, first, the prior authorisation scheme at issue, the Commission points out that the Court has held, in respect of a prior authorisation scheme for the acquisition of holdings or assets, that the scheme at issue did not make it possible to ensure in all cases that the security of energy supply would be guaranteed if a real and sufficiently serious threat to that supply were to arise after the authorisation for the operation concerned had been delivered (judgment of 17 July 2008 in Case C-207/07 *Commission* v *Spain*, paragraph 52) and also that the sole supervision of the public entity at the time when it takes control of an undertaking does not make it possible to ensure that, once the voting rights linked to the shares held by that entity are recognised, it will use them in an appropriate way to guarantee the security of energy supply (judgment in Case C-274/06 *Commission* v *Spain*, paragraph 45).

46 The Commission claims, moreover, that the disproportionate character of the prior authorisation scheme lies in the fact that the criteria on the basis of which that authorisation must be decided, such as set out in Article 11(2) of Law 3631/2008, are inadequate to attain the stated objective of the law of guaranteeing the continuity of the services supplied and the operation of the networks.

47 According to the Commission, it follows from that provision that, although all of the criteria mentioned must be fulfilled and taken into account at the time of the authorisation decision, these are not listed exhaustively but merely by way of example. The criteria on the basis of which an authorisation decision is granted or refused are not therefore detailed nor necessarily known in advance by the economic operators concerned.

48 Moreover, the legislative framework adopted at EU level in certain sectors such as those of energy and telecommunications leaves the Member States broad discretion to adopt, in compliance with the Treaty and, in particular, the principle of proportionality, provisions on public service obligations imposed on undertakings which are less restrictive of the fundamental freedoms (see, to that effect, judgment in Case C-207/07 *Commission* v *Spain*, paragraphs 43 to 45).

49 The Hellenic Republic replies that the prior authorisation scheme is entirely appropriate for the purposes of achieving the objective pursued, does not go beyond what is reasonable, and also constitutes a necessary instrument inasmuch as horizontal legislative measures are not sufficient to attain that objective.

50 As for the argument that that *ex ante* scheme is not appropriate on account of the fact that it covers only the time at which a strategic holding is obtained, this fails to take account of the fact that that scheme is complemented by an *ex post* control measure.

51 The evaluation criteria provided for in Article 11(2) of Law 3631/2008 apply to certain elements which are taken into consideration for the purposes of evaluating the business plan of a third-party investor. Those elements are totally objective and converge towards an essential criterion which is that of the presentation, by the third-party investor, of a serious business plan and of guarantees relating to it in order to prevent devaluation of the undertaking at issue and any threat to the continuity of the services supplied and the operation of the basic networks.

52 Moreover, the Hellenic Republic disputes the allegation that, in breach of the principle of legal certainty, the criteria set out in Article 11(2) of Law 3631/2008 are not clear and leave a broad discretionary power to the public authorities which cannot be the subject of judicial review.

53 The Hellenic Republic claims that, in the cases relied upon by the Commission, either the investors concerned were given no indication of the specific objective circumstances in which prior authorisation would be granted or withheld (judgment in Case C-463/00 *Commission* v *Spain*, paragraph 74), or no criteria existed which were as specific as those provided for by Law 3631/2008 (judgment in Case C-274/06 *Commission* v *Spain*, paragraph 52).

54 The Hellenic Republic claims, moreover, that it cannot be maintained that the *ex ante* measure of control is not necessary on the ground that the objective pursued of the continuity of services and the operation of networks may be attained by horizontal legislative measures such as those provided for in the relevant directives in the telecommunications and energy sectors.

55 The directives at issue establish only a framework within which the Member States define the general policies on security of supply and constitute merely a minimal common approach. The fundamental choices concerning the level of, and the measures for, the protection of public security continue to be a matter for the competent national authorities subject the principle of proportionality being observed.

56 As regards, next, the adequacy of the *ex post* control provision such as that provided in Article 11(3) of Law 3631/2008, the Commission concedes that, in Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, the Court held that the *ex post* control scheme at issue in that case constituted a justified restriction on the free movement of capital.

57 However, according to the Commission, the guidance from that judgment is not applicable in the present case, the characteristics of the national scheme at issue in that case being different to those of the national scheme at issue in the present case.

58 The Commission claims that, in the present case, the national legislation at issue also provides neither criteria to be taken into account by the authorities in order to decide whether they intend to object to the decision concerned nor the objective circumstances in which such an intervention may take place in order to preserve the general interest objectives pursued.

59 Consequently, the authorities have, in that context, a particularly broad discretionary power to intervene in the essential activities of the undertakings at issue, with the result that the decisions taken in exercising that power are not amenable to effective judicial review.

60 As regards the adequacy of the right to object in Article 11(3) of Law 3631/2008, the Hellenic Republic claims that it, just as the provision having formed the subject of the judgment in Case C-503/99 *Commission* v *Belgium*, lists exhaustively the decisions concerned, namely either decisions directly linked to the existence of the undertaking, decisions referred to in points (a) and (b) of Article 11(3), or decisions which concern the transformation or alteration of the allocation of 'strategic elements of the assets of the abovementioned undertakings and of the basic networks and infrastructure necessary for the economic and social life of the country as well as its security' referred to in point (c) of that provision.

61 Even if the strategic elements of the assets of the undertakings concerned are not listed, it appears clearly that, just like the provision at issue in Case C-503/99 *Commission* v *Belgium*, the legislation concerned determines exhaustively the strategic elements of the assets falling within its scope, namely networks and basic infrastructure.

62 As regards the criteria concerning the exercise of the right to object and judicial review of an opposition decision, the Hellenic Republic points out that the public security clause and its various elements, despite their flexible nature, may be controlled, and are in fact controlled, by the courts, both at the national and EU level, as clauses derogating from the fundamental freedoms of movement enshrined in the Treaties (see, to that effect, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 to 35, and Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 34).

63 In the present case, the criteria for judicial control are more specific still since they relate to the threat to basic services and the operation of networks of the undertakings at issue as a result of corporate decisions relating to the transformation or alteration of the allocation of strategic elements of their assets.

Findings of the Court

64 It is apparent from the file, and was confirmed at the hearing, that the single objective with regard to which the justification for the restrictions of the freedom of establishment which override the prior authorisation scheme and the arrangements for *ex post* control provided for in Article 11 of Law 3631/2008 must be assessed is that of ensuring continuity of certain basic services and the operation of networks considered to be necessary to the economic and social life of a country; in particular the country's necessary energy and water supply, the provision of telecommunications services, and the management of the country's two largest ports.

65 In that respect, it must be borne in mind that, in the case of undertakings carrying out activities and supplying public services in the petroleum, telecommunications and energy sectors, the Court has held that the objective of guaranteeing the security of supply of such products or the supply of such services in the event of a crisis, on the territory of the Member State at issue, may constitute a public security reason and, therefore, possibly justify an obstacle to the free movement of capital (judgment in Case C-463/00 *Commission* v *Spain*, paragraph 71).

66 Moreover, the Court has already held that the pursuit of general interests which concern public policy, public security and public health may possibly justify certain restrictions on the fundamental freedoms (Case C-326/07 *Commission* v *Italy*, paragraph 45 and the case-law cited).

67 However, as regards an objective linked to the security of supply of energy, the Court has pointed out that this can be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (judgment in Case C-207/07 *Commission* v *Spain*, paragraph 47).

68 As regards, more specifically, in the first place, the prior authorisation scheme, a measure of that kind neither appears to be a suitable means of attaining the objective invoked nor proportional thereto.

69 The Court has held that the mere acquisition of a holding of more than 10% of the capital of a company operating in the energy sector or any other acquisition conferring significant influence on such a company cannot, as a general rule, be regarded as a real and serious enough threat to security of supply (Case C-326/07 *Commission* v *Italy*, paragraph 48 and the case-law cited).

70 However, the scheme at issue produces its effects before the company has even adopted a decision, namely without a risk being established, even a potential one, of interference with the security of supply (judgment in Case C-274/06 *Commission* v *Spain*, paragraph 50).

71 Moreover, at the time of issuing the authorisation, it is not certain that all the cases of real and serious threats to the security of energy supply may be identified and taken into account (judgment in Case C-207/07 *Commission* v *Spain*, paragraph 53).

72 Moreover, the limitation to the exercise of voting rights, even, if necessary, the refusal to recognise those rights which give rise to the mechanism provided for in Article 11(1) of Law 3631/2008, applies to all decisions giving rise to a vote by shareholders and not only those capable of specifically threatening the stated objective of that law (see, to that effect, judgment in Case C-274/06 *Commission* v *Spain*, paragraph 47).

73 As for the assessment of the proportionality of the prior authorisation scheme, the Court has already held such a scheme to be disproportionate on the ground that the imposition of positive obligations on undertakings in the sector concerned would enable the intended objective to be attained, namely the security of the supply of energy, by interfering less with the free movement of capital (judgment in Case C-274/06 *Commission* v *Spain*, paragraph 47).

74 In an analogous context to that of the present case, the Court has held that, if the national legislation at issue defines those criteria non-exhaustively, it follows that that leaves the authorities broad discretion which is difficult for the courts to control (judgment in Case C-274/06 *Commission* v *Spain*, paragraph 52).

75 The uncertainty surrounding the circumstances in which those powers may be exercised gives them a discretionary nature, having regard to the latitude enjoyed by the national authorities in making use of them. Such latitude is disproportionate in relation to the objectives pursued (Case C-326/07 *Commission* v *Italy*, paragraph 52).

76 In the present case, the criteria applicable to the exercise of the power by the authorities whether or not to approve an application to acquire shares in the public limited companies at issue, while listed in Article 11(2) of Law 3631/2008, are expressly ‘for indicative purposes’.

77 Neither the general reference in Article 11(2) of Law 3631/2008 to ‘general interest criteria for ensuring the continuity of the services provided and the operation of the networks’ nor the nine evaluation criteria which are listed merely by way of example, which in essence concern the choice of

a strategic partner offering the best guarantees to sustainably ensure the continuity of service and networks, make it possible to determine the specific objective circumstances in which the power to oppose the acquisition of holdings is capable of being exercised.

78 Moreover, the provisions fixing the reasons for which the authorities are empowered to refuse an authorisation to purchase a holding in strategic public limited companies are drawn up in general and imprecise terms which do not allow the interested parties to distinguish with certainty the various cases in which that authorisation may be refused. That is particularly the case with the expression 'general interest criteria for ensuring the continuity of the services provided and the operation of the networks.' Moreover, the nine evaluation criteria listed in Law 3631/2008 do not cover cases of real and sufficiently serious threats to the security of supply and cannot, therefore, be considered to be of direct relevance to the intended objective.

79 It follows that such a prior authorisation scheme confers a discretionary power on the administration which is difficult for the courts to control and which includes a risk of discrimination.

80 As regards, in the second place, the arrangements for *ex post* control of certain decisions taken by the strategic public limited companies at issue, such as provided for in Article 11(3) of Law 3631/2008, the Hellenic Republic maintains that it must be accepted, as it is similar to the scheme at issue in Case C-503/99 *Commission* v *Belgium*, in respect of which the Court held that it was justified by the objective of guaranteeing the security of energy supply in the event of a crisis.

81 The Court has held that it results from paragraphs 49 to 52 of the judgment in Case C-503/99 *Commission* v *Belgium* that the national scheme at issue was characterised by the fact that it specifically listed the strategic assets concerned and the management decisions which could be challenged in any given case. Finally, the intervention by the administrative authorities was strictly limited to cases in which the objectives of the energy policy were jeopardised. Any decision taken in that context had to be supported by a formal statement of reasons and was subject to an effective review by the courts (judgment in Case C-463/00 *Commission* v *Spain*, paragraph 78).

82 However, following the example of the schemes examined by the Court in its judgments in Case C-463/00 *Commission* v *Spain* and in Case C-326/07 *Italy* v *Commission*, the scheme at issue in the present case, even it if it is of an *ex post* nature and is therefore less restrictive than an *ex ante* scheme, cannot be justified in the light of the criteria stemming from the judgment in Case C-503/99 *Commission* v *Belgium*.

83 First, as for the decisions listed in Article 11(3)(a) and (b) of Law 3631/2008, the Court has already held that such decisions do not constitute, contrary to the decisions which formed the background to Case C-503/99 *Commission* v *Belgium* (paragraph 50), specific management decisions but decisions fundamental to the life of an undertaking (judgment in Case C-463/00 *Commission* v *Spain*, paragraph 79).

84 Next, the specification in Article 11(3)(b) and (c), according to which it applies to decisions in so far as they are 'capable of jeopardising the supply of services in sectors of strategic importance' or they concern the 'allocation of strategic elements of the assets of the abovementioned undertakings and of the basic networks and infrastructure necessary for the economic and social life of the country as well as its security', may hardly be considered to be a specific list of the strategic assets concerned.

85 Finally, even if, as the Hellenic Republic claims, Article 11(3) of Law 3631/2008 must be understood as meaning that the right to object which it provides may be exercised only to guarantee the continuity of services supplied and the operation of networks, the fact remains that, with no details of the actual circumstances in which the right to object may be exercised, the investors are not able to know when it may be applicable.

86 Accordingly, as the Commission maintains, the circumstances in which the right to object may be exercised are potentially numerous, undetermined and indeterminable and leave the national authorities too much discretion.

87 Consequently, it must be stated that, by laying down the requirements referred to in Article 11(1), read in conjunction with Article 11(2), and those referred to in Article 11(3) of Law 3631/2008, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC on the freedom of establishment.

Costs

88 Under Article 138(1) 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 asked for costs and the Hellenic Republic has failed in its submissions, the Hellenic Republic must be ordered to pay the costs.

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

1. **Declares that, by laying down the requirements referred to in Article 11(1), read in conjunction with Article 11(2), and those referred to in Article 11(3) of Law 3631/2008, on the creation of a national fund for social cohesion, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC on the freedom of establishment;**

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

[Signatures]