

JUDGMENT OF THE COURT (Third Chamber)

26 March 2009*

In Case C-326/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 13 July 2007,

Commission of the European Communities, represented by L. Pignataro-Nolin and H. Støvlbæk, 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 (Third Chamber),

composed of A. Rosas, President of Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2008,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2008,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that, by adopting the provisions contained in Article 1(2) of the Decree of the President of the Council of Ministers of 10 June 2004 defining the criteria for the exercise of the special powers referred to in Article 2 of Decree-Law No 332 of 31 May 1994, converted into law with amendments by Law No 474 of 30 July 1994 (decreto del Presidente del Consiglio dei Ministri, definizione dei criteri di esercizio dei poteri speciali, di cui all'art. 2 del decreto-legge 31 maggio 1994, n. 332, convertito, con

modificazioni, dalla legge 30 luglio 1994, n. 474), (GURI No 139, of 16 June 2004, p. 26, 'the Decree of 2004'), the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 56 EC.

Legal context

Decree-Law No 332/1994

- 2 Decree-Law No 332 of 31 May 1994 providing for acceleration of the procedures for the disposal of the State's and public bodies' shareholdings in joint stock companies (Decreto-legge n. 332, norme per l'accelerazione delle procedure di dismissione di partecipazioni dello Stato e degli enti pubblici in società per azioni), (GURI No 126 of 1 June 1994, p. 38), was converted into law, with amendments, by Law No 474 of 30 July 1994 (GURI No 177 of 30 July 1994, p. 5). That Decree-Law was later amended by Law No 350 of 24 December 2003 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Law for 2004) (legge n. 350, disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004), Ordinary Supplement to GURI No 196 of 27 December 2003, 'Finance Law No 350/2003'). The Decree-Law, as converted and amended ('Decree-Law No 332/1994'), provides that the State is to hold special powers in certain companies ('special powers').

- 3 Article 2(1) of Decree-Law No 332/1994 provides:

'1. The President of the Council of Ministers shall determine, by decree adopted on a proposal of the Minister for Economic Affairs and Finance, in agreement with the Minister for Productivity and the competent sectoral ministers and after notification to the competent parliamentary committees, those companies controlled directly or indirectly by the State and operating in the defence, transport, telecommunications, energy resources and other public service sectors, the articles of association of which

are to stipulate that, prior to the adoption of any measure resulting in a loss of control, there shall be inserted, by resolution to that effect passed at an extraordinary general meeting of the company, a provision conferring on the Minister for Economic Affairs and Finance one or more of the following special powers, to be exercised in consultation with the Minister for Productivity ...'

4 Those special powers are set out in Article 2(1)(a) to (d) as follows:

- (a) power to oppose the acquisition by investors of significant shareholdings representing at least 5% of voting rights or a lower percentage fixed by decree of the Minister for Economic Affairs and Finance. For the expression of their opposition, the authorities have a period of 10 days from the date of the communication which must be made by the directors of the company concerned when the request is made for entry in the register of shareholders, while the transferee has 60 days in which to challenge the decision of the authorities before the competent court or tribunal;

- (b) power to oppose the conclusion of contracts or agreements between shareholders representing at least 5% of voting rights or a lower percentage fixed by decree of the Minister for Economic Affairs and Finance. The periods of 10 and 60 days mentioned in subparagraph (a) are applicable to opposition by the authorities and to an action brought by the shareholders participating in the contracts or agreements concerned, respectively;

- (c) power to veto resolutions for the dissolution of the company, transfer of the undertaking, merger, demerger, transfer abroad of the company headquarters, alteration of the company's objects, amendment of the articles of association removing or modifying the special powers. A period of 60 days is provided for challenging a veto;

(d) power to appoint a non-voting director.

- 5 It is clear from the application that a clause relating to the exercise of the special powers was introduced into the articles of association of, inter alia, ENI, Telecom Italia, Enel and Finmeccanica, companies governed by Italian law and operating in the petrochemical and energy, telecommunications, electricity and defence sectors, respectively.
- 6 Article 4(230) of Finance Law No 350/2003 provides that an ad hoc decree of the President of the Council of Ministers, on a proposal by the Minister for Economic Affairs and Finance and the Minister for Productivity, to be adopted within 90 days of the entry into force of that Law, is to determine the criteria for the exercise of the special powers, limiting their use exclusively to cases of harm to the vital interests of the State.

The Decree of 2004

- 7 Article 1(1) and (2) of the Decree of 2004 provides:

‘1. The special powers referred to in Article 2 of Decree-Law No 332/1994 shall be exercised solely when justified by important and compelling reasons in the public interest concerning, more particularly, public policy, public security, public health and defence, and shall take the form of measures appropriate and proportionate to the protection of those interests, such as the application of appropriate time-limits, without prejudice to observance of the principles of domestic and Community law and, above all, of the principle of non-discrimination.

2. Without prejudice to the rules laid down in subparagraph 1, the special powers provided for in Article 2(1)(a), (b) and (c) of Decree-Law No 332/1994 shall be exercised in the following circumstances:

- (a) real and serious risk of an interruption of the minimum national supply of energy and petroleum products or in the supply of related and subsequent services and, in general, of the supply of raw materials and goods essential to the public as a whole, and interruption of the supply of a minimum service in the telecommunications and transport sectors;

- (b) real and serious risk to the continuous performance of obligations vis-à-vis the public as a whole in connection with the supply of a public service and to the performance of the duties entrusted to the company in order to serve the public interest;

- (c) real and serious risk to the security of plant and networks in essential public services;

- (d) real and serious risk to national defence, military security, public policy and public security;

- (e) health emergencies.’

Pre-litigation procedure

- 8 The Commission initiated proceedings for a declaration of failure to fulfil obligations on account of infringement of Articles 43 EC and 56 EC concerning the conditions for the exercise of the special powers by sending a letter of formal notice to the Italian Republic on 6 February 2003. That Member State accordingly amended its legislation by adopting Finance Law No 350/2003 and the Decree of 2004. Taking the view, none the less, that the amendments so made were insufficient, the Commission sent it a further letter of formal notice on 22 December 2004.
- 9 After receiving the Italian Government's reply on 20 May 2005, the Commission, considering that it could not concur with the arguments in that reply, sent to the Italian Republic on 18 October 2005 a reasoned opinion dealing solely with the criteria fixed by Article 1(2) of the Decree of 2004, requesting that State to comply with the opinion within a period of two months from receiving it. In answer, the Italian Republic sent a note challenging, in substance, the Commission's analysis.
- 10 Considering that the situation remained unsatisfactory, the Commission brought the present proceedings.

The action*Arguments of the parties*

- 11 According to the Commission, the Italian Republic's infringement of Articles 43 EC and 56 EC arises from the fact that the Decree of 2004 does not make sufficiently clear the

conditions for the exercise of the special powers. In the institution's opinion, those conditions do not enable investors to know in what situations the powers will be used.

- 12 The Commission thus maintains that the actual cases that may be covered by the concept of 'real and serious risk' appearing in Article 2(1)(a) to (d) are, potentially, numerous, undetermined and undeterminable. That want of precision in the determining of the specific objective circumstances which justify the State's recourse to the special powers gives those powers a discretionary nature, having regard to the latitude enjoyed by the Italian authorities. The result is to discourage investors generally, more specifically those contemplating settling in Italy with a view to exerting some influence on the management of the undertakings to which the legislation at issue applies.
- 13 The Commission observes that, given that Article 1(2) of the Decree of 2004 concerns the exercise of the special powers provided by Decree-Law No 332/1994, assessment of the proportionality of the Decree includes the examination of the lawfulness of those powers in particular situations.
- 14 The Commission accepts that freedom of establishment and free movement of capital may be restricted by national measures justified on the basis of Articles 46 EC and 58 EC or by overriding reasons in the public interest, but only in so far as there is no Community harmonising legislation providing for measures necessary to ensure the protection of the fundamental interests of the State.
- 15 With regard to the regulated sectors, such as those of energy, natural gas and telecommunications, the Commission considers that the object of protecting the fundamental interests of the State can be attained by adopting less restrictive measures, such as those provided for by the Community legislature. It cites 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), 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), and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and

services (Framework Directive) (OJ 2002 L 108, p. 33). The Commission emphasises that those directives provide for the implementation of measures designed to safeguard a minimum national supply in the spheres concerned. It argues that the Italian Republic does not explain why the protection of a minimum national supply in the sectors of the economy so regulated could not be guaranteed on the basis of those directives.

16 With regard to the non-regulated sectors, the Commission maintains that the Italian Republic has put forward no reasons for the application of the criteria at issue.

17 It notes, in addition, that there is no causal link between the need to guarantee the supply of energy and to provide public services, on the one hand, and the supervision of an undertaking's shareholding and management, on the other.

18 According to the Commission, the Decree of 2004 constitutes, therefore, an instrument which goes beyond what is necessary to defend the public interests to which it applies.

19 The Italian Republic states, first, that much of the Commission's analysis is devoted to the alleged unlawfulness of the special powers whose rules are fixed by Decree-Law No 332/1994. The breach of obligations referred to by the action and by the reasoned opinion relates to the Decree of 2004 alone, and not to Decree-Law No 332/1994. Consequently, the alleged unlawfulness of the special powers regime, laid down by that Decree-Law, is not covered by the present action.

20 According to that Member State, it follows that the essential part of the objections made by the Commission in its action cannot be upheld. The same applies to the objections

relating to the limits imposed by the Italian Republic on the acquisition of shares in the companies concerned, objections that concern the ownership of shares, that is to say, the structure of those companies. The Commission complains chiefly that the Italian Republic has introduced supervisory measures relating to that structure, and not measures making it possible to check specific management decisions. Those objections concern Decree-Law No 332/1994 and not the Decree of 2004.

21 The Italian Republic contends, therefore, that the heads of claim alleging that the measures are not proportionate to the special powers should be dismissed, given that that part of the action in fact relates to Decree-Law No 332/1994.

22 Secondly, the Italian Republic challenges the analysis made by the Commission in that the latter bases the core of its objections on an alleged infringement of Article 56 EC, relating to the free movement of capital, adding that those objections might equally be based on infringement of Article 43 EC, relating to freedom of establishment. According to the Member State, it is apparent from the Court's case-law, in particular from Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, that if a question can be examined from the point of view of freedom of establishment, it is impossible that it should fall within the scope of the free movement of capital.

23 Thirdly, the Italian Republic challenges the substance of the objection relating to the discretionary nature conferred on the special powers attributed to the national authorities by the provisions of the Decree of 2004.

24 Fourthly, that Member State disputes the Commission's arguments relating to the directives applicable to the regulated sectors. Those directives would be relevant only if

the action concerned Decree-Law No 332/1994, which lays down structural measures. The Decree of 2004, for its part, introduced no measure of that kind, but merely defined the circumstances and conditions for the adoption of the measures provided for by that Decree-Law. The Italian Republic maintains that, on any view, there is nothing to stop the Member States from adopting, in those essential sectors, measures creating powers to intervene going further even than the provisions of those directives.

²⁵ The Italian Republic adds that the principle of subsidiarity must apply. Domestic legislation is more suitable than Community legislation for regulating situations presenting a risk to the vital interests of the State, situations that only the State can evaluate correctly and in good time.

²⁶ In the other public-service sectors, which have not yet been subject to harmonisation, such as the national defence sector, a Member State is entitled to adopt measures for the purpose of confronting situations seriously damaging to the common good.

²⁷ According to the Italian Republic, the only argument in the action to be taken into consideration is the alleged unforeseeability of the actual cases in which recourse may be had to the provisions of Decree-Law No 332/1994. However, that Member State argues that it is only when an investor appears that all the specific circumstances are identified and can be assessed. It concludes therefore that the conditions for the exercise of the special powers cannot be defined more precisely than they are in the Decree of 2004.

Findings of the Court

The subject-matter of the action

- 28 According to the Italian Republic, in a considerable part of its arguments the Commission in actual fact challenges not the criteria in the Decree of 2004 but the special powers introduced by Decree-Law No 332/1994, and seeks to have those powers held to be inconsistent with Community law. By so doing, those arguments extend the subject-matter of the dispute and are therefore inadmissible.
- 29 It is to be borne in mind here that the subject-matter of an action for a declaration of failure to fulfil obligations is delimited by the reasoned opinion and the application (see, to that effect, Case C-350/02 *Commission v Netherlands* [2004] ECR I-6213, paragraph 20 and the case-law cited). Given that in the instant case those two measures concern only the criteria fixed in Article 1(2) of the Decree of 2004, it must be held that the Commission has not extended the subject-matter of the dispute, with the result that the action is admissible.
- 30 The Commission has indeed developed certain arguments criticising the special powers introduced by Decree-Law No 332/1994, but it has not called the powers in question and challenges only the criteria enabling their exercise.
- 31 The alleged failure to fulfil obligations concerning only the criteria defined in Article 1(2) of the Decree of 2004, there is no need to rule on any point other than the compatibility of that provision with Community law.

The application of Articles 43 EC and 56 EC

- 32 The Commission takes the view that the infringement of which it complains must be examined in the light of Article 43 EC, relating to freedom of establishment, and of Article 56 EC, relating to free movement of capital.
- 33 As regards the question whether national legislation falls within the ambit of one or other of those freedoms, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, and case-law cited).
- 34 Provisions of national law which apply to the possession by nationals of one Member State of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its activities fall within the ambit *ratione materiae* of the provisions of the EC Treaty on freedom of establishment (see, to that effect, in particular, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22, and Case C-112/05 *Commission v Germany* [2007] ECR I-8995, paragraph 13).
- 35 Direct investments, that is to say, investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity fall within the ambit of Article 56 EC on the free movement of capital. That object presupposes that the shares held by the shareholder enable him to participate effectively in the management of that company or in its control (*Commission v Germany*, paragraph 18, and case-law cited).
- 36 National legislation not intended to apply only to those shareholdings which enable the holder to have 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 ambit of both Article 43 EC and Article 56 EC (see, to that effect, *Holböck*, paragraphs 23 and 24). Contrary to what the Italian Republic maintains, *Cadbury Schweppes and Cadbury Schweppes Overseas* does not support the conclusion that in such a case only Article 43 EC is of relevance. That judgment, as its paragraph 32 makes clear, concerns only a situation in which a company holds shareholdings giving it control of other companies (see Case C-207/07 *Commission v Spain*, paragraph 36).

37 In this case, a distinction must be drawn, depending on whether the criteria are applied to the State's powers to oppose the acquisition of shareholdings and the conclusion of contracts by shareholders representing a certain proportion of voting rights or are applied to the power to veto certain company resolutions.

38 With regard, first, to the powers of opposition contained in Article 2(1)(a) and (b) of Decree-Law No 332/1994, it is clear from the documents before the Court that the proportion of at least 5% of voting rights or, as the case may be, a lesser percentage fixed by the competent minister has to enable the persons concerned to participate effectively in the management of the company in question, which is covered by Article 56 EC. It is conceivable, in respect of companies having in general large numbers of smaller shareholdings, that the holders of shareholdings corresponding to those percentages might have the power to influence in a definite manner the management of such a company and to determine its activities, which is covered by Article 43 EC, as the Italian Republic maintains. Furthermore, because Decree-Law No 332/1994 fixes a minimum percentage, that legislation is also designed to apply to holdings greater than that percentage which give an obvious power of control. It is therefore necessary to examine the criteria relating to the exercise of those powers of opposition in the light of those two Treaty provisions.

39 With regard, second, to the power of veto contained in Article 2(1)(c) of Decree-Law No 332/1994, that power clearly 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 the companies concerned, with the result that the criteria applying to the exercise of that power must be examined in the light of

Article 43 EC. Moreover, even if the effects of those criteria 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 (*Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 33). Consequently, the criteria applying to the exercise of the power of veto must be examined solely from the point of view of Article 43 EC.

The criteria set out in Article 1(2) of the Decree of 2004 as they relate to the exercise of powers of opposition

— Failure to fulfil obligations under Article 56 EC

⁴⁰ A preliminary point to note is that the criteria examined here determine the circumstances in which the powers of the State to oppose the acquisition of certain shareholdings or the conclusion of certain agreements of shareholders in the companies concerned may be exercised. It is apparent from the Court's case-law that the use of such powers may be contrary to the free movement of capital guaranteed by Article 56 EC (see, inter alia, Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, paragraph 50, and *Commission v Spain*, paragraph 58). The point at issue in this case is whether those criteria fix conditions that make it possible to vindicate the exercise of such powers.

⁴¹ It is to be borne in mind, in this regard, that the free movement of capital may be restricted by national measures justified by the reasons set out in Article 58 EC or by overriding reasons in the public interest, in so far as there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests (see *Commission v Germany*, paragraph 72, and case-law cited).

- 42 In the absence of such Community harmonisation, it is in principle for the Member States to decide on the degree of protection they intend to afford to such legitimate interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted should be appropriate to secure the attainment of the objective which they pursue and should not go beyond what is necessary in order to attain it (see *Commission v Germany*, paragraph 73, and case-law cited).
- 43 Furthermore, even in the spheres that have been harmonised, the principle of proportionality applies to those cases in which the Community legislature has left the Member States some discretion.
- 44 In the instant case, the Italian Republic and the Commission take points of view that differ on the issue whether the criteria applicable to the exercise of the powers of opposition to the acquisitions of shareholdings or to the conclusion of contracts by shareholders representing at least 5% of voting rights, or even a lesser percentage in certain cases, are such that that exercise is proportionate to the objectives pursued and so compatible with the freedom guaranteed by Article 56 EC.
- 45 It may be noted that the criteria at issue apply to common interests concerning, in particular, the minimum supply of energy resources and goods essential to the public as a whole, the continuity of public service, national defence, the protection of public policy and public security and health emergencies. The pursuit of such interests may, subject to observance of the principle of proportionality, warrant certain restrictions of the exercise of fundamental freedoms (see, inter alia, judgment of 14 February 2008 in Case C-274/06 *Commission v Spain*, paragraph 38).
- 46 However, as noted in paragraphs 42 and 43 above, the first requirement of observance of the principle of proportionality is that the measures taken should be appropriate for the purpose of attaining the objectives pursued.

- 47 Application of the criteria at issue as they relate to the exercise of the powers of opposition is not appropriate for the purpose of attaining the objectives pursued in the case in point, because there is no link between the criteria and the power.
- 48 The Court has earlier 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 (*Commission v Spain*, paragraphs 38 and 51).
- 49 In its written pleadings, the Italian Republic has provided no proof or even anything at all to show that the application of the criteria for the exercise of the powers of opposition makes it possible to attain the objectives pursued. At the hearing, that Member State did indeed cite several examples. Thus, it mentioned the possibility that a foreign operator with links to a terrorist organisation might seek to acquire substantial holdings in national companies in a strategic sector. It also raised the possibility that a foreign company controlling international energy transmission networks and having, in the past, used that position to create serious supply problems for bordering countries might buy shares in a national company. According to that Member State, the existence of precedents of that kind could justify opposition to the acquisition by such investors of significant holdings in the national companies concerned.
- 50 Such considerations do not, however, appear in the Decree of 2004, which mentions no specific objective circumstance.
- 51 The Court has previously held that a State's powers of intervention such as the powers of opposition in respect of which the criteria at issue determine the conditions for their exercise, which are not qualified by any condition, save for a reference to the protection of national interests, formulated in general terms and without any indication of the

specific objective circumstances in which those powers are to be exercised, constitute serious interference with the free movement of capital (see, to that effect, Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraphs 50 and 51).

52 Those considerations are applicable to the present case. Even if the criteria at issue concern different kinds of public interests, they are formulated in a general and imprecise manner. What is more, the lack of any connection between the criteria and the special powers to which they relate increases the uncertainty surrounding the circumstances in which those powers may be exercised and 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.

53 Furthermore, the mere statement in Article 1(1) of the Decree of 2004 that the special powers must be used only in accordance with Community law cannot make the use of those criteria consistent with Community law. The general and abstract nature of those criteria is incapable of ensuring that the special powers will be exercised in accordance with the requirements of Community law (see, to that effect, Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 63 and 64).

54 Last, while the fact that the exercise of the special powers may be submitted to review by the national court, pursuant to Article 2(1)(a) to (c) of Decree-Law No 332/1994, is essential to the protection of persons having regard to the application of the rules on freedom of establishment, it cannot, on its own, suffice to make good the incompatibility with those rules of the criteria for the application of the special powers.

55 It is therefore to be declared that, by adopting the provisions in Article 1(2) of the Decree of 2004, the Italian Republic has failed to fulfil its obligations under

Article 56 EC, in so far as those provisions apply to the special powers provided for by Article 2(1)(a) and (b) of Decree-Law No 332/1994.

— Failure to fulfil obligations under Article 43 EC

⁵⁶ In so far as the exercise of the powers of opposition also concern holdings conferring on their holders the power to influence in a definite manner the managements of the companies concerned and to determine their activities and may therefore restrict freedom of establishment, it must be considered that, for the same reasons as those set out above in the examination of the compatibility of the criteria in Article 1(2) of the Decree of 2004 with Article 56 EC, those criteria give the Italian authorities disproportionate discretion in the exercise of their powers of opposition.

⁵⁷ It must consequently be declared that, by adopting the provisions in Article 1(2) of the Decree of 2004, the Italian Republic has failed to fulfil its obligations under Article 43 EC, in so far as those provisions apply to the special powers provided by Article 2(1)(a) and (b) of Decree-Law No 332/1994.

The criteria set out in Article 1(2) of the Decree of 2004 as they relate to the exercise of the power of veto

⁵⁸ As mentioned in paragraph 39 above, the application of the criteria in Article 1(2) of the Decree of 2004 to the power to veto certain decisions has to be examined from the viewpoint of Article 43 EC alone.

59 The Commission takes the view that those criteria, so far as they are applicable to the power of veto, are disproportionate to the objective pursued and, accordingly, contrary to Article 43 EC. The Italian Republic challenges that analysis.

60 It must be held that, with regard to the companies concerned, resolutions for the dissolution of the company, transfer of the undertaking, merger, demerger, transfer abroad of the company headquarters, alteration of the company's objects and amendment of the articles of association removing or modifying the special powers relate to important aspects of the management of those companies.

61 It is possible that such decisions, which may affect the very existence of those companies, may impinge on the continuity of the public service or on the maintenance of a minimum national supply of goods essential to the public as a whole, which constitute public interests covered by the Decree of 2004.

62 There exists, therefore, a connection between the special power of veto and the criteria fixed in the Decree of 2004.

63 However, the circumstances in which that power may be exercised are not clear.

64 The Court has held, with regard to a right to oppose certain decisions to transfer or use as security the assets of companies operating in the oil sector, that the exercise of that right not being qualified by any condition limiting the wide discretion of the minister concerned regarding controls on the identity of the holders of those companies' assets, the system in question went beyond what was necessary in order to attain the objective pleaded, namely, the prevention of disruption of a minimum supply of petroleum products in the event of a real threat. The Court added that, failing any precise objective

criteria in the structure of the system, the legislation in question was disproportionate to the stated objective (*Commission v France*, paragraphs 52 and 53).

- 65 It falls to be ascertained whether similar considerations are applicable to the instant case.
- 66 The Decree of 2004 contains no details of the circumstances in which the criteria for the exercise of the power of veto provided by Article 2(1)(c) of Decree-Law No 332/1994 may be applicable. Even if that power may be exercised only in situations of real serious risk or health emergencies, in accordance with Article 1(2) of the Decree, and in observance of the conditions referred to in Article 1(1) of the Decree, that is to say, for reasons of public policy, public safety, public health and defence, investors do not know, for want of any information as to the actual circumstances permitting the exercise of the power in question, when the power of veto may be applicable. In consequence, it must be considered, as the Commission argues, that the situations allowing the exercise of the power of veto are potentially numerous, undetermined and undeterminable, and that they leave the Italian authorities broad discretion.
- 67 None the less, the Italian Republic argues that the principle of subsidiarity is applicable in the strategic areas concerned and that the Member States must keep a broad discretion, for they are best placed to deal with emergencies affecting the vital interests of the State. The directives issued in the regulated spheres, such as that of energy, lay down only minimum rules for the observance of public service requirements.
- 68 As pointed out in paragraph 43 above, even though those directives leave the Member States some leeway, especially in order to adopt measures in an emergency, the provisions they adopt must observe the limits drawn by the Treaty, in particular the principle of proportionality.

- 69 The Court has in particular accepted, with regard to bodies operating in the oil, telecommunications and electricity sectors, that the object of ensuring a secure supply of such services in the case of a crisis in the territory of the Member State concerned may constitute a reason of public security and, therefore, justify a restriction of a fundamental freedom (*Commission v Spain*, paragraph 71).
- 70 The Court has, nevertheless, ruled that if the Member States remain, in essential respects, free to fix, in keeping with their domestic needs, the requirements of public policy and public security, as grounds for derogating from a fundamental freedom, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally without any control by the institutions of the European Community. So, public policy and public security may not be invoked unless there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-54/99 *Eglise de scientologie* [2000] ECR I-1335, paragraph 17; and *Commission v Spain*, paragraph 47).
- 71 The Court has applied that analysis to an opposition system in force in Belgium in the energy sector, which covered certain decisions concerning the strategic assets of national companies, in particular energy supply networks, and specific management decisions relating to those companies, State intervention being possible only when there was a threat that the objectives of the energy policy might be compromised. The Court considered that that system was based on objective criteria amenable to judicial review and that the Commission had not shown that less restrictive measures could have been taken to attain the objective pursued (Case C-503/99 *Commission v Belgium* [2000] ECR I-4809, paragraphs 50 to 53).
- 72 In the circumstances of this case, however, as found in paragraph 66 above, the Decree of 2004 contains no details of the actual circumstances in which the power of veto may be exercised and the criteria it lays down are not, therefore, based on objective verifiable conditions.

73 As noted in paragraphs 53 and 54 above, the statement that the power of veto must be used only in accordance with Community law and the fact that its exercise may be subject to national judicial review cannot make the Decree of 2004 compatible with Community law.

74 It must therefore be declared that, by adopting the provisions in Article 1(2) of the Decree of 2004, the Italian Republic has failed to fulfil its obligations under Article 43 EC, in so far as those provisions apply to the special power provided by Article 2(1)(c) of Decree-Law No 332/1994.

Costs

75 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 in its submissions, the latter must be ordered to pay the costs.

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

- 1. Declares that, by adopting the provisions contained in Article 1(2) of the Decree of the President of the Council of Ministers of 10 June 2004 defining the criteria for the exercise of the special powers referred to in Article 2 of Decree-Law No 332 of 31 May 1994, converted into law with amendments by Law No 474 of 30 July 1994 (decreto del Presidente del Consiglio dei Ministri, definizione dei criteri di esercizio dei poteri speciali, di cui all'art. 2 del decreto-legge 31 maggio 1994, n. 332, convertito, con modificazioni, dalla**

legge 30 luglio 1994, n. 474), the Italian Republic has failed to fulfil its obligations:

- **under Articles 43 EC and 56 EC, in so far as those provisions apply to the special powers provided by Article 2(1)(a) and (b) of the Decree-Law, as amended by Law No 350 of 24 December 2003 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Law for 2004) (legge n. 350, disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004), and**

- **under Article 43 EC, in so far as those provisions apply to the special power provided by Article 2(1)(c) of the Decree-Law;**

2. Orders the Italian Republic to pay the costs.

[Signatures]