JUDGMENT OF THE COURT (First Chamber)

2 June 2005 *

In Case C-174/04,

ACTION for failure to fulfil obligations under Article 226 EC, brought on 13 April 2004,

Commission of the European Communities, represented by E. Traversa and C. Loggi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (First Chamber),

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

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that Decree-Law (decreto-legge) No 192 of 25 May 2001 (*GURI* No 120 of 25 May 2001, p. 4), converted into Law No 301 entitled 'Urgent provisions to ensure the liberalisation and privatisation of specific public

service sectors' (Legge No 301, recante disposizioni urgenti per salvaguardare i processi di liberalizzazione e privatizzazione di specifici settori dei servizi pubblici), of 20 July 2001 (*GURI* No 170 of 24 July 2001, p. 4 — 'Decree-Law No 192/2001'), is incompatible with Article 56 EC in so far as it provides for automatic suspension of the voting rights attached to shareholdings exceeding 2% of the capital of companies in the electricity and gas sectors.

Legal background

Community law

2 Article 56(1) EC is worded as follows:

'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 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 (hereinafter 'the nomenclature annexed to Directive 88/361'). It lists, in particular, 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 undertaking with a view to establishing or maintaining lasting economic links.

...'

4 According to the explanatory notes that 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 of 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.

...'

5 The nomenclature annexed to Directive 88/361 also mentions 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 ...

...'

National law

6 Article 1(1) and (2) of Decree-Law No 192/2001 provide:

'Until completion, within the European Union, of a market wholly open to competition in the electricity and gas sectors, with a view to safeguarding the processes of liberalisation and privatisation that are under way, in the case of legal persons controlled directly or indirectly by a State or by other public authorities and enjoying a dominant position in their domestic markets and not quoted on regulated

financial markets, which acquire, directly or indirectly, or through an intermediary, including by means of a future or deferred public offer, holdings in excess of 2% in the capital of companies operating in the abovementioned sectors, directly or through companies controlled by or associated with them, the grant or the transfer of authorisation or concession measures provided for by Legislative Decrees No 79 of 16 March 1999 on electrical energy and No 164 of 23 May 2000 on the internal market in natural gas shall be subject to to the conditions set out in paragraph 2. The limit of 2% shall apply to the legal person itself and to the group to which it belongs, being deemed to be the person, whether or not in the form of a company, which exercises control, the controlled companies and those subject to joint control, and related companies. The limit shall also apply to legal persons who, directly or indirectly, including through controlled, linked or fiduciary companies or through intermediaries, enter into, with or without third parties, agreements relating to the exercise of voting rights or agreements or pacts between shareholders.

If the limit referred to in paragraph 1 is exceeded, from time of the grant or transfer of the authorisations or concessions referred to in paragraph 1, the voting rights attaching to the shares in excess of that limit shall be automatically suspended and shall not be taken into account in the quorum of deliberative meetings. Future or deferred acquisition or subscription rights shall likewise not be exercisable.'

The pre-litigation procedure

7 By letter of 23 October 2002, the Commission informed the Italian Government that it considered that Decree-Law No 192/2001, in so far as it provides, in relation to undertakings operating in the electricity and gas sectors, for the suspension of voting rights attached to holdings in excess of 2% where those holdings are acquired

by public undertakings, was contrary to the Treaty provisions on the free movement of capital. It therefore called on the Italian Government to submit its observations within a period of two months.

8 The Italian Government replied that, although Decree-Law No 192/2001 constituted a restriction on the free movement of capital, it nevertheless represented the only possible way of protecting the Italian market from forms of investment which do not meet the criteria of freedom of competition.

9 Taking the view that those observations did not justify the rules at issue, the Commission sent the Italian Republic a reasoned opinion on 11 July 2003, requesting compliance within a period of two months.

10 The Italian Government did not respond to the reasoned opinion and the Commission therefore instituted the present proceedings before the Court.

The application

Arguments of the parties

11 Relying on the judgments of the Court in Case C-376/98 *Commission* v *Portugal* [2002] ECR I-4731; Case C-483/99 *Commission* v *France* [2002] ECR I-4781; Case

C-503/99 *Commission* v *Belgium* [2002] ECR I-4809; Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, and Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, the Commission submits that Decree-Law No 192/2001 introduces different and restrictive treatment for investments made by a particular category of investors and consequently impedes the free movement of capital within the Community. In particular, those rules have a dissuasive effect on public undertakings of other Member States which might be interested in acquiring a holding in companies operating in the electricity and gas sectors, since they would be unable to participate effectively in the decisions of such companies or to influence the way in which they are managed.

12 Article 56 EC draws no distinction between discriminatory and non-discriminatory measures or between public and private undertakings. Although that article does not define the concept of 'capital movements', direct cross-frontier investment falls within that concept by virtue of the nomenclature annexed to Directive 88/361. It is characterised, in particular, by the possibility of taking an effective part in the management and control of a company. The acquisition of holdings and the full exercise of voting rights attached to such holdings are therefore covered by the concept of 'capital movements'.

13 The Italian Government contends that the application should be dismissed.

14 Decree-Law No 192/2001 does not in its view give rise to discriminatory treatment. It concerns acquisitions made by Italian public undertakings in the same way as acquisitions made by public undertakings of other Member States.

15 Moreover, a limitation of voting rights does not in every case affect the free movement of capital. The Italian Government refers, by way of example, to Articles

85 to 97 of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ 2001 L 184, p. 1), and Article 10 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), which directly implemented Article 56 EC. Those provisions, which also allow a limitation of voting rights to ensure that an ordinary capital investment does not give rise to an effective power of control and management of a company, are not themselves incompatible with the principle of the free movement of capital.

16 Decree-Law No 192/2001 is in its view compatible with the free movement of capital, principally because it pursues the Community objectives formulated in the Commission Communication of 13 March 2001 entitled 'Completing the internal energy market' (COM (2001) 125 final), in particular that of limiting the anti-competitive influence that public undertakings holding a monopoly which take control of undertakings operating in the electricity and gas sectors might exercise in the relevant markets.

17 It is true that the opening up of the markets of the Member States in the electricity and gas sectors has progressed considerably in recent years because of Community legislation, in particular Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20) and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1).

18 However, those directives have been transposed into the legal orders of the Member States in such a way that the opening up of a number of domestic markets has been

asymmetrical. Certain States chose to open their markets to an extent greater than that provided for by those directives, whilst others confined themselves to opening their markets strictly within the limits imposed by those directives. The measures adopted at Community level to rectify that imbalance have, however, proved insufficient. It is therefore the responsibility not only of the Community institutions but also of the Member States to remedy the asymmetry existing in the competitive structure of the market in question and any distortions of competition which might derive from possible abuses.

19 Thus, Decree-Law No 192/2001 was the only instrument capable of ensuring that the Italian market was not subjected to speculative and anti-competitive attacks by public entities operating in the same sector in other Member States and enjoying advantages by virtue of their national legislation.

20 The problem in this case is different from that which arose in *Commission* v *Portugal, Commission* v *France, Commission* v *Belgium, Commission* v *Spain* and *Commission* v *United Kingdom*. In those cases, the national measures at issue were designed in each case to maintain the State's influence and to prevent liberalisation. In contrast, Decree-Law No 192/2001, in so far as it is addressed solely to public undertakings, is designed to exclude State influence. Therefore, the criteria laid down in the abovementioned judgments cannot be transposed to the present case.

21 Furthermore, Decree-Law No 192/2001 is of a temporary nature. It will apply only until attainment of a fully liberalised internal market in the gas and electricity sectors.

22 Finally, being concerned solely with public undertakings holding a dominant position in their domestic markets, it confines itself to strictly necessary and proportional measures.

23 According to the Commission, those arguments are all irrelevant.

24 The Member States are not entitled to encroach upon the competence of the Community in this area. It is the responsibility not of national governments but of the Commission, as guardian of the Treaties, to ensure the proper application of the Community provisions at issue and to take action against any infringements in the area of freedom of competition. Unilateral measures adopted by certain Member States, on the pretext of avoiding distortions in their markets, in fact introduce such distortions in the Community market as a whole, which is unacceptable. The national measures at issue in this case are of a strictly protectionist character.

25 Moreover, it cannot be contended that the Community legislation is inadequate. The legislation has even been strengthened recently by a number of measures, in particular Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37) and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

Findings of the Court

26 It must be borne in mind at the outset that Article 56(1) EC gives effect to the free movement of capital between Member States and between Member States and non-member countries. To that end, in the chapter of the Treaty entitled 'Capital and payments', it provides that all restrictions on movements of capital between Member States and between Member States and third countries are to be prohibited.

27 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, has an indicative value for the purposes of defining the notion of capital movements (see *Commission* v *United Kingdom*, paragraph 39, and Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraphs 20 and 21).

28 Points I and III of the nomenclature annexed to Directive 88/361 and the explanatory notes which it contains indicate that direct investment in the form of a shareholding in an undertaking and the acquisition of securities on the capital market constitute capital movements within the meaning of Article 56 EC. By virtue of those explanatory notes, direct investment, in particular, is characterised by the possibility of participating effectively in the management and control of a company.

29 In the light of those considerations, it is necessary to examine whether Decree-Law No 192/2001, which provides for the automatic suspension of voting rights attaching to holdings exceeding 2% of the capital of undertakings operating in the electricity and gas sectors, where such holdings are acquired by public undertakings

that are not quoted on regulated financial markets and hold a dominant position, constitutes a restriction on capital movements between Member States.

30 In that connection, it must be pointed out that the suspension of voting rights, as provided for in Decree-Law No 192/2001, means that the category of public undertakings concerned is precluded from participating effectively in the management and control of Italian undertakings operating in the electricity and gas markets. Since the objective pursued by Decree-Law No 192/2001 is to avoid 'anti-competitive attacks by public entities operating in the same sector in other Member States', it has the effect of dissuading public undertakings established in other Member States, in particular, from acquiring shares in Italian undertakings operating in the energy sector.

31 It follows that the suspension of voting rights provided for by Decree-Law No 192/2001 constitutes a restriction on the free movement of capital prohibited, in principle, by Article 56 EC.

32 The fact that the legislation at issue is addressed only to a category of public undertakings holding a dominant position in their domestic markets does not detract from that finding. The Treaty provisions on the free moment of capital do not draw a distinction between private undertakings and public undertakings or between undertakings that hold a dominant position and those that do not.

33 Furthermore, the Italian Government cannot claim, on the basis of the compatibility with the Treaty provisions on the free movement of capital of those provisions of

Directive 2004/39 which, under certain conditions, allow a limitation of the voting rights attaching to certain shares, that the same applies to Decree-Law No 192/2001. That directive, which was adopted in the context of freedom of establishment and not, contrary to the Italian Government's assertion, in the context of Article 56 EC, was adopted in relation to a different and very specific situation, namely the admission of transferable securities to official listing. It provides for limitations on voting rights only to penalise failure to comply with legislative provisions. Those limitations are not, therefore, in contrast to those imposed by Decree-Law No 192/2001, liable to dissuade undertakings of other Member States from making investments in certain domestic undertakings. Moreover, Articles 85 to 97 of Directive 2001/34 merely lay down obligations to provide information when a substantial holding in a company quoted on the stock exchange is acquired or transferred and an obligation on Member States to impose appropriate penalties for infringement of those obligations. Measures adopted by Member States in that connection are irrelevant in the context of the present case.

34 It is also necessary to consider whether the restriction on the free movement of capital might be justifiable under the provisions of the Treaty.

35 In that connection, it must be borne in mind that 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 58(1) EC or by overriding public-interest grounds. 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 *Commission* v *Belgium*, paragraph 45, and Case C-319/02 *Manninen* [2004] ECR I-7498, paragraph 29).

36 The Italian Government contends that, through the process of liberalisation and privatisation, the energy markets in Italy have been opened up to competition. Decree-Law No 192/2001 is designed to ensure sound and fair conditions of competition in those markets. It makes it possible to ensure that, pending effective liberalisation of the energy sector in Europe, the Italian market is not subjected to anti-competitive attacks by public undertakings operating in the same sector in other Member States that have been placed at an advantage by domestic legislation which has kept them in a privileged position. If control of undertakings operating in the Italian electricity and gas markets were acquired by public undertakings of that kind, the efforts of the Italian authorities to open up the energy sector to competition might be negated.

37 In that connection, as the Court has already held, an interest in generally strengthening the competitive structure of the market in question cannot constitute valid justification for restrictions on the free movement of capital (see *Commission* v *Portugal*, paragraph 52).

38 In any event, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) is applicable. It must be borne in mind in that regard that the domestic rules at issue apply only to public undertakings which already hold a dominant position in their national markets. Pursuant to Article 2(3) of Regulation No 139/2004, the Commission is required to prohibit concentrations with a Community dimension which would significantly impede effective competition in the common market or a substantial part thereof 'in particular as a result of the creation or strengthening of a [pre-existing] dominant position'.

39 The Italian Government also refers to the need to safeguard the supply of energy within Italian territory.

40 Even though the need to safeguard energy supplies may, under certain conditions, justify restrictions of fundamental freedoms under the Treaty (see Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34 and 35, and *Commission* v *Belgium*, paragraph 46), the Italian Government has not demonstrated in what way a limitation of voting rights affecting only one specific category of public undertakings is necessary in order to attain that objective. In particular, it has not explained why it is necessary for the shares of undertakings operating in the energy sector in Italy to be held by private shareholders or by public shareholders quoted on regulated financial markets for the undertakings concerned to be able to guarantee sufficient and uninterrupted supplies of electricity and gas in the Italian market.

41 It follows that the Italian Government has not established that Decree-Law No 192/2001 is necessary in order to safeguard the energy supplies in Italy.

42 It must therefore be held that, by keeping in force Decree-Law No 192/2001, which provides for the automatic suspension of voting rights attaching to holdings in excess of 2% of the capital of undertakings operating in the electricity and gas sectors, where those holdings are acquired by public undertakings not quoted on regulated financial markets and enjoying a dominant position in their own domestic markets, the Italian Republic has failed to fulfil its obligations under Article 56 EC.

Costs

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

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

1. **Declares that, by maintaining in force Decree-Law (decreto-legge) No 192 of 25 May 2001, converted into Law No 301, entitled 'Urgent provisions to ensure the liberalisation and privatisation of specific public service sectors' (legge n° 301, recante disposizioni urgenti per salvaguardare i processi di liberalizzazione e privatizzazione di specifici settori dei servizi publici), of 20 July 2001, which provides for the automatic suspension of voting rights attaching to holdings in excess of 2% of the capital of undertakings operating in the electricity and gas sectors, where those holdings are acquired by public undertakings not quoted on regulated financial markets and enjoying a dominant position in their own domestic markets, the Italian Republic has failed to fulfil its obligations under Article 56 EC;**

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

[Signatures]