Press and Information

Court of Justice of the European Union
PRESS RELEASE No 74/10
Luxembourg, 8 July 2010

Judgment in Case C-171/08
Commission v Portugal

The Portuguese State's holding of 'golden' shares in Portugal Telecom constitutes an unjustified restriction on the free movement of capital

Those golden shares grant the Portuguese State influence over decision-making in the company which is liable to discourage investments from operators in other Member States

Portugal Telecom (PT) was created in 1994 following the restructuring of the Portuguese telecommunications sector. As of 1995 the company was privatised in five successive phases. Under Portuguese legislation on privatisation, the articles of association of companies which were due to be privatised could, in exceptional cases and where grounds of national interest so required, provide for golden shares which are intended to remain the State's property. Irrespective of their number, that type of share aimed to 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.

PT's articles of association were adopted in 1995, at a time when the Portuguese State held 54.2% of the share capital. They provide that the share capital is made up approximately of a billion ordinary shares and 500 special ('golden') shares. The majority of the latter must be held by the State or other public sector shareholders and certain privileges are attached to those shares, in the form of special rights. Following its privatisation, all of the public shareholdings in PT were sold, except for the 500 golden shares.

By its action, the Commission challenges the special rights which the Portuguese State holds in Portugal Telecom in connection with its golden shares.

In today's judgment, **the Court of Justice declares that, by maintaining in Portugal Telecom special rights, allocated in connection with golden shares, Portugal has failed to fulfil its obligations pursuant to the free movement of capital**.

First, the Court considers that the exercise of the special rights in PT conferred on Portugal by the golden shares constitutes a restriction on the free movement of capital.

The Court notes that the approval of a considerable number of important decisions concerning PT[1] depends on the agreement of the Portuguese State, given that those decisions cannot be adopted without the majority of the votes conferred on golden shares. Moreover, a majority of the votes conferred on golden shares is required, in particular, for any decision amending PT's articles of association, with the result that the influence of the Portuguese State on PT can be weakened only with the consent of the State itself.

In those circumstances, the holding of golden shares confers on Portugal an influence on the management of PT which is not justified by the size of its shareholding and is liable to discourage operators from other Member States from making direct investments in PT. That is because they could not be involved in the management and control of that company in proportion to the value of their shareholdings. In addition, any refusal by the State to approve an important decision for the

[1] Such as, for example, the acquisition of shareholdings exceeding 10% of the share capital of the company, the management of the company or defining the general principles of its policy in respect of the acquisition and disposal of shareholdings in companies or groups, where the general meeting's prior authorisation is required.

company is capable of depressing the value of its shares and thus deterring shareholders from investing in the company.

Second, the Court declares that the contested restriction cannot be allowed on the basis of the justifications invoked by Portugal.

In that regard, the Court notes that national measures which restrict the free movement of capital may be justified, in particular, on the grounds set out in the EC Treaty (including public security), provided that they are appropriate to secure the attainment of the objective which they pursue and are proportionate to that objective.

Thus, as regards the objective invoked, namely to ensure the security of the availability of the telecommunications network in case of crisis, war or terrorism, the Court recognises that such an objective may constitute a ground of public security and justify a restriction on the free movement of capital. Nonetheless, the Court notes that public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. However, the Court points out, in this regard, that Portugal merely raised that ground without stating how the holding of golden shares would make it possible to prevent such an interference with public security. Consequently, such a justification cannot be upheld.

Finally, as regards the proportionality of the restriction at issue, the Court finds that the exercise of the special rights by the State is not subject to any specific and objective condition or circumstances. Even though the legislation on privatisations made the creation of golden shares subject to the condition that grounds of national interest so require, neither that legislation nor PT's articles of association lay down any criteria determining the circumstances in which those special powers may be exercised. Thus, such uncertainty constitutes serious interference with the free movement of capital. It confers on the national authorities a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.
Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

The full text of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355

Pictures of the delivery of the judgment are available from "Europe by Satellite" ☎ (+32) 2 2964106