JUDGMENT OF THE COURT

4 June 2002 *

In Case C-367/98,

Commission of the European Communities, represented initially by A. Caeiro, and subsequently by F. Benyon and F. de Sousa Fialho, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented initially by L. Fernandes and L. Bigotte Chorão, and subsequently by L. Fernandes and J. Vasconcelos, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations (*Diário da República* I, Series A, No 80, of 5 April 1990, p. 1664), in particular Article 13(3)

* Language of the case: Portuguese.

thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 (*Diário da República* I, Series A, No 267, of 15 November 1993, p. 6362) and 65/94 of 28 February 1994 (*Diário da República* I, Series A, No 49, of 28 February 1994, p. 993), the Portuguese Republic has failed to comply with its obligations under the EC Treaty, in particular Articles 52 (now, after amendment, Article 43 EC), 56 (now, after amendment, Article 46 EC), 58 (now Article 48 EC), 73b (now Article 56 EC) et seq. and 221 (now, after amendment, Article 294 EC) thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann (Rapporteur), N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 May 2001, at which the Commission was represented by F. de Sousa Fialho and by M. Patakia,

acting as Agent, and the Portuguese Republic by L. Fernandes and by C. Botelho Moniz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2001,

gives the following

Judgment

1 By application received at the Court Registry on 14 October 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations (*Diário da República* I, Series A, No 80, of 5 April 1990, p. 1664, hereinafter 'Law No 11/90'), in particular Article 13(3) thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 (*Diário da República* I, Series A, No 267, of 15 November 1993, p. 6362, hereinafter 'Decree-Law No 380/93') and 65/94 of 28 February 1994 (*Diário da República* I, Series A, No 49, of 28 February 1994, p. 993, hereinafter 'Decree-Law No 65/94'), the Portuguese Republic has failed to comply with its obligations under the EC Treaty, in particular Articles 52 (now, after amendment, Article 43 EC), 56 (now, after amendment, Article 46 EC), 58 (now Article 48 EC), 73b (now Article 56 EC) et seq. and 221 (now, after amendment, Article 294 EC) thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession').

Legal framework

Community law

2 Article 73b(1) of the Treaty is in the following terms:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

3 Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC) provides:

'The provisions of Article 73b shall be without prejudice to the right of Member States:

...

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.'

4 Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) contains a nomenclature of the capital movements referred to in Article 1 of that directive. In particular, it lists the following movements:

'I — Direct investments

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links.

...'

5 According to the explanatory notes appearing at the end of Annex I to Directive 88/361, 'direct investments' means:

'Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links

between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

...

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person or another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

...'

6 The nomenclature appearing in Annex I to Directive 88/361 also refers to the following movements:

'III — Operations in securities normally dealt in on the capital market

...

A — Transactions in securities on the capital market

1. Acquisition by non-residents of domestic securities dealt in on a stock exchange

...

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange

...'

7 Article 222 of the EC Treaty (now Article 295 EC) provides:

'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'

8 Article 222 of the Act of Accession is in the following terms:

'1. Until 31 December 1989, the Portuguese Republic may maintain a system of advance authorisation for direct investments, within the meaning of the First

Council Directive of 11 May 1960 for the implementation of Article 67 of the EEC Treaty, as amended and added to by Second Council Directive 63/21/EEC of 18 December 1962 and by the 1972 Act of Accession, carried out in Portugal by nationals of other Member States and connected with the exercise of the right of establishment and the freedom to provide services and whose overall value exceeds the following amounts:

...

2. The provisions of paragraph 1 shall not apply to direct investments concerning the credit institutions sector.

3. For every investment project subject to advance authorisation pursuant to paragraph 1, the Portuguese authorities must take a decision at the latest two months after the application has been made. If no decision is taken within this time-limit, the proposed investment shall be deemed to be authorised.

4. The investors covered by paragraph 1 may not be treated differently from one another nor be granted less favourable treatment than that granted to nationals of third countries.'

9 Article 231 of the Act of Accession provides as follows:

'The Portuguese Republic shall, circumstances permitting, carry out the liberalisation of capital movements and invisible transactions referred to in Articles 224 to 230 before expiry of the time-limits laid down in those articles.'

National law

10 Article 3 of Law No 11/90 provides:

'Re-privatisations shall pursue the following main objectives:

(a) to modernise economic entities and make them more competitive, and to contribute to strategies for restructuring the sector or undertaking concerned;

(b) to strengthen national business capacity;

(c) to help reduce the role played by the State in the economy;

(d) to contribute to the development of the capital market;

(e) to permit widespread participation by Portuguese citizens in the share capital of undertakings, by means of an adequate capital spread, with particular attention being paid to workers in the undertakings concerned and small-scale shareholders;

(f) to preserve the property interests of the State and to develop other national interests;

(g) to help reduce the burden of public debt in the economy.'

11 Article 13(3) of Law No 11/90 provides:

'The legislation providing for transformation may also limit the overall amount of shares which may be acquired or subscribed for by foreign entities or entities the majority of the capital of which is held by foreign entities. It may also lay down rules fixing the maximum value of their respective participations in the capital of any company and the corresponding methods of control, non-compliance with which, in the circumstances to be prescribed, will be penalised by the forced sale of any shares exceeding those limits, loss of the voting rights conferred by those shares or the nullity of those acquisitions or subscriptions.'

12 The possibility afforded by Article 13(3) of Law No 11/90 appears to have been used in many decree-laws regulating the privatisation of certain undertakings, specifying in each case the maximum authorised foreign participation. In its application, the Commission refers to 15 decree-laws providing for maximum foreign participations varying between 5 and 40%, in relation to undertakings operating in the banking, insurance, energy and transport sectors.

13 The single article of Decree-Law No 65/94 provides as follows:

'For the purposes of application of Article 13(3) of Law No 11/90 of 5 April 1990, the maximum permitted participation by foreign entities in the capital of companies whose re-privatisation has been completed shall henceforth be fixed at 25%, save where a higher limit has previously been fixed by the legislation providing for their re-privatisation.'

14 Article 1 of Decree-Law No 380/93 provides:

'1. The acquisition *inter vivos*, with or without consideration, by a single natural or legal person, of shares representing more than 10% of the voting capital, and the acquisition of shares which, when added to those already held, exceeds that limit, in companies which are to be re-privatised, shall require the prior authorisation of the Minister for Financial Affairs.

2. Subject to the conditions laid down for each privatisation procedure, the provisions of paragraph 1 shall apply only to acquisitions made following privatisation.'

Pre-litigation procedure

15 Following fruitless contacts in 1992, 1993 and 1994, the Commission issued a formal notice to the Portuguese Government on 4 July 1994 in which it asserted that Law No 11/90 and Decree-Laws Nos 380/93 and 65/94 were contrary to Articles 52, 56, 58, 73b et seq. and 221 of the Treaty and to Articles 221 to 231 of the Act of Accession.

16 The Portuguese Government replied to that formal notice by letter of 28 September 1994, in which it maintained that the special situation of Portugal since 1975 justified the restrictions in issue. At the same time, it undertook, in relation to future privatisations, no longer to impose restrictions on the acquisition of shares based on the nationality of the investors concerned.

17 The Commission was not persuaded by the arguments put forward by the Portuguese Government, and therefore sent a reasoned opinion to the Portuguese Republic on 29 May 1995.

18 The Portuguese Government replied to the reasoned opinion by letter of 7 September 1995, in which it again undertook not to use, in the context of future privatisations, the possibility afforded by Law No 11/90 of limiting participation by Community investors. In addition, it argued that the system established by Decree-Law No 380/93 was applicable without any discrimination based on the nationality of investors, and that it was designed to permit attainment of the objectives pursued by re-privatisation operations in accordance with Article 3 of Law No 11/90.

19 The Commission was not satisfied by those responses, and therefore decided to bring the present action before the Court.

Pleas and arguments of the parties

20 The Commission states, as a preliminary point, that the phenomenon of widespread intra-Community investment has prompted certain Member States to adopt measures to control that situation. Those measures, most of which have been adopted in the context of privatisations, are liable, in certain circumstances, to be incompatible with Community law. For that reason, it adopted on 19 July 1997 its Communication on certain legal aspects concerning intra-EU investment (OJ 1997 C 220, p. 15, hereinafter 'the 1997 Communication').

21 In that communication, the Commission interpreted the relevant Treaty provisions concerning the free movement of capital and freedom of establishment, *inter alia* in the context of procedures for the grant of general authorisation or the exercise of a right of veto by public authorities.

22 Point 9 of the 1997 Communication is worded as follows:

'The analysis undertaken above concerning measures having a restrictive character on intra-Community investment has concluded that discriminatory measures (i.e. those applied exclusively to investors from another EU Member State) would be considered as incompatible with Articles 73b and 52 of the Treaty governing the free movement of capital and the right of establishment unless covered by one of the exceptions of the Treaty. As regards non-discriminatory measures (i.e. those applied to nationals and other EU investors alike), they are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.'

23 According to the Commission, the legislation at issue is contrary to the criteria laid down by the 1997 Communication.

24 First, the prohibition precluding investors from another Member State from acquiring more than a given number of shares in certain Portuguese undertakings, pursuant to Decree-Law No 65/94 in conjunction with Law No 11/90, gives rise to discrimination between Portuguese entities and those of other Member States which is incompatible with Articles 52 and 73b of the Treaty. Such discriminatory restrictions can be accepted only if they are justified on grounds of public policy, public security or public health, which is not the position in the present case.

25 Second, the obligation imposed by Decree-Law No 380/93, whereby prior authorisation must be obtained for the acquisition of an interest in a Portuguese undertaking above a certain level, is likewise incompatible with Articles 52 and 73b of the Treaty.

26 Those national rules, although applicable without distinction, create obstacles to the right of establishment of nationals of other Member States and to the free movement of capital within the Community, inasmuch as they are liable to impede, or render less attractive, the exercise of those freedoms.

27 According to the Commission, authorisation and opposition procedures can be held to be compatible with those freedoms only if they are covered by the exceptions contained in Article 55 of the EC Treaty (now Article 45 EC) and in Articles 56 and 73d of the Treaty, or if they are justified by overriding requirements of the general interest and qualified by stable, objective criteria which have been made public, in such a way as to restrict to the minimum the discretionary power of the national authorities.

28 The provisions in issue do not meet any of those criteria and the conditions governing those exceptions are not fulfilled. Furthermore, Article 222 of the Treaty is irrelevant in the present case. That article merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.

29 The Portuguese Republic denies the alleged failure to comply with its obligations. As regards, first, the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, pursuant to Decree-Law No 65/94 in conjunction with Law No 11/90, the Portuguese Government admits the alleged infringement in

principle but contends that since 1994 it has undertaken, as a matter of policy, not to use the powers conferred on it by those provisions. Moreover, by virtue of the direct effect and primacy of Community law, the provisions in question must in any event be interpreted as referring solely to investors who are not Community nationals.

30 As regards, second, the obligation imposed by Decree-Law No 380/93, whereby prior authorisation must be obtained for the acquisition of an interest in a Portuguese undertaking above a certain level, the scheme applies generally to all potential investors, whether they are from Portugal, elsewhere in the Community or outside the Community, and which does not give rise to any restriction or discrimination based on nationality.

31 In any event, the scheme is justified by overriding requirements of the general interest. Decree-Law No 380/93 is intended to enable the Portuguese Republic, when re-privatising an undertaking in stages, to make sure, with a view to safeguarding the general interest, that the economic policy objectives pursued by the re-privatisation are not frustrated in the course of the operation. Depending on the operation in question, those objectives may involve choosing a strategic partner where the activities of the undertaking are to assume an international dimension, or strengthening the competitive structure of the market concerned, or modernising and increasing the efficiency of means of production.

32 The Portuguese Government further argues that it is unacceptable for a Member State to be precluded from becoming involved in a process of re-privatisation by appropriate means whilst respecting the general rules of the Treaty, with a view to safeguarding its financial interest. Such an interest constitutes an overriding requirement of the general interest.

33 The criterion of proportionality is likewise satisfied, inasmuch as an assessment of operations which alter the structure of the share ownership constitutes an appropriate means of attaining the objective pursued.

34 As to the question whether the scheme in question is necessary, the Portuguese Government states that it is applicable only for as long as the re-privatisation process is continuing, and relates only to substantial holdings, namely those conferring more than 10% of the voting rights.

35 Moreover, any decision taken by the Minister for Financial Affairs may be the subject of a review conducted in the context of court proceedings and, where appropriate, declared invalid.

Findings of the Court

Article 73b of the Treaty

36 It must be recalled at the outset that Article 73b(1) of the Treaty gives effect to free movement of capital between Member States and between Member States and third countries. To that end it provides, within the framework of the provisions of the chapter headed 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

37 Although the Treaty does not define the terms 'movements of capital' and 'payments', it is settled case-law that Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraphs 20 and 21).

38 Points I and III in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes appearing in that annex, indicate that direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitute capital movements within the meaning of Article 73b of the Treaty. The explanatory notes state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.

39 In the light of those considerations, it is necessary to consider whether the legislation in issue, which (a) prohibits the acquisition by investors from other Member States of more than a given number of shares in certain Portuguese undertakings and (b) requires the grant by the Portuguese Republic of prior authorisation for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, constitute a restriction on the movement of capital between Member States.

40 As regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, it is common ground — and, moreover, not disputed by the Portuguese Government — that this involves unequal treatment of nationals of other Member States and restricts the free movement of capital. The Portuguese Government does not plead any justification in that regard. However, it argues that it has undertaken, as a matter of policy, not to use the powers conferred on it by the provisions in issue and that, by virtue of the direct effect and primacy of Community law, those provisions must in any event be interpreted as referring solely to investors who are not Community nationals.

41 That argument cannot be accepted. The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty (see, in particular, Case C-151/94 *Commission* v *Luxembourg* [1995] ECR I-3685, paragraph 18, and Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17).

42 Consequently, as regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, non-compliance with Article 73b of the Treaty is established.

43 As regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, the Portuguese Government concedes in principle that the restrictions arising from the rules in issue fall within the scope of the free movement of capital but argues that the rules apply without distinction to national shareholders and to shareholders who are nationals of other Member States. They do not therefore involve any discriminatory or particularly restrictive treatment of nationals of other Member States.

44 That argument cannot be accepted. Article 73b of the Treaty lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.

45 Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the free movement of capital illusory (see, in that regard, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 25, and Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 44).

46 In those circumstances, the rules in issue must be regarded as a restriction on the movement of capital within the meaning of Article 73b of the Treaty. It is therefore necessary to consider whether, and on what basis, that restriction may be justified.

47 As is also apparent from the 1997 Communication, it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (see today's judgments in Case C-483/99 *Commission* v *France*, ECR I-4781, paragraph 43, and Case C-503/99 *Commission* v *Belgium*, ECR I-4809, paragraph 43).

48 However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (*Konle*, cited above, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.

49 The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, *Sanz de Lera*, cited above, paragraph 23, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18).

50 As regards a scheme of prior administrative authorisation of the kind at issue in the present case, the Court has previously held that such a scheme must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto* (see, to that effect, *Sanz de Lera*, paragraphs 23 to 28; *Konle*, paragraph 44; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35). Such a scheme must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (*Analir*, cited above, paragraph 38).

51 Having regard to those considerations, it is necessary to consider the grounds of justification put forward by the Portuguese Government.

52 As regards the need to safeguard the financial interest of the Portuguese Republic, it must be recalled that, save in so far as they may fall within the ambit of the reasons set out in Article 73d(1) of the Treaty, which relate in particular to tax law, the general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty (see, as regards the free movement of goods, Case C-265/95 *Commission* v *France* [1997] ECR I-6959,

paragraph 62, and, in relation to freedom to provide services, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23). That reasoning is equally applicable to the economic policy objectives reflected in Article 3 of Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production. Such interests cannot constitute a valid justification for restrictions on the fundamental freedom concerned.

53 Consequently, as regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, non-compliance with Article 73b of the Treaty is established.

54 In view of all the foregoing considerations, it must be held that, by adopting and maintaining in force the legislation in issue, the Portuguese Republic has failed to comply with its obligations under Article 73b of the Treaty.

Articles 52, 56, 58 and 221 of the Treaty

55 The Commission also seeks a declaration of failure to comply with Articles 52, 56, 58 and 221 of the Treaty, namely the Treaty rules regarding freedom of establishment, in so far as they concern undertakings.

56 To the extent that the legislation in issue involves 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 73b of the Treaty 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.

Articles 221 and 231 of the Act of Accession

57 The Commission also seeks a declaration that the adoption and maintenance in force of the legislation in issue constitutes a failure to comply with Articles 221 and 231 of the Act of Accession. However, it does not indicate in the grounds of its application what that failure is alleged to consist of.

58 It is clear that those provisions of the Act of Accession establish, in relation to direct investments, a transitional regime which came to an end on 31 December 1989. Since all of the national rules in issue were adopted after that date, they cannot be said to infringe a transitional regime which has ceased to have any effect.

59 The Commission's application for a declaration of non-compliance with Articles 221 and 231 of the Act of Accession must therefore be dismissed.

Costs

60 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, in essence, been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Declares that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations, in particular Article 13(3) thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 and 65/94 of 28 February 1994, the Portuguese Republic has failed to comply with its obligations under Article 73b of the EC Treaty (now Article 56 EC);

2. Dismisses the remainder of the action;

3. Orders the Portuguese Republic to pay the costs.

Rodríguez Iglesias	Jann	Colneric
von Bahr	Gulmann	Edward
La Pergola	Puissochet	Schintgen
Skouris	Cunha Rodrigues	

Delivered in open court in Luxembourg on 4 June 2002.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President