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Press and Information

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Judgment of the Court of Justice in Case C-463/04 and C-464/04

Federconsumatori and Others v Comune di Milano

**A PRIVILEGE RESERVED TO PUBLIC BODIES WHICH ALLOWS THEM TO
EXERCISE A LEVEL OF CONTROL IN A COMPANY LIMITED BY SHARES
DISPROPORTIONATE TO THEIR SHAREHOLDING INFRINGES COMMUNITY
LAW**

Italian legislation giving a public body the ability directly to appoint the members of the board of directors is liable to deter investors from other Member States

AEM SpA (Azienda Elettrica Milanese SpA) is a company limited by shares set up by the Commune of Milan operating in the public service sector as a distributor of gas and electricity. When it was listed on the stock exchange in 1998, that commune held 51% of its capital. Continuing the company's privatisation, the commune decided to reduce its shareholding to 33.4%. Against that background, the right for the commune directly to appoint up to one quarter of the directors was inserted in AEM's articles of association. In addition, the articles confer on it the right to participate in the election on the basis of lists of the directors not directly appointed by it.

The combined effect of the right of direct appointment and the right to participate in the list system enables the Commune of Milan to retain an absolute majority of appointments to AEM's board of directors, even though it holds, subsequent to the transfer of shares, only a relative majority of its capital.

Federconsumatori, Adiconsum, AEM, ADOC and other associations of consumers and small shareholders challenged the decisions of the municipal council designed to enable the Commune of Milan to retain the majority of the appointments to AEM's board of directors. They challenge that privileged position because it discourages potential investors from purchasing shares in AEM and depreciates their holdings in the company.

The Tribunale amministrativo regionale della Lombardia requests the Court of Justice to give a ruling on the compatibility with Community law of the Italian legislation on which that privileged position is based.¹

¹ In particular, Article 2449 of the Italian Civil Code provides that the articles of association of a company limited by shares may confer on a public shareholder the right directly to appoint one or more directors, and Law 474/1994

The Court observes that the questions referred to it are based on the premise that only public shareholders may enjoy such a privileged position. It states that the Italian legislation thus enables public shareholders to participate in a more significant manner in the activity of the board of directors of a company limited by shares than their status as shareholders would normally allow. In that way they may exercise influence exceeding their levels of investment; that constitutes a restriction on the movement of capital.

That privileged position is made possible, first, by the Italian legislation which does not provide for any limit as to the number of directors who may be directly appointed by the public shareholder and, secondly, by the participation of such a shareholder in the election on the basis of lists of directors not directly appointed by it.

By giving public shareholders an instrument to restrict the possibility of the other shareholders participating effectively in the management of the company, the Italian legislation is liable to deter direct investors from other Member States.

The fact that that measure is included in the provisions of the Civil Code and the right of appointment requires a decision of the general meeting of the shareholders does not take away the restrictive character of the Italian legislation.

Although such a right of appointment need not be permanent, since it may be amended by a subsequent revision of the articles of association, it is still relatively highly protected since amendment of the articles requires a qualified majority of the shareholders.

Accordingly, even if a public shareholder no longer holds the majority necessary to appoint the directors directly, it may nevertheless continue to enjoy such a right.

In that way, as long as the Comune di Milano retains its 33.4% shareholding in AEM, it is impossible for any investor to repeal its right of direct appointment of directors.

The Court therefore declares that the principle of the free movement of capital must be interpreted as precluding national legislation such as the Italian provision.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: BG FR CS DE EN HU IT NL PL SK GR

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-463/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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on privatisations provides that that shareholder may participate in the election on the basis of lists of the directors not directly appointed by it.