

JUDGMENT OF THE COURT (First Chamber)

11 November 2010*

In Case C-543/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 December 2008,

European Commission, represented by G. Braun, P. Guerra e Andrade and M. Teles Romão, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, assisted by C. Botelho Moniz and P. Gouveia e Melo, advogados,

defendant,

* Language of the case: Portuguese.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 April 2010,

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

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining special rights for the Portuguese State in EDP — Energias de Portugal ('EDP'), allocated in connection with that State's golden shares, the Portuguese Republic has failed to fulfil its obligations under Articles 56 EC and 43 EC.

Legal context

National legislation

- 2 Article 13(2) of Law No 11/90 of 5 April 1990 concerning the Framework Law on Privatisations (Lei No 11/90, Lei Quadro das Privatizações) (*Diário da República I*, Series-A, No 80 of 5 April 1990) (the 'LQP') provides:

'In re-privatisations carried out by public competitive tendering, an offer on the stock market or public subscription, no entity, whether a natural or legal person, may acquire, or subscribe for, more than a fixed percentage of the share capital to be re-privatised, that percentage being determined in the text mentioned in Article 4(1), failing which the penalty will be the compulsory sale of shares acquired in excess of the determined limit, loss of the right to vote conferred by those shares or nullity.'

- 3 In that regard, the implementing Decree-Laws relating to the re-privatisation of EDP, in particular the Decree-Laws No 78-A/97 of 7 April 1997 approving the first phase of the re-privatisation of the share capital of EDP — Electricidade de Portugal SA (*Diário da República I*, Series-A, No 81 of 7 April 1997), No 94-C/98 of 17 April 1998 approving the third phase of the re-privatisation of the share capital of EDP — Electricidade de Portugal SA (*Diário da República I*, Series-A, No 90 of 17 April 1998), and No 141/2000 of 15 July 2000 approving the fourth phase of the re-privatisation of the

share capital of EDP — Electricidade de Portugal SA (*Diário da República* I, Series-A, No 162 of 15 July 2000), provide, in the respective Article 9(1) of each:

‘No entity, whether a natural or legal person, may acquire, in transactions provided for in this Decree-Law, shares representing a proportion of the share capital of EDP greater than 5%, and proposed acquisitions in excess of that limit shall be reduced thereto.’

- ⁴ Under Article 384(2) of the Portuguese Commercial Companies Code (‘CCC’), the articles of association of those companies may:

‘(a) provide that a certain number of shares shall carry a single vote, provided that all shares issued by the company are taken into account and that at least one vote is attached to each EUR 1 000 of share capital;

(b) provide that votes exceeding that number shall not be counted if they are cast by a single shareholder, whether on his own behalf or as the representative of another shareholder.’

- 5 Article 384(3) of the CCC provides:

‘The restriction on the number of votes permitted in [Article 384(2)(b)] may be imposed in respect of all shares or solely in respect of shares in one or more categories, but not in respect of specific shareholders.’

- 6 Article 15(3) of the LQP provides for the possibility of creating golden shares in the following terms:

‘The legislative instrument referred to in Article 4(1) (approving the articles of association of the undertaking to be privatised or converted into a public limited company) may also, in exceptional cases, where grounds of national interest so require, provide for the existence of golden shares which are intended to remain the State’s property and which, irrespective of their number, confer on the State a right of veto over amendments to the company’s articles of association and over other decisions in a particular field, duly specified in the articles of association.’

- 7 Article 13(1) of Decree-Law No 141/2000 contains the following provision on the special powers of the State:

‘While the State is a shareholder in the company, irrespective of the number of shares held by the State and whether they are held directly or indirectly, through the intermediary of public bodies within the meaning of Article 1(2)(c) of Law No 71/88 of

24 May 1988, the general assembly resolutions listed below shall be deemed not to have been adopted unless the State votes in their favour:

- (a) resolutions on amendments of the articles of association, including increases of share capital, mergers, divisions and winding-up;
- (b) resolutions on the conclusion of certain contracts concerning the structure and control of groups of companies;
- (c) resolutions on the removal or restriction of the preferential rights of shareholders in the case of an increase in share capital.’

8 Article 15(1) of the LQP provides:

‘In exceptional circumstances, and where grounds of national interest so require, the legislative measure relating to the adoption of the articles of association of the company to be re-privatised may provide, in order to safeguard the public interest, that resolutions relating to specific matters must be approved by a director appointed by the State.’

- 9 Article 13(2) and (3) of Decree-Law No 141/2000 contain the following provisions in relation to the State's special powers:

'2. While the State is a shareholder in the company, within the meaning of [Article 13(1)], the State shall, if it votes against the nominees successfully elected as directors, retain the right to appoint a director who shall automatically replace the person in the list of successful nominees who received the fewest votes or, if the votes cast are equal, the last named successful nominee.

3. The right conferred on the State in the above paragraph takes precedence over the similar rights conferred on minority shareholders by Article 392 of the [CCC].'

- 10 Article 10 of Decree-Law No 218-A/2004 of 25 October 2004 approving the fifth phase of the re-privatisation of the share capital of EDP — Electricidade de Portugal SA (*Diário da República* I, Series-A, No 251 of 25 October 2004), and Article 6 of Decree-Law No 209-A/2005 of 2 December 2005 approving the sixth phase of the re-privatisation of the share capital of EDP — Energias du Portugal SA (*Diário da República* I, Series-A, No 231 of 2 December 2005) expressly preserved the special rights of the Portuguese State.

EDP's articles of association

¹¹ Article 4(4) of EDP's articles of association provides:

'Category B shares are shares which are to be re-privatised; their sole privilege is that shareholders who are the owners of them, or their representatives, are not affected by the restriction on the number of votes laid down in Article 14(3) et seq. in respect of those shares.'

¹² Article 14(2) and (3) of those articles of association state:

'2. Each share carries the right to one vote.

3. No account will be taken of votes from Category A, cast by one shareholder, on his own behalf or as the representative of another shareholder, which exceed 5 % of the total number of votes attached to the share capital.'

13 Article 17(2) of those articles of association is worded as follows:

‘The adoption of the company’s strategic plan and the performance, by the company or by companies controlled by EDP, of the transactions listed below must obtain the approval of the supervisory board:

- (a) acquisitions and disposals of assets, rights or shares of a significant monetary value;
- (b) recourse to financing of a significant value;
- (c) opening or closure of places of business or large parts of places of business and large extensions or reductions of business activity;
- (d) other operations or transactions with a significant monetary or strategic value;
- (e) formation or termination of strategic partnerships or other forms of lasting cooperation;

(f) any proposed division, merger or conversion;

(g) amendments of the articles of association, including a change of registered office and an increase in share capital, when they are promoted by the executive board of directors.’

Background to the case and pre-litigation procedure

¹⁴ Since the early 1990s, an extensive restructuring of the Portuguese electricity sector has taken place. In that context, EDP, which was formed in 1976 as a public undertaking by Decree-Law No 502/76 of 30 June 1976 (*Diário da República* I, Series-A, No 151 of 30 June 1976), was converted into a public limited company in 1991. Thereafter, the Portuguese State carried out the re-privatisation of that undertaking by means of a process which was implemented in several phases. Currently, according to the Portuguese Republic, the Portuguese State holds 25.73 % of EDP’s share capital through the intermediaries of Parpública — Participações Públicas SGPS SA and Caixa Geral de Depósitos SA.

¹⁵ EDP is the principal licensed distributor of electricity in Portugal, and the undertaking which acts as last resort supplier, and it also has a presence in the business sectors of distribution and supply of natural gas in the Greater Porto region, through the intermediary of its subsidiary EDP Gás SA.

- ¹⁶ On 18 October 2006, the Commission sent a letter of formal notice to the Portuguese Republic accusing it of having failed to fulfil its obligations under Articles 56 EC and 43 EC on the ground that the State and other public sector shareholders held golden shares with special rights in the share capital of EDP, in particular the right of veto in respect of certain resolutions of the general meeting of the company's shareholders; the right to appoint a director, where the State has voted against the nominees successfully elected as directors, and the exemption of the State from the voting ceiling of 5 % laid down in relation to the casting of votes.
- ¹⁷ Since the Commission considered that the reply provided by the Portuguese Republic on 18 December 2006 was inadequate, on 29 July 2007 the Commission issued a reasoned opinion restating the content of the formal notice and inviting the Portuguese Republic to comply with that opinion within two months of its receipt.
- ¹⁸ The Portuguese authorities replied to that reasoned opinion by letter of 30 October 2007. The Commission was not satisfied with that reply and decided to bring this action.

Admissibility of the action

Arguments of the parties

- ¹⁹ In its rejoinder, the Portuguese Republic contends that the action is in part inadmissible since the Commission, in its reply, relied on a new legal argument to the effect that the director referred to in Article 13(1) of Decree-Law No 141/2000 has the power to approve the resolutions of the EDP general meeting in accordance with Article 15 of the LQP, which amounts to introducing, at this advanced stage of proceedings, a new ground of complaint in relation to the failure of the Portuguese Republic to fulfil its obligations, a ground of complaint which should be declared to be inadmissible.

Findings of the Court

- ²⁰ In that regard, it must first be recalled that it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and that the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, *inter alia*, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 3; Case C-256/98 *Commission v France* [2000] ECR I-2487, paragraph 31; and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 61).

- 21 Furthermore, by virtue of Article 21 of the Statute of the Court of Justice of the European Union and Article 38(1)(c) of its Rules of Procedure, the Commission must, in any application made under Article 258 TFEU, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see, to that effect, Case C-52/90 *Commission v Denmark* [1992] ECR I-2187, paragraph 17; Case C-508/03 *Commission v United Kingdom*, paragraph 62; and Case C-487/08 *Commission v Spain* [2010] ECR I-4843, paragraph 71).
- 22 In the present case, it is apparent that the Commission, in the forms of order sought in the application initiating the proceedings, clearly stated that the complaint directed to the Portuguese Republic concerned the fact that the Portuguese State and other public shareholders were the holders of golden shares with special rights in the share capital of EDP, namely the right of veto over certain resolutions of the company, the right to appoint a director where the State votes against the nominees successfully elected as directors and the exemption from the 5 % voting ceiling laid down as regards the casting of votes. By also referring to the obligations incumbent on Member States under Articles 43 EC and 56 EC which the Portuguese Republic was alleged not to have complied with, the Commission thereby defined in sufficiently precise terms the subject-matter of the dispute.
- 23 It is true that only in its reply did the Commission for the first time rely on Article 15(1) of the LQP and the right laid down in that provision. However, it is clear from the documents before the Court that, contrary to the contention of the Portuguese Republic, the Commission did not take the view, in its reply, that the Portuguese State had a fresh special power, but made reference as a supplementary argument to show the merits of its complaint, to another right enjoyed by the Portuguese State. Consequently, the fact that the Commission set out in detail a complaint which it had already made more generally in the application did not alter the subject-matter of the alleged infringement, and has thus had no effect on the scope of the proceedings (see

Case C-185/00 *Commission v Finland* [2003] ECR I-14189, paragraphs 84 to 87, and Case C-171/08 *Commission v Portugal* [2010] ECR I-6817, paragraph 29).

- ²⁴ In the light of the foregoing, the plea of inadmissibility submitted by the Portuguese Republic must be rejected.

Substance

Whether there are restrictions

Arguments of the parties

- ²⁵ First of all, in the Commission's submission, the creation of golden shares in the share capital of EDP is not a result of the normal application of company law and constitutes therefore a State measure which falls within the scope of Articles 56 EC and 43(1) EC.
- ²⁶ The Commission claims in that regard that the special rights attached to such shares must be regarded as the product of acts carried out in the exercise of [the State's]

public authority and not as the product of private acts. The right of veto and the right to appoint a director are provided for by the legislation and are directly applicable. Irrespective of the number of shares the State holds, either directly or indirectly, the Portuguese State can exercise those special rights, which take precedence over the special rights of minority shareholders. As regards the voting ceiling, it can be identified as a State measure, according to the Commission, because the State, first, inserted in EDP's articles of association the provision which fixed the voting ceiling in respect of every shareholder while granting itself an exemption and, second, introduced, subsequently and through legislation, the specific right of veto over resolutions involving amendment of those articles of association.

²⁷ As regards the restrictions prohibited by Articles 56 EC and 43 EC, the Commission maintains that the right of veto restricts and limits the right of shareholders to participate effectively in the management and control of EDP in proportion to the value of their shareholdings, by depriving shareholders of the ability to take strategic management decisions and decisions on changes of ownership of the company. In addition, that right also restricts the free movement of capital and freedom of establishment since it may affect investments made in order to obtain a financial investment and is liable to deter investors in other Member States from making such investments.

²⁸ The Commission claims, secondly, that the right of veto attaching to the golden shares of the Portuguese State is to be regarded as an authorisation system and therefore as a system which restricts freedom of establishment. The LQP contains no guidelines governing the exercise of the right of veto, whereas the Commission considers that such a system should be based on criteria which are objective and known in advance to the companies concerned.

29 As regards the State's right to appoint a director, the Commission maintains that this also constitutes a restriction contrary to Articles 56 EC and 43 EC, inasmuch as it represents an obstacle to direct investment, since this specific right derogates from general company law, given that it is laid down by a national legislative measure for the sole benefit of public shareholders. The Portuguese Republic's argument that, under an updated interpretation of the CCC, the State's right to appoint a director should not, ultimately, be construed as such, but should be understood as the right to appoint a member of the general supervisory board and therefore a supervisor, is rejected by the Commission. On this point, the Commission refers to Article 17(2) of EDP's articles of association, according to which significant strategic decisions and amendments of those articles are, in any event, subject to the prior approval of the general supervisory board.

30 As regards the restriction on the number of votes available to ordinary shareholders to 5 % of EDP's share capital, a restriction which does not apply to the golden shares held by the Portuguese State, the Commission submits that such a provision restricts the ability to participate effectively in the management of an undertaking or its control and may deter investors in other Member States from acquiring shares in the company concerned.

31 The Portuguese Republic entirely denies the alleged failure to fulfil its obligations by claiming, first of all, that the provisions of national law at issue do not fall within the scope of Articles 43 EC and 56 EC, since it is neither their purpose nor their effect to establish a direct and substantial obstacle to the access of direct investors or portfolio investors to the share capital of EDP. The special rights to which the Portuguese State is entitled do not either directly or substantially place conditions on access to investment in EDP and it is therefore not an effect of those rights that investors or undertakings, whether domestic or foreign, are deterred from making either portfolio

investments or direct investments. Furthermore, since it has submitted no analysis of the effects of such special rights on the decisions of investors based in the European Union and on the incentives addressed to them, the Commission has not met the burden of proof imposed on it by Article 226 EC.

- 32 The Portuguese authorities go on to contend that the scope of the concept of a 'restrictive measure' affecting the free movement of capital and freedom of establishment must be clarified, since national measures which apply without distinction to domestic investors and to investors from other Member States can constitute restrictive measures under Articles 43 EC and 56 EC only if they impose direct and substantial conditions on the access of investors to the market. The Portuguese Republic consequently invites the Court to interpret the concept of a 'restriction' on the free movement of capital and on freedom of establishment in the light of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 on selling arrangements in relation to the free movement of goods.
- 33 In relation to the issue whether the 5 % voting ceiling, a provision in EDP's articles of association, is a State measure, the Portuguese Republic claims that that does not constitute a State measure, but is rather an act governed by private law which is outside the scope of Articles 43 EC and 56 EC.
- 34 Lastly, the Portuguese Republic challenges the Commission's analysis of the right of veto, namely that that special right amounts to a system of prior authorisation which restricts and limits the right of shareholders to participate effectively in the management and control of the company in proportion to the value of their shareholdings or to take strategic management decisions. The national provisions at issue do no more than confer on the Portuguese State, with due regard for the public interest in protecting the security of the country's energy supply, the right of veto over any resolutions of the general meeting which might fundamentally alter the structure of EDP

and which, for that reason, would jeopardise that security. Consequently, that right does not deprive shareholders of the ability to take strategic management decisions.

³⁵ As regards the right of the Portuguese State to appoint a director, the Portuguese Republic emphasises that, following revision of the CCC in 2006, that right must be understood as the ability to appoint a member of the supervisory board and not a director, as the Commission incorrectly considers to be the case. In fact, since the State has a single representative and a single vote in a collegiate supervisory body such as the supervisory board, the State does not therefore have a decisive influence on the executive body of EDP and thus does not limit the effective participation of other shareholders in the management or control of that company. In any event, according to the Portuguese Republic, that right cannot have any effect whatsoever on whether domestic undertakings or those established in other Member States will have an interest in acquiring financial holdings or qualifying holdings in the share capital of EDP.

³⁶ In reply to the arguments advanced in the Portuguese Republic's defence, the Commission contends, with reference to Case C-463/00 *Commission v Spain* [2003] ECR I-4581, that application of the case-law embodied in *Keck and Mithouard* is not appropriate.

³⁷ The Portuguese Republic also contends, in the rejoinder, that the national provisions at issue in this action must be examined exclusively in the light of Article 43 EC and not under Article 56 EC. Referring to Case C-326/07 *Commission v Italy* [2009] ECR I-2291, the Portuguese Republic considers that the special rights enjoyed by the State are capable of affecting only those shareholders who own a proportion of the share capital of EDP which gives them a definite influence over the company's management.

On the assumption — which the Portuguese Republic does not accept — that the provisions at issue are capable of having a restrictive effect on the free movement of capital, the Portuguese Republic argues that such an effect is hypothetical and very tenuous and that, in any event, it is no more than the unavoidable consequence of any restriction on freedom of establishment and does not warrant a separate and independent examination of the national provisions at issue under Article 56 EC.

- ³⁸ Furthermore, the Portuguese Republic claims that the Commission, by not carrying out any analysis of the said national provisions in the light of the arguments advanced by the Portuguese State on the basis of Article 86(2) EC, has significantly failed to discharge its obligation in relation to the burden of proof imposed on it by Articles 226 EC and 86(2) EC.

Findings of the Court

— The applicability of Articles 56 EC and 43 EC

- ³⁹ The Commission considers that the alleged failure to fulfil obligations must be examined under both Article 56 EC, relating to the free movement of capital, and Article 43 EC, concerning freedom of establishment. On the other hand, the Portuguese Republic considers that the national provisions at issue in the present action must be analysed exclusively in the light of Article 43 EC and not under Article 56 EC.

- 40 As regards the question whether national legislation falls within the ambit of one or other of those fundamental freedoms, it is clear from well established case-law that the purpose of the legislation concerned must be taken into consideration (see, in particular, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, and Case C-326/07 *Commission v Italy*, paragraph 33).
- 41 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 that company's decisions and to determine its activities fall within the ambit *ratione materiae* of Article 43 EC on freedom of establishment (see, in particular, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22, and Case C-326/07 *Commission v Italy*, paragraph 34).
- 42 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 company 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 (see, in particular, Case C-112/05 *Commission v Germany* [2007] ECR I-8995, paragraph 18 and case-law cited, and Case C-326/07 *Commission v Italy*, paragraph 35).
- 43 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 (Case C-326/07 *Commission v Italy*, paragraph 36).

⁴⁴ It must be stated that, in this action for failure to fulfil obligations, it is not inconceivable that the national provisions at issue affect all shareholders and potential investors and not only those shareholders capable of exerting a definite influence on the management and control of EDP. Consequently, the contested provisions must be examined in the light of both Articles 56 EC and 43 EC.

— The failure to fulfil obligations under Article 56 EC

⁴⁵ It should be noted, at the outset, that, according to consistent case-law, Article 56(1) EC generally prohibits restrictions on movements of capital between Member States (see, *inter alia*, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, paragraph 18 and case law cited; *Commission v Germany*, paragraph 17; and Case C-171/08 *Commission v Portugal*, paragraph 48).

⁴⁶ In the absence of an EC Treaty definition of ‘movement of capital’ within the meaning of Article 56(1) EC, the Court has acknowledged the indicative value of the nomenclature of movements of capital set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article [67] of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5). Thus, the Court has held that movements of capital within the meaning of Article 56(1) EC include in particular ‘direct’ investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and ‘portfolio’ investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management

and control of the undertaking (see Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*, paragraph 19 and case-law cited; *Commission v Germany*, paragraph 18; and Case C-171/08 *Commission v Portugal*, paragraph 49).

⁴⁷ Concerning those two forms of investment, the Court has stated that national measures must be regarded as ‘restrictions’ within the meaning of Article 56(1) EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital (see Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, paragraph 45; Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraph 40; Case C-463/00 *Commission v Spain*, paragraphs 61 and 62; Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, paragraphs 47 and 49; Case C-174/04 *Commission v Italy* [2005] ECR I-4933, paragraphs 30 and 31; Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*, paragraph 20; *Commission v Germany*, paragraph 19; and Case C-171/08 *Commission v Portugal*, paragraph 50).

⁴⁸ In relation to the 5 % voting ceiling, the Portuguese Republic disputes the classification of Article 14(3) of EDP’s articles of association as a national measure within the meaning of the case-law cited in the preceding paragraph, maintaining that those articles of association are private. Consequently, according to the Portuguese authorities, the provision at issue does not constitute a State measure and therefore is outside the scope of Articles 43 EC and 56 EC.

⁴⁹ In that regard, it must be observed that it is indeed the case that the CCC does no more than admit the possibility of providing for a restriction on votes in respect of shares of a particular category under EDP’s memorandum and articles of association and that it is specifically under provisions of EDP’s articles of association, adopted pursuant to that legislation, that those shares were created and allocated to the Portuguese State.

- 50 However, it remains the case, as is clear from the documents before the Court, that that provision of the articles of association was adopted before the end of the first phase of EDP's privatisation, in other words at a period when the Portuguese State held the predominant share of EDP's share capital. After the determination of that voting ceiling and at the time when that State was about to hold a smaller proportion of the share capital, Article 15(3) of the LQP created for the State a specific right of veto over, in particular, resolutions to amend EDP's articles of association. Accordingly, the provision concerning the voting ceiling, included in Article 14(3) of the articles of association, can now no longer be removed by the shareholders without the consent of the State.
- 51 In those circumstances, it must be found that it was the Portuguese Republic itself which, first, through the intermediary of its legislature, authorised the creation of golden shares in the share capital of EDP and, second, in its capacity as a public authority, decided, pursuant to Article 15(3) of the LQP, to introduce golden shares in EDP, to allocate them to the State and to define the special rights which they confer.
- 52 Moreover, it must also be stated that the creation of those golden shares is not the result of a normal application of company law since, in derogation from the CCC, those shares are intended to remain the property of the State and are thus not transferable.
- 53 Consequently, the exemption enjoyed by the Portuguese State from the 5% voting ceiling must be regarded as being attributable to the State and, consequently, within the scope of Article 56(1) EC.

- 54 As regards the restrictive nature of the Portuguese State's holding of golden shares in the share capital of EDP to which special rights attach, which is provided for in the national legislation — in part, in conjunction with EDP's articles of association — such shares are liable to deter operators from other Member States from investing in the capital of that company.
- 55 In relation to the right of veto, it is clear from Article 13(1) of Decree-Law No 141/2000 that the adoption of a large number of significant resolutions relating to EDP is subject to the approval of the Portuguese State. In that regard, it must be pointed out that the State's vote in favour is required for, inter alia, any resolution involving an amendment of EDP's articles of association, so that the influence of the Portuguese State on EDP cannot be reduced except with the consent of that State itself.
- 56 Consequently, that right of veto, in so far as it confers on that State an influence on the management and control of EDP which is not justified by the size of its shareholding in that company, is liable to discourage operators from other Member States from making direct investments in EDP since they could not be involved in the management and control of that company in proportion to the value of their shareholdings (see, in particular, *Commission v Germany*, paragraphs 50 to 52, and Case C-171/08 *Commission v Portugal*, paragraph 60).
- 57 Similarly, the right of veto at issue may have a deterrent effect on portfolio investments in EDP in so far as a possible refusal by the Portuguese State to approve an important decision, proposed by the organs of that company as being in the company's interests, is in fact liable to depress the value of the shares of that company and thus reduce the attractiveness of an investment in such shares (see, to that effect, Joined

Cases C-282/04 and C-283/04 *Commission v Netherlands*, paragraph 27, and Case C-171/08 *Commission v Portugal*, paragraph 61).

58 As regards the fact that the exercise by any shareholder of the voting rights carried by his holding of ordinary shares is restricted to a 5% ceiling, save only that the Portuguese State is not subject to that restriction, it is clear that the voting rights attaching to shares constitute one of the principal ways whereby the shareholder can actively participate in the management of an undertaking or in its control. Consequently, any measure which is designed to prevent those rights being exercised or to subject them to qualifications may deter investors in other Member States from acquiring stakes in the undertakings concerned and constitute a restriction on the free movement of capital (see the judgment of 14 February 2008 in Case C-274/06 *Commission v Spain*, paragraph 24). Furthermore, a voting ceiling is an instrument which is liable to limit the ability of direct investors to participate in a company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, and which diminishes the interest in acquiring a stake in the capital of a company (*Commission v Germany*, paragraph 54).

59 As regards the right to appoint a director, the Portuguese Republic claims, first, that, under an updated interpretation of the CCC, that right, provided for in Article 15(1) of the LQP and Articles 13(2) and (3) of Decree-Law No 141/2000, must be understood as the ability to appoint a member of the general supervisory board and therefore a supervisor. The Commission does not accept that interpretation.

60 The Portuguese Republic's argument cannot be accepted. Even if such an 'updated' interpretation were correct, that Member State has not, however, adduced any evidence for that interpretation, which is disputed by the Commission. First, there is no

support for that interpretation in the wording of the provisions referred to in the preceding paragraph. Both Article 15(1) of the LQP and Article 13(2) and (3) of Decree-Law No 141/2000 provide expressly for the appointment of a director and not a supervisor. Secondly, the Portuguese Republic has not shown why it should necessarily follow from the amendment of certain rules of the CCC governing the Portuguese law relating to commercial companies that the ability to appoint a 'director' in accordance with those provisions should be understood as the ability to appoint a 'supervisor', given that those provisions are related to privatisations, in particular, in the energy sector and therefore fall within the ambit of public law, while the wording of those provisions has not been expressly amended.

⁶¹ In any event, the fact that the general supervisory board is not a decision-making body, but a monitoring body, is not such as to undermine the position and influence of the public authorities concerned. While Portuguese company law assigns to the supervisory board the task of monitoring a company's management, it confers significant powers on that body for the purpose of performing that task. Furthermore, as the Commission has pointed out, approval by the general supervisory board is necessary, under Article 17(2) of EDP's articles of association, for a number of transactions, including, in addition to the acquisition and disposal of assets, rights or shares of significant monetary value, the opening or closure of places of business or significant parts of places of business, the establishment or termination of strategic partnerships or other forms of lasting cooperation, the division, merger or conversion of the company, and amendments of its articles of association, including a change of registered office and an increase in share capital (see, to that effect, *Commission v Germany*, paragraph 65).

⁶² That said, it is clear that the right to appoint a director constitutes a restriction on the free movement of capital since such a specific right constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities (see *Commission v Germany*, paragraph 61). While it is true that that facility can be conferred by legislation as a right of a qualified

minority, it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the State.

- ⁶³ By restricting the opportunity for shareholders other than the Portuguese State to participate in the company with a view to establishing or maintaining lasting and direct economic links with it such as to enable them to participate effectively in the management of that company or in its control, the right to appoint a director, provided for in Article 15(1) of the LQP and Article 13(2) and (3) of Decree-Law No 141/2000, is liable to deter direct investors from other Member States from investing in the share capital of that company.
- ⁶⁴ It follows that the right of veto over certain resolutions of EDP's general assembly, the exemption enjoyed by the Portuguese State from the 5 % voting ceiling and the right to appoint a director, in the event that the State has voted against the nominees successfully elected as directors, constitute restrictions on the free movement of capital within the meaning of Article 56(1) EC.
- ⁶⁵ Such a finding cannot be undermined by the arguments raised by the Portuguese Republic that the alleged logic underlying the judgment in *Keck and Mithouard* is applicable to the present case.
- ⁶⁶ In that regard, it should be noted that the national measures at issue are not comparable to the rules concerning selling arrangements which were found, in *Keck and Mithouard*, not to fall within the scope of Article 28 EC.

67 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, second, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter products to the market of the Member State of importation or to impede such access more than it impedes access by domestic products (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).

68 In the present case, while it is true that the restrictions at issue apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market (see Case C-463/00 *Commission v Spain*, paragraph 61 and case-law cited, and Case C-171/08 *Commission v Portugal*, paragraph 67).

69 Furthermore, the finding that those national provisions constitute restrictions on the free movement of capital cannot be called into question by the Portuguese Republic's argument to the effect that the special rights at issue have no effect on either direct investments or portfolio investments in EDP given that the shares in that company are among the most sought-after on the Lisbon Stock Exchange, a large number of those shares being in the hands of foreign investors.

- ⁷⁰ It is clear, as stated in paragraphs 56 and 58 of this judgment, that the national provisions at issue, to the extent that they create instruments liable to limit the ability of investors to participate in the share capital of EDP with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management or control of that company, diminish the interest in acquiring a stake in that capital (see, to that effect, *Commission v Germany*, paragraph 54).
- ⁷¹ That finding is not affected by the fact that the shareholders of EDP include a certain number of direct investors. That circumstance is not such as to cast doubt on the fact that, because of the provisions of national law at issue, direct investors from other Member States, whether actual or potential, may have been deterred from acquiring a stake in the capital of that company in order to participate in it with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, even though they were entitled to benefit from the principle of the free movement of capital and the protection which that principle affords them (see, to that effect, *Commission v Germany*, paragraph 55).
- ⁷² In the light of the foregoing, it must be held that the Portuguese State's holding of golden shares with the special rights which such shares confer on the shareholder constitutes a restriction on the free movement of capital for the purposes of Article 56(1) EC.

Whether the restrictions are justified

Arguments of the parties

⁷³ The Commission considers that restrictions such as those established by the national provisions at issue cannot be justified by any of the public interest objectives relied on by the Portuguese Republic and that, in any event, they infringe the principle of proportionality.

⁷⁴ As regards the need to guarantee the security of the Portuguese Republic's energy supply, the Commission states that such security does not fall within the scope of 'public security' within the meaning of the Treaty, as claimed by the Portuguese Republic. In that regard, the Commission considers that, notwithstanding the requirements of the case-law and, in particular, Case C-463/00 *Commission v Spain*, paragraphs 71 and 72, the Portuguese Republic has not shown the existence of a 'genuine and sufficiently serious threat to a fundamental interest of society' capable of justifying the rights at issue on grounds of public security and public policy.

⁷⁵ The Commission considers that the Portuguese Republic could respond to any actual threat to the security of the energy supply by using its regulatory regime under administrative law and not by means of the grant of special rights in the share capital of EDP, linked to golden shares, and thus without placing restrictions on the free movement of capital or on freedom of establishment.

- ⁷⁶ Nor does the Commission accept that EDP's activity falls within the scope of public service. In its view, supplies of electrical energy and gas are services in the public interest, but are not a public service. As regards such services in the public interest, the State has a responsibility as a guarantor, in other words those services can be provided by private entities. As regards EDP's activities, namely as distributor and last resort supplier, they are covered by the State's responsibility as guarantor, and as its essential instrument the State must ensure that its energy supply regulatory system operates effectively, rather than take a specific State shareholding in the companies concerned.
- ⁷⁷ The Commission also submits that, in any event, the provisions of national law at issue contravene the principle of proportionality. The exercise of the special rights at issue is not subject to any precise and objective criterion governing when the system set up is applicable, except that such rights must be used solely where grounds of national interest so require. Even if the objectives invoked by the Portuguese Republic were lawful, such discretionary powers would go beyond what is necessary to attain them.
- ⁷⁸ Lastly, the Commission denies the validity of the Portuguese Republic's argument on the applicability of Article 86(2) EC by stating that that argument disregards the context of that provision.
- ⁷⁹ The Portuguese Republic states that, even if the special rights held by the State in the share capital of EDP constitute restrictions on the freedoms referred to by the Commission, such restrictions are justified by overriding reasons in the public interest. First, referring to Case 72/83 *Campus Oil and Others* [1984] ECR 2727, the Portuguese Republic states that the national measures at issue are designed to guarantee the security of the country's energy supply, which constitutes a public security interest. The Portuguese Republic also finds justification in the fact that the special

rights held by the Portuguese State relate to activities which are subject to public service obligations and are therefore, in any event, justified under Articles 58(1)(b) EC and 46(1) EC.

- ⁸⁰ The Portuguese Republic adds that, since, as it currently stands, European Union law contains no rules or measures which provide adequate safeguards for the security of Member States' energy supplies, the Portuguese Republic retains both the power and the corresponding duty, imposed on it by national law and also by European Union law, to adopt national measures which can sufficiently guarantee the protection of that fundamental interest of society, with due regard for the rules of the Treaty, as *Campus Oil and Others*, makes clear.
- ⁸¹ Furthermore, the Portuguese Republic claims that those special rights are instruments which sufficiently protect the security of the energy sector in Portugal while respecting the principle of proportionality, since there are no other less restrictive methods which make it possible to prevent the governing bodies of a company such as EDP from adopting resolutions which may affect the regularity, security and continuity of the energy supply.
- ⁸² In addition, according to the Portuguese Republic, the national provisions at issue are required to enable EDP to carry out its task, of providing services of general economic interest, conferred on it by the Portuguese State pursuant to Article 86(2) EC. If those provisions were held to be contrary to Articles 43 EC and 56 EC, the application of those articles would hinder the provision of services of general economic interest, within the meaning of Article 86(2) EC, conferred on EDP. In any event, the fact that those national provisions conferring special rights on the Portuguese State remain in force does not affect trade within the European Union nor the interests of the European Union. Moreover, it is for the Commission to define the interest of the

European Union in the light of which an assessment should be made of any effect on trade which might be caused by the existence of the rights held by the Portuguese State in EDP, and consequently the Commission has not discharged the burden of proof imposed on it by Article 226 EC.

Findings of the Court

⁸³ According to settled case law, national measures which restrict the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see *Commission v Germany*, paragraphs 72 and 73 and case law cited, and Case C-171/08 *Commission v Portugal*, paragraph 69).

⁸⁴ As regards the derogations permitted under Article 58 EC, it cannot be denied that the objective invoked by the Portuguese Republic to ensure a secure energy supply in that Member State in case of crisis, war or terrorism may constitute a ground of public security (see Case C-274/06 *Commission v Spain*, paragraph 38, and Case C-171/08 *Commission v Portugal*, paragraph 72) and possibly justify an obstacle to the free movement of capital. The importance attached by Member States and the European Union to the protection of a secure energy supply can moreover be seen, for example, in Directive 2009/72/EC of the European Parliament and of the Council

of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

⁸⁵ However, it is undisputed that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, in particular, Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17, and Case C-171/08 *Commission v Portugal*, paragraph 73).

⁸⁶ In that regard, the Portuguese Republic has argued that such a threat, in the light of the crucial importance of energy in the form of electricity and natural gas to all contemporary economies and societies, does not have to be immediate. Given that each Member State is obliged to guarantee the security of a regular and uninterrupted supply of electricity and natural gas, the Portuguese Republic can legitimately equip itself with the means required to guarantee the fundamental interest of security of supply even if there is no imminent threat. In that regard, since the risk of serious threats to the security of energy supply cannot be excluded and since such threats are by definition sudden and, in the majority of cases, unforeseeable, it is the duty of the Member State concerned to ensure that adequate mechanisms are put in place to enable it to react rapidly and effectively to guarantee that the security of that supply is not interrupted.

- ⁸⁷ That argument is not entirely without merit. However, since the Portuguese Republic has done no more than raise that ground relating to the security of the energy supply, without stating clearly the exact reasons why it considers that the special rights at issue, considered either individually or as a whole, would make it possible to prevent such an interference with a fundamental interest of society, a justification based on public security cannot be upheld in the present case.
- ⁸⁸ Moreover, the Portuguese Republic's argument, to the effect that European Union law, as it currently stands, does not adequately guarantee the security of energy supply in Member States, a circumstance which compels the Portuguese Republic to adopt national measures which are sufficient to guarantee the protection of that fundamental interest of society, is of no relevance.
- ⁸⁹ Even were it accepted that, pursuant to provisions of European Union secondary legislation, a Member State has an obligation to guarantee the supply of energy within its territory, as is claimed by the Portuguese Republic, compliance with such an obligation cannot be relied on to justify any measure which is contrary in principle to a fundamental freedom.
- ⁹⁰ Moreover, as regards the proportionality of the provisions of national law at issue, it should be noted that, as correctly stated by the Commission, the exercise of the special rights which the holding of golden shares in the share capital of EDP confers on the Portuguese State is not subject to any specific and objective condition or circumstance, contrary to what is claimed by the Portuguese Republic.

- ⁹¹ Although Article 15(3) of the LQP states that the creation in the share capital of EDP of golden shares which confer special rights on the Portuguese State is subject to the condition, which, it may be added, is formulated in a rather general and imprecise manner, that grounds of national interest must so require, the fact nevertheless remains that neither that law nor EDP's articles of association lay down any criteria determining the specific circumstances in which those special rights may be exercised (see Case C-326/07 *Commission v Italy*, paragraph 51). The same finding applies to Article 15(1) of the LQP, in that, under that provision, the State's appointment of a director is subject to the condition, also formulated in a rather general and imprecise manner, of safeguarding the public interest.
- ⁹² Thus, such uncertainty constitutes serious interference with the free movement of capital in that it confers on the national authorities, as regards the use of such rights, a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued (see, to that effect, Case C-326/07 *Commission v Italy*, paragraph 52).
- ⁹³ Lastly, as regards the justification based on Article 86(2) EC, it must be stated that that provision, in conjunction with Article 86(1) EC, may be relied on to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to the provisions of the Treaty, to the extent that performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the European Union (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 52; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, paragraph 78; and Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 44).

⁹⁴ In the present case, it is clear, however, that that is not the purpose of the provisions laid down by the national legislation at issue in these infringement proceedings brought against the Portuguese Republic.

⁹⁵ As the Commission correctly states, those proceedings are not concerned with the granting of special or exclusive rights to EDP nor with the classification of EDP's activities as services of general economic interest, but with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares held by the Portuguese State in the share capital of EDP.

⁹⁶ It follows that Article 86(2) EC is not applicable to a situation such as that of the present case and cannot, therefore, be relied on by the Portuguese Republic as justification of the national provisions at issue to the extent that they constitute restrictions on the free movement of capital upheld by the Treaty.

⁹⁷ It must consequently be declared that, by maintaining for the Portuguese State and other public sector bodies special rights in EDP such as those provided for in the present case by the LQP Decree-Law No 141/2000 and EDP's articles of association, allocated in connection with the Portuguese State's golden shares in the share capital of EDP, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC.

The failure to fulfil obligations under Article 43 EC

⁹⁸ The Commission also seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under Article 43 EC, on the ground that the allocation of special rights to the Portuguese State, tied to the golden shares held by it, is liable to prevent other shareholders from having an effective influence on the decisions of EDP and, therefore, from determining EDP's activities.

⁹⁹ In that regard, it is sufficient to note that, in accordance with settled case-law, in so far as the national measures at issue entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered in paragraphs 45 to 72 of this judgment, to which they are inextricably linked. Consequently, since an infringement of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment (see, in particular, Case C-463/00 *Commission v Spain*, paragraph 86; Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*, paragraph 43, and Case C-171/08 *Commission v Portugal*, paragraph 80).

Costs

¹⁰⁰ 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 been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

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

- 1. Declares that, by maintaining for the Portuguese State and other public bodies special rights in EDP — Energias de Portugal, such as those provided for in this instance by Law No 11/90 of 5 April 1990 concerning the framework law on privatisations (Lei No 11/90 Lei Quadro das Privatizações), by Decree-Law No 141/2000 of 15 July 2000 approving the fourth phase of the re-privatisation of the share capital of EDP — Electricidade de Portugal SA, and by the articles of association of that company, allocated in connection with golden shares held by the Portuguese State in the share capital of that company, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC.**

- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]