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Case law of the European Court of Justice on “golden shares” of Member States in privatised companies: Comment on the ECJ decisions of 4 June 2002

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A. Introduction

In three decisions issued on 4 June 2002, the ECJ starkly circumscribed the permissibility under European law of special voting rights attaching to equity interests of Member States in privatised (initially public) undertakings, in addition to other means of exercising control over corporate decisions. These instruments are often subsumed under the term “golden shares”, even in those isolated cases in which the Member State’s particular rights are not linked to a position as shareholder.

Whereas two proceedings established violations of the EC Treaty by national regulations to which the Commission objected – C-367/98 (*Commission v Portugal*) and C-483/99 (*Commission v France*), the ECJ determined in Case C-503/99 (*Commission v Belgium*) that regulations concerning golden shares held by Belgium in private undertakings are compatible with EC law under certain conditions. The ECJ laid out in concrete terms the criteria against which state measures for exercising influence in privatised undertakings must be measured, particularly in view of Article 56 et seq. of the EC Treaty.² The ECJ set the benchmark according to which similar forms of special voting rights and comparable instruments are to be judged in the future. At the same time, it made a useful contribution to clarifying the scope of the free movement of capital in general, the extent of which up to now was decidedly less precise than that of the remaining fundamental principles.

In addition to a survey of the contents of the decisions (part B), the repercussions of the judgments will be weighed with particular regard to the validity of the so-called “Volkswagen law”³ in Germany (part C).

B. Decisions of the ECJ

1. The essential fact common to each of the three decisions is that they all concern cases in which Member States allowed the possibility of exerting influence on shareholder structure as well as other corporate decisions by means of domestic regulations. In the particular case of the Belgian regulation

contested by the Commission, the ECJ had to decide a matter in which the golden shares of the Belgian state in the *Société nationale de transport par canalisation* as well as the *Société de distribution du gaz SA* were the subject of dispute. The Belgian regulation essentially demanded that the responsible minister be given advance notice of any transfer, use as security or change in the intended destination of the company’s system of lines and conduits which are used or are capable of being used as major infrastructures for the domestic conveyance of energy products. The minister would thereupon be entitled to oppose such operations if he considers that they adversely affect domestic interests in the energy sector.

In *Commission v France*, the ECJ was confronted with a decree that allowed the French state by means of a golden share to secure influence over the *Société nationale Elf-Aquitaine* in such a manner as to require prior approval from the minister for economic affairs when a person, acting alone or in conjunction with others, exceeded a certain ceiling (one-tenth, one-fifth, or one-third) of the capital of or voting rights in a company.⁴

In contrast with the circumstances in both of the other cases, the Portuguese regulation objected to by the Commission provided for, *inter alia*, restrictions on the acquisition of shares by foreign investors within the framework of privatisation.⁵

2. Concurring with the Commission, the ECJ determined that all three cases touched upon the scope of the free movement of capital under Article 56 et seq. of the EC Treaty. While once again avoiding a definition of its own for this fundamental principle, the Court manages – as it has in the past⁶ – with reference to Council Directive 88/361/EEC,⁷ together with the nomenclature annexed to it, to come to the conclusion that the disputed regulations fall under the concept of the movement of capital and payments in Article 53(1) of the EC Treaty. In accordance with Annex I, capital movements comprise, *inter alia*, direct investments which are characterised among other things by the possibility of actually taking part in the control and administration of a company.⁸

The central point of the Court’s remarks is the problem of justifying these restrictions on the free movement of capital.

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¹ ECJ 4 June 2002 – C-367/98 – *Commission v Portugal* (hereinafter *Portugal*), reprinted in this edition at 285.

² Article 73 b et seq. of the EC Treaty (old version).

³ Gesetz über die Überführung der Anteilsrechte an der Volkswagen Gesellschaft mit beschränkter Haftung in private Hand (law on the transfer of equity rights in Volkswagen GmbH to private individuals) of 21 July 1960, BGBl. I 1960, at 585, last amended by law of 31 July 1970, BGBl. I 1970, at 1149.

⁴ ECJ 4 June 2002 – C-483/99 – *Commission v France* (hereinafter *France*), reprinted in this edition at 281, paras 9 and 10.

⁵ *Portugal* (*supra* note 1), paras 9 and 10.

⁶ ECJ 16 March 1999 – C-222/97 – *Trummer and Mayer* [1999] ECR I-1661, para. 21.

⁷ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, at 5).

⁸ ECJ 4 June 2002 – C-503/99 – *Commission v Belgium* (hereinafter *Belgium*), paras 36-38, reprinted in this edition at 288; *France* (*supra* note 4), paras 35-37; *Portugal* (*supra* note 1), paras 36-38.

In the opinion of the ECJ, a justification in principle presupposes the existence either of grounds in the sense of Article 58(1) of the EC Treaty or of overriding requirements of the general interest. Moreover, the regulations in question would have to satisfy the requirement of proportionality.⁹ On the question of whether a public interest in the continuity of power supplies is to be assumed in the cases of Belgium and France, the ECJ refers to its earlier decision in *Campus Oil* and its argument in that case relating to justifications for the impairment of the free movement of goods.¹⁰ However, one must take into account that the criterion of public security must be strictly interpreted, as a derogation to the principle of the free movement of capital, and that measures limiting this freedom can only be justified in the event of a genuine and sufficiently serious threat affecting a fundamental interest of society.¹¹

In the case of the Belgian regulation, the ECJ then affirms the necessity for the special rights of the Belgium state in order to ensure continuity in the energy supply in situations of a genuine and serious threat. It stresses that the ministerial intervention right vis-à-vis an advance notice requirement takes the undertaking's decision-making autonomy into account and that the requirement of strict time-limits for interventions, as well as the substantive restriction of objections to measures in connection with strategic assets of the company concerned, curb the effects of the restrictive measures.¹²

In contrast, the ECJ rejects the justification behind the disputed French regulations. Both with regard to the prior authorisation for certain stock acquisitions exceeding the ceilings and to the right to oppose the transfer of certain assets or their use as security, these gave too great a discretion to the decision makers, given the lack of sufficiently precise and objective criteria for authorisation and consent. This violates the principle of legal certainty, since the extent of the rights and obligations of the individual concerned cannot be ascertained under Article 56 of the EC Treaty.¹³ The regulations exceeded what was necessary for ensuring a minimum supply of petroleum products.

The ECJ also denied the justification in the case of the Portuguese regulation. Unlike the other two decisions, Portugal could not plead any permissible ground for justification in the view of the Court. The general financial interests alleged by Portugal did not fall under any of the grounds listed in Article 58(1) of the EC Treaty.¹⁴ The ECJ affirms the directly discriminatory effect of the disputed regulations to the extent to which they concern only foreigners. Portugal cannot rely on the fact that in 1994 it had already committed itself on a political level no longer to impose the discriminatory regulations. The incompatibility of provisions of a Member State with

treaty provisions can be eliminated only by means of binding domestic provisions having the same legal force. This is not the case with the political obligation made here.¹⁵

3. The criteria for determining the permissibility of special rights for Member States in privatised undertakings, as established by the ECJ has established in these three decisions, can therefore be summarised as follows:

– First comes an examination of the extent to which the Member State regulations concerned fall within the ambit of the free movement of capital and payments. For lack of a definition in the EC Treaty, this is to be viewed in light of Directive 88/361, together with the nomenclature found in its annex.

– With the next question about a limitation on the scope of Article 56 of the EC Treaty, the ECJ stresses that the mere possibility that regulations keep investors from other Member States from acquiring shares is sufficient to presume a restriction on the free movement of capital. It does not depend on a discriminatory effect of the regulation.¹⁶

– In addition to those grounds provided in Article 58(1) of the EC Treaty, possible justifications for restrictions on free movement also include unwritten grounds of overriding requirements of the general interest.

– The pursuit of permissible justifications must accord with the principle of proportionality. An examination of proportionality essentially concerns the appropriateness and necessity of the disputed regulation for the implementation of an intended objective.¹⁷ Insofar as these regulations comprise a system of prior notification to authorities, such a system must be based on objective, non-discriminatory criteria known to the undertakings in advance, with recourse to the courts available to all individuals affected by the restrictive measures.¹⁸

4. The ECJ avoids a detailed consideration of possible impairments of the freedom of establishment under Article 43 et seq. of the EC Treaty¹⁹ by the national regulations discussed with reference to the fact that, in the cases of Portugal and France, restrictions on the freedom of establishment are direct consequences of and inseparably linked to the obstacles to the movement of capital,²⁰ and that, in the case of Belgium, possible restrictions on the freedom of establishment are justified for the same reasons as the restrictions on the movement of capital.²¹

It is amazing not only that the ECJ deviates in the outcome of its decisions from the opinions of Advocate General Colomer, but beyond that that it dedicates hardly more than a few words to his arguments,²² in particular on the problem of

⁹ *Belgium* (supra note 8), para. 45; *France* (supra note 4), para. 45; *Portugal* (supra note 1), para. 49.

¹⁰ ECJ 10 July 1984 – 72/83 – *Campus Oil and Others* [1984] ECR 2727, paras 34 and 35.

¹¹ *Belgium* (supra note 8), para. 47; *France* (supra note 4), para. 48.

¹² *Belgium* (supra note 8), paras 49 and 50.

¹³ *France* (supra note 4), paras 50-53.

¹⁴ *Portugal* (supra note 1), para. 52.

¹⁵ *Portugal* (supra note 1), paras 40 and 41.

¹⁶ *France* (supra note 4), para. 41; *Portugal* (supra note 1), para. 45.

¹⁷ *Belgium* (supra note 8), para. 45; *France* (supra note 4), para. 45; *Portugal* (supra note 1), para. 49.

¹⁸ *France* (supra note 4), para. 46; *Portugal* (supra note 1), para. 50.

¹⁹ Article 52 et seq., old version.

²⁰ *France* (supra note 4), para. 56; *Portugal* (supra note 1), para. 56.

²¹ *Belgium* (supra note 8), para. 59.

²² For a more detailed discussion, see also *Ruge*, Goldene Aktien und

Article 295 of the EC Treaty.²³ The ECJ thereby prevents the three Member States from relying on Article 295 on the grounds that the system of property ownership does not justify the impairments by Member States that would result from privileges embodied in share certificates in privatised undertakings, and/or from a system of official authorisation as in the case of the Portuguese regulation.

C. Overview

The three decisions of the ECJ inject new life into the ongoing theme in European law of special rights of individual Member States in privatised undertakings. From now on, such regulations must be measured against the criteria established by the ECJ. Additional proceedings alleging similar treaty violations have been pending even since the year 2000;²⁴ the ECJ will use these cases to refine the criteria it has established up to this point. Moreover, the outcome of the three test cases dealt with here will animate the Commission to conduct additional examinations.

The meaning of the decisions is at present a topic of discussion in Germany, in particular for the so-called "Volkswagen law".²⁵ Article 3(5) of the law limits the voting quota of Volkswagen AG shareholders to the number of votes granted to shares in the total nominal amount of 20 per cent of the share capital, even if an individual shareholder should hold more than 20 per cent of the shares. Moreover, for decisions taken at the general shareholders' meeting, which ordinarily require a three-fourths majority in accordance with company law, the law provides in § 4(3) a requirement of a four-fifths majority. The federal state of Lower Saxony, which holds about 20 per cent of the shares in the Hannoversche Beteiligungsgesellschaft mbH,²⁶ thereby ensures an extremely strong position for itself vis-à-vis investor takeovers. Under § 4(1) of the law, Lower Saxony also appoints two members to the supervisory board as long as it holds shares, and in this manner it consistently forms the majority, together with members from the employee side.

EU Commissioner Frits Bolkestein has already announced that the Volkswagen law as well as additional regulations conferring special rights in other Member States are presently under examination. The first reactions from the German side took this to mean that the legal position which the law confers to the state of Lower Saxony is not comparable to the Belgian, Portuguese and French regulations objected to by the Com-

mission and therefore that there is no visible need for action.²⁷ In fact, the machinery introduced by the Volkswagen law differs from circumstances which the ECJ had to examine. On the one hand, the Volkswagen law provides neither for a duty to notify state agencies nor for approval or opposition requirements for certain sales of shares. Thereby the transfer of shares is, in principle, not subject to restrictions without prejudice to the portion of the capital shares involved. On the basis of the ECJ's argumentation in the cases mentioned, there does not necessarily appear to be a violation of the free movement of capital. However, the Volkswagen law does fix maximum voting rights for shares in Volkswagen AG. Since the amendment of § 134(1) sentence 4 of the Aktiengesetz (AktG, law on companies) by the KonTraG,²⁸ rights of this sort are by statutory regulation in principle only permissible for publicly traded companies not listed on the stock exchange.

If one takes as a basis the criteria established by the ECJ for determining the permissibility of special rights of Member States with regard to privatised undertakings, then it is first questionable whether the Volkswagen law falls within the scope of the free movement of capital and payments contained in Article 56 et seq. of the EC Treaty whatsoever. The Volkswagen law must likewise be measured against Directive 88/361/EEC and its associated nomenclature. As mentioned, the free movement of capital covers direct investments which could possibly result in actual participation in the administration of a company or control over it.

In fact, the limits on voting rights regulated by the Volkswagen law as well as the provision relating to the composition of the supervisory board do not completely prevent the possibility for third party investors to participate in the control and administration of the corporation. However, in cases of higher equity interests, these possibilities are out of balance with voting quota, of which use can be made and which therefore could be deemed as restrictions on the free movement of capital. The fact that the regulations of the Volkswagen law do not discriminate in their application to investors from Germany and other Member States cannot be an argument in the wake of these three judgments. The ECJ regards each regulation as a restriction on the free movement of capital preventing the acquisition of shares in the undertaking concerned and thereby keeping parties from other Member States from investing in the undertaking's capital.²⁹ Making matters more difficult is the fact that the federal government itself stigmatised caps on voting rights as an impairment of the free movement of capital in an explanatory statement to the KonTraG since they prevented takeovers and thus that the "takeover fantasy" is absent.³⁰

Therefore, if one wanted to presume a restriction on the free movement of capital through the Volkswagen law, as some have advocated, then it must be considered whether the rea-

EG-Recht, [2002] EuZW 423.

²³ Corresponds to Article 222 of the EC Treaty (old version): "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership".

²⁴ These include cases brought by the Commission against Spain (C-463/00) and Great Britain (C-98/01).

²⁵ "Brüsseler Kommission prüft VW-Gesetz", FAZ of 6 June 2002, at 14; "Die Politiker stehen in Treue fest zum VW-Gesetz", FAZ of 14 June 2002, at 20; on the compatibility of the Volkswagen law with EC law, see also Endell, Volkswagen im Angebot – VW-Gesetz bietet keinen dauerhaften Schutz vor feindlicher Übernahme, [2000] NZG 1160; Ruge (*supra* note 22), at 423 et seq.; and Krause, Von "goldenen Aktien", dem VW-Gesetz und der Übernahmerichtlinie, [2002] NJW 2749.

²⁶ In an interest of simplifying matters, a presentation of the precise ownership relationships is not gone into here.

²⁷ "Bundesregierung ist nicht überrascht", FAZ of 5 June 2002, at 15; "EU-Richter setzen Maßstäbe für 'Goldene Aktien'", available online at: www.ftd.de/vw-gesetz (visited 17 September 2002).

²⁸ Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (law on control and transparency in the area of undertakings), BGBl. I 1998, at 786.

²⁹ France (*supra* note 4), para. 41; Portugal (*supra* note 1), para. 45.

³⁰ BT-Drucks. 13/9712, at 20.

sons put forth by the ECJ enable a justification of the Volkswagen law. Possibilities include the grounds listed in Article 58(1) of the EC Treaty or an overriding requirement of the general interest. The regional interests that gladly lobbied for the Volkswagen law might hardly withstand an examination by the ECJ, however. Moreover, the justification is additionally complicated by the fact that the ECJ once again denied general economics interests as a fit ground for justification in the case of Portugal.³¹ After all that, justifications able to withstand the Court's scrutiny will be found only with difficulty.

Common wisdom substantially attributes the failure of the takeover directive last year to the problem of "golden shares". It is widely known that Germany's objection to the directive was based, *inter alia*, upon the fact the directive exposed German undertakings to the danger of acquisition by foreign investors. This view is not acceptable, given the protective mechanisms often existing in other Member States through special voting rights. The bottom is at least partially knocked out of this argumentation via the decisions discussed here. It will be curious to see how additional discussion will affect the Commission's new draft for the takeover directive.³²

D. Conclusion

The three decisions commented on here have punched a hole in the system still perpetuated by Member States to maintain influence over privatised former state enterprises exposed to the free play of the market powers. Even in the extremely sensitive area of energy supply, "cashing up" may not be gilded by the privatising state, as has been the case up to now, through an unchecked retention of power on the part of Member States by means of self created special rights. In this case, the task of separating the wheat from the chaff is certain to remain an important task of the ECJ.

³¹ Portugal (*supra* note 1), para. 52.

³² The Commission's new draft of 2 October 2002 is not applicable to special voting rights for Member States under domestic law; available at europa.eu.int/comm/internal_market/en/company/company/news/index.htm (visited 14 October 2002).

ECJ 4 June 2002 – C-483/99 – Commission v France Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC) – Failure by a Member State to fulfil its obligations – Rights attaching to the 'golden share' held by the French Republic in Société Nationale Elf-Aquitaine

By maintaining in force Article 2(1) and (3) of Decree No 93-1298 of 13 December 1993 vesting in the State a 'golden share' in Société Nationale Elf-Aquitaine, according to which the following rights attach to the 'golden share' held by the French Republic in that company:

(a) any direct or indirect shareholding by a natural or le-

gal person, acting alone or in conjunction with others, which exceeds the ceiling of one tenth, one fifth or one third of the capital of, or voting rights in, the company must first be approved by the Minister for Economic Affairs;

(b) the right to oppose any decision to transfer or use as security the assets listed in the annex to the Decree - the assets in question being the majority of the capital of four subsidiaries of that company, namely Elf-Aquitaine Production, Elf-Antar France, Elf-Gabon SA and Elf-Congo SA

the French Republic has failed to comply with its obligations under Article 73b of the EC Treaty (now Article 56 EC).

Facts: The Commission contended that certain provisions of French law relating to the acquisition of shares in privatised undertakings were incompatible with Community law. The French Government took the view that the challenged restrictions relate to companies in the energy sector and that Community law does not preclude Member States from ensuring the continuity of their energy supplies. Subsequent amendments to the legislation concerned were deemed inadequate by the Commission, which therefore brought an action before the Court. The Court granted Denmark, Spain and the United Kingdom leave to intervene in support of the form of order sought by France.

Extract from the decision: "(...)"

Legal framework

Community law

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

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

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

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

(...)

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

5. Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty¹ contains a nomenclature of the capital movements referred to in Article 1 of that directive. In particular, it lists the following movements:

I - Direct investments

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

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

(...)

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

Investments of all kinds by natural persons or commercial, industrial or

¹ OJ 1988 L 178, at 5.