OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 13 February 2007 [1]

I — Introduction

1. The Volkswagen company, which is unquestionably associated more with the German economic miracle than with its grim national socialist origins, constitutes the most visible example of the success of the social market economy, a development model introduced in the Federal Republic of Germany after the Second World War by the minister Ludwig Erhard, [2] following the postulates of the so-called Freiburg School. [3]

2. In addition to their well-known technical qualities, a number of the models produced are part of the cultural heritage [4] of Germany and of all the countries on whose roads they have been driven, and they form one of the indelible images of the 1950s and 1960s in Europe and on the other side of the Atlantic. [5] It is therefore easy to understand how many citizens, filled with nostalgia for that golden era, regard the action for failure to fulfil obligations which the Commission has brought in relation to certain paragraphs of the Volkswagen Law [6] as more than a complaint about national legislation and as an attack on a symbol of the German way of life and a veritable modern legend.

3. Apart from those nostalgic reminiscences, this case may be numbered among those

1 — Original language: Spanish.

2 — Erhard held that post between 1949 and 1963, the year in which he succeeded Konrad Adenauer as chancellor.

3 — A group of professors centred around Walter Eucken, Franz Böhm, Hans Grossmann-Doerth and Leonhard Miksch, who, as a reaction against Nazism, insisted on the idea of freedom in the face of totalitarianism, not only in the economy but also in other areas of life; Hildebrand, D., *The Role of Economic Analysis in the EC Competition Rules*, Kluwer, 1998, The Hague, pp. 184 to 187.

4 — The Volkswagen has featured in many works of Pop Art and was the star of the Walt Disney film *The Love Bug*, directed in 1968 by Robert Stevenson, which was entitled *Ahí va ese bólido* in Spain, *Un amour de coccinelle* in France, and *Ein toller Käfer* in Germany where the film was extraordinarily successful, attracting five million viewers in its first eight months on release. There followed a series of films for cinema and television, culminating recently in 2005 in *Herbie: Fully Loaded*, directed by Angela Robinson.

5 — In 1958, a history of Volkswagen was published in English for the American market: Nitske, W.R., *The amazing Porsche and Volkswagen story*, Comet Press Books, New York.

6 — Law on the privatisation of equity in Volkswagen GmbH of 21 July 1960 (BGBl. I, p. 585, and BGBl. III, 641-1-1), as amended on 6 September 1965 (BGBl. I, 461) and 31 July 1970 (BGBl. I, p. 1149).

aimed at determining whether certain laws of the Member States which confer on the public authorities excessive rights in private companies, popularly known as golden shares, are compatible with the EC Treaty. However, I should point out in advance that there are notable differences in this case, which play a decisive role.

4. Specifically, the Commission complains about the following: the limitation of voting rights to 20% of the share capital where a shareholder holds in excess of that amount; the fact that the majority required to adopt resolutions is increased to more than 80%, whereas the Aktiengesetz [7] (German Law on public limited companies) provides for a majority of 75%; and the right of the Bund (federal State) and the Land of Lower Saxony each to appoint two members of the supervisory board of the company.

II — The legislative framework

A — *Community law*

5. Usually, the national measures whose validity has been called into question by the Commission are examined by the Court in the light of two of the fundamental freedoms laid down in the EC Treaty, namely the free movement of capital and the right of establishment. With regard to the former, Article 56(1) EC provides as follows:

'1. 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.'

6. For its part, the right of establishment is governed by the first paragraph of Article 43 EC, pursuant to which:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

7 — Of 6 September 1965, BGBl. I, p. 1089.

7. Given its importance to the assessment, it is also appropriate to refer to Article 295 EC:

'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'

8. Annex I to Directive 88/361/EEC [8] contains a nomenclature for classifying the capital movements referred to in Article 1. In particular, the annex lists 'Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links' (direct investments), [9] and 'acquisition by non-residents of domestic securities dealt in on a stock exchange' (portfolio investments). [10]

B — *German law*

9. The present action for failure to fulfil obligations certain provisions of the Law on public limited companies and of the law known as the Volkswagen Law are relevant.

1. The Law on public limited companies

10. Under Paragraph 134, as amended by the Law on the monitoring and transparency of companies (Gesetz zur Kontrolle und Transparenz im Unternehmensbereich), voting rights are exercised by reference to the par value of shares or, in the case of no par value shares ('Stückaktien'), the number of shares held. In the case of unquoted companies, that paragraph also provides that, where shareholders hold a number of shares, the articles of association may restrict their voting rights by fixing an absolute or progressive ceiling.

11. Pursuant to Paragraph 101(2), the right to appoint representatives on the supervisory board must be laid down in the articles of association and such right may be granted only to specified shareholders or to the holders of registered shares the transfer of which is subject to authorisation by the company. In addition, the provision restricts that right to one third of the number of members of the supervisory board appointed by the shareholders in accordance with the law or the articles of association. However, the final sentence of the paragraph explicitly provides that the special rules in that regard which are laid down in Paragraph 4 of the Volkswagen Law are exempt from that restriction.

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

9 — Point I.2 of the annex.

10 — Point III.A.1 of the annex.

2. The Volkswagen Law

12. Paragraph 1 converts the former limited liability company whose sole shareholder was the Federal Republic of Germany into a public limited company.

13. Next, Paragraph 2 contains rules concerning the exercise of voting rights which subparagraph 1 limits to one fifth of the share capital where more than 20% of the share capital is held. The paragraph then sets out guidelines for calculating the shares held by each shareholder (subparagraphs 2 and 3).

14. Paragraph 4, which is headed 'Articles of Association of the Company', concerns a number of matters, including, in subparagraph 1, the right to appoint two members of the supervisory board which is conferred on the Federal Republic of Germany and the Land of Lower Saxony, respectively, for such time as they hold shares in the company.

15. In accordance with Paragraph 4(2), the construction and delocalization of factories must be approved by a majority of two thirds of the supervisory board.

16. Paragraph 4(3) provides that the quorum for approving resolutions of the general meeting, which, under the Law on public limited companies, must receive the favourable vote of at least three quarters (75%) of the share capital, is increased to more than four fifths (80%) of the share capital.

III — The facts and the prior administrative procedure

A — *The historical background to the Volkswagen Law*

17. A better understanding of the national legislation in issue for a consideration of the origins of the company, which the German Government describes in some detail both in the defence and, in particular, in its reply of 20 June 2003 to the Commission's letter of formal notice of 20 March 2003. The Commission has not refuted those descriptions of the company's origins.

18. When Adolf Hitler came to power in January 1933, a development plan for the automobile industry [11] was implemented and a call for tenders was held with a view to

11 — Adolf Hitler announced that initiative during the opening speech of the 1934 Automobile Fair in Berlin.

awarding the contract to build the so-called people's car (Volks-Wagen). The aim was to build a simple car which most Germans would be able to afford without imposing an excessive burden on their finances. The contract was awarded to the legendary engineer Ferdinand Porsche. [12]

19. The project needed to be completed with great speed and two subsidies, amounting in total to 700 000 Reichmarks (RM), were awarded, while financial support was also sought from the Reichverband der Deutschen Automobilindustrie (German Automobile Industry Association) which was to provide RM 20 000 per month for the 10 months set for completion of the work. However, the difficulties which that association reported to the Chancellor of the Reich caused Hitler to award the contract for production of the Volkswagen to the Arbeitsfront (labour front), [13] following the construction of the largest factory ever seen. Finance was obtained from a number of sources: in addition to contributions from the German State, the government appealed to public thrift and asked people who wished to purchase a car to deposit RM 5 per week in an account intended to cover the costs of the company. In that way, 286 million marks were raised.

20. Thus, on 28 May 1937, responsibility for the Volkswagen project was withdrawn from the German Automobile Industry Association and a State-owned company, the Gesellschaft zur Vorbereitung des Deutschen Volkswagen mbH, was set up with an initial capital of RM 50 million provided by the Arbeitsfront. An aeroplane was placed at the disposal of the Arbeitsfront so that it could search for a suitable site in Germany on which to build the magnificent factory; that site needed to be located in the centre of the country and have good river and road communications. Finally, the ideal site was found in Lower Saxony, not far from Wolfsburg Castle. The castle, which had been owned by the family of Count von der Schulenburg since the 14th century, was expropriated. The factory was therefore built close to the town of Fallersleben on the section of motorway linking Hannover and Berlin, near the Mittelland canal. On 26 May 1938, the first stone was laid in front of over 70 000 people, while at the same time plans were also being drawn up for a new city — now Wolfsburg — to house the future workers. To widespread surprise, the Führer renamed the vehicle and called it the KdF Wagen (Kraft durch Freude Wagen) or the strength through happiness car, even though Porsche's office had already registered the Volkswagen trade mark both nationally and internationally. [14]

12 — Ferdinand Porsche, the son of a tinsmith, was born in Maffersdorf-an-der-Neisse (now Vratislavice nad Nisou, Czech Republic) on 3 September 1875. At the time, that city in Bohemia was part of the Austro-Hungarian Empire but, after the First World War, the political map of Europe changed and Porsche became a Czechoslovakian citizen. It was impossible for someone whom Hitler referred to as 'the greatest German motor car builder' to retain Czechoslovakian nationality and everything was arranged with the Czechoslovakian consul in Stuttgart so that, after renouncing his original nationality, Porsche became a German. Parvulesco, C., *Coccinelle. Triomphe de la voiture populaire*, ETAI, Boulogne-Billancourt, 2006, p. 18.

13 — Parvulesco, C., op. cit., pp. 17 and 18.

14 — Parvulesco, C., op. cit., p. 26.

21. At the official unveiling of the vehicle, three different models were shown: a cabriolet, a convertible and a limousine. The dictator, surrounded by soldiers wearing gaudy uniforms and conducting themselves in a manner which demonstrated clearly their unshakeable support for his political regime, took a seat in the cabriolet driven by Ferdinand Porsche's son, Ferry, who was propelled to instant fame. The Führer's announcement that the KdF Wagen would soon be available to everyone at the price of only RM 990 generated enormous enthusiasm.

22. In addition, the workshops of what, in the imagination of the politicians who sponsored it, would be the largest factory in Europe were built using the money obtained from the sale of the assets seized and plundered from the trades unions of the Weimar Republic, which were prohibited after the national socialist coup d'etat. [15]

23. The large-scale production of vehicles was due to begin on 15 October 1939 but Hitler invaded Poland on 1 September of that year and the outbreak of World War II disrupted the plans of everyone involved, with production instead being geared towards the satisfaction of military needs, in particular those relating to the movement of troops and the supply of ammunition. As a result, the nearly 336 000 small savers, [16] who had been caught up in a dream which vanished in the thunder of gunfire, were left without their longed-for small car. [17]

24. The company's plant was seriously affected by the allied bombings, with more than a thousand tonnes of high explosive bombs being dropped in four air raids, [18] but, although it was damaged, the factory recommenced operations in May 1945 [19] after the chief inspection engineer Rudolf Brörmann, who had stubbornly resisted American attempts to demolish the factory, was placed in charge of the company by the military government in the British occupied zone. Brörmann was replaced [20] in 1947 by Heinrich Nordhoff, a member of the board of directors of Opel. The military government did not manage to sell the company to a foreign competitor, such as Ford or Chrysler, and therefore, when the United Kingdom withdrew from the zone in 1949, Volkswagen had virtually become ownerless property.

15 — Information available at http://es.wikipedia.org/wiki/Volkswagen.

16 — Figure provided by the German Government.

17 — Parvulesco, C., op. cit., p. 27.

18 — The attacks took place in April, June and August 1944.

19 — On that date 110 *Kübelwagen* (the military predecessor of the Volkswagen Beetle) were manufactured for the allies using surplus parts.

20 — According to Momsen, H., 'Das Volkswagenwerk und die "Stunde Null": Kontinuität und Diskontinuität', http://www.dhm.de/ausstellungen/aufbau_west_ost, Brörmann was removed from his post as a result of a campaign to erase all traces of Nazism from the Volkswagen site.

25. However, despite having no known owner, the factory demonstrated a surprising dynamism which transformed it into a flourishing business; [21] the hunger of its workers was awakened, no doubt as a result of their direct and immediate participation in the success of the enterprise. At the end of the 1950s, when it seemed that the courts were on the verge of dismissing the action brought by the Volkswagen savers, the employees claimed ownership of the company, meaning that, including the Bund, the Land of Lower Saxony, the unions and the unfortunate savers, there were now five parties asserting that they were proprietors of the Volkswagen trade mark.

26. The tension generated by those conflicting interests threatened to continue for a lengthy period before the German courts, placing in jeopardy the stability of a company which was a symbol of the still young Federal Republic. After many years of intense discussions and difficult negotiations, a compromise was reached in the form of an agreement governing the legal relationships in the Volkswagen GmbH factory, which was concluded on 12 November 1959 between the Bund and the Land of Lower Saxony. [22]

27. The agreement provided that, during the first phase, all the shares in the company, which was then a limited liability company, would be transferred to the federal State. [23] After the company had been converted into a public limited company in the second phase, 60% of the shares were distributed to private individuals while the remainder were distributed, in two blocks of 20% each, to the two public bodies involved, namely the Bund and the Land of Lower Saxony. [24]

28. The agreement between the national and regional administrations also took into account the interests of the workers through the creation of the Volkswagen Foundation for the promotion of research, training, science and technology.

29. The articles of association of the Volkswagen public limited company were adopted on 6 July 1960 and were included in the Volkswagen Law together with the rest of the agreement. Two of the clauses provided, respectively, for the increase of the qualified majority required to adopt a number of company resolutions from 75% to more than 80% and for the restriction of voting rights to 20% of the share capital.

21 — In 1955, the millionth Beetle came off the production line and, by 1972, 15 million Beetle models had been sold. During that period, an American author attempted to take advantage of the popular appeal of the German car by including its name in the title of a novel: Woods, E., *Yellow Volkswagen*, Greywood Publishing Ltd., Toronto, 1971.

22 — Vertrag über die Regelung der Rechtsverhältnisse bei der Volkswagenwerk Gesellschaft mit beschränkter Haftung und über die Einrichtung einer Stiftung Volkswagenwerk.

23 — Pursuant to the Law governing the legal relationships of Volkswagenwerk GmbH (Gesetz über die Regelung der Rechtsverhältnisse der Volkswagenwerk GmbH; BGBl. I, p. 301).

24 — In accordance with the Volkswagen Law.

B — *The prior administrative procedure*

30. After receiving complaints about the Volkswagen Law, the Commission sent Germany a letter of formal notice on 19 March 2003, to which that Member State replied on 20 June 2003.

31. The Commission was unconvinced by the explanations in that reply and therefore, on 1 April 2004, it sent a reasoned opinion requesting that the measures required to repeal or amend the contested law be adopted within two months of the date on which the reasoned opinion was sent.

32. The German Government set out its observations in a letter dated 12 July 2004, in which it reiterated its view that the law in question did not infringe Article 56 CE and that no amendment was necessary. The German Government accordingly requested that the procedure be abandoned on the grounds that the allegation of infringement was unfounded.

33. The Commission disagreed with the position of the German Government and brought an action before the Court, seeking a declaration under Article 226 EC that, by infringing Articles 56 EC and 43 EC, Germany has failed to fulfil its obligations.

IV — The procedure before the Court and the claims of the parties

34. The application, which was received at the Court Registry on 4 March 2005, requests a declaration that Paragraphs 2(1) and 4(1) and (3) of the Volkswagen Law are contrary to Articles 56 EC and 43 EC, in addition to an order that the defendant Member State must pay the costs.

35. The defence, which was lodged on 25 May 2005, requests that the action be dismissed as unfounded and that the Commission be ordered to pay the costs.

36. By Order of 7 September 2005, the President of the Court of Justice gave leave for the Republic of Finland to intervene. However, the latter withdrew from the proceedings by letter received at the Registry on 25 November 2005.

37. The reply was lodged on 22 August 2005 and the rejoinder on 16 November 2005.

38. At the hearing, which was held on 12 December 2006, oral argument was presented by the representatives of the Federal Republic of Germany and the Commission.

V — Analysis of the failure to fulfil observations

A — *Preliminary observations*

39. First of all, it is important to point out that, although it has alleged a breach of Article 43 EC, the Commission restricts its arguments in the application to the infringement of the free movement of capital (Article 56 EC), doubtless because of the way the Court has dealt with cases relating to golden shares in the past. However, that does not preclude the Court from also giving a ruling on the simultaneous infringement of the freedom of establishment.

1. The Volkswagen Law in relation to the case-law on golden shares

40. The Commission relies principally on the golden share case-law[25] and bases its analysis on the fact that the Volkswagen Law is a national measure which confers special rights on the State, that is, in the present case, the Bund and the Land of Lower Saxony.

41. Further, the Commission draws attention to the public nature of the agreement which the two bodies concluded for the purpose of settling the ownership dispute affecting the company, since the law concerned was enacted for a single company.

42. The German Government disagrees with that approach and argues that the situations on which the Court has ruled in the past cannot be compared to the situation of the Volkswagen company. The German Government refers to the objective nature of the disputed provisions, at least of the provisions concerning the limitation of voting rights and the increase in the majority required at the general meeting of shareholders for a number of fundamental decisions, and maintains that there is no element of discrimination in those provisions since they affect all investors, both public and private, in equal measure.

43. The defendant Government also asserts that the Volkswagen Law cannot be described as a State measure because it merely sets out the text of a private agreement concluded in 1959 between the federal State and Lower Saxony.

25 — Judgments in Case C-58/99 *Commission* v *Italy* [2000] ECR I-3811; Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731; Case C-483/99 *Commission* v *France* [2002] ECR I-4781; Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809; Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581; and Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641. More recently, the Court has delivered judgments in Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, and Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141.

44. Although the present case does not really come within the ambit of golden shares in the strict sense because the special rights concerned are not attached to the shares held by public bodies, it is not possible to accept a reductionist view of how those rights must be construed. In fact, the important factor is not so much whether the excessive rights are formally attached to certain shareholdings but rather whether those rights are conferred in a privileged manner to the extent that they dissuade investors, particularly foreign investors.

45. I also find puzzling the claim by the German Government that it does not regard a law adopted by the national parliament as a State measure, since there is no more typical example of the conduct of the public authorities than the exercise of their legislative powers. The description of a *Staatsvertrag* under German law as a private agreement is equally surprising in view of the fact that German academic writers unanimously classify the *Staatsvertrag* as a German public law act. [26]

46. I therefore reject the arguments put forward by the German Government aimed at drawing a distinction from the outset between the present case and other cases concerning golden shares in which judgment has already been given. The foregoing is subject to a detailed analysis of the grounds of failure put forward by the Commission which I will carry out below.

2. The relevance of Article 295 EC

47. Curiously, the defendant Government has not relied in the defence on the requirement to comply with Article 295 EC, which was examined at length in the two joined Opinions I delivered in *Commission* v *Portugal*, *Commission* v *France* and *Commission* v *Belgium*, [27] on the one hand, and *Commission* v *Spain* and *Commission* v *United Kingdom*, [28] on the other.

48. I continue to hold the view that the expression 'system of property ownership' contained in Article 295 EC refers not to the civil rules concerning property relationships but to the ideal body of rules of every kind, including public law rules, which are capable of granting economic rights in respect of an undertaking: in other words, rules which allow the person vested with such ownership to exercise decisive influence on the definition and implementation of all or some of its economic objectives. At the same time, the

26 — Maurer, H., *Allgemeines Verwaltungsrecht*, C.H. Beck, 12th ed. revised and amended, Munich, 1999, p. 352 et seq.

27 — Delivered on 3 July 2001.

28 — Delivered on 6 February 2003.

necessary purposive interpretation of the provision precludes a distinction between public and private undertakings, for the purposes of the Treaty, which is based merely on the identity of its various shareholders, and that distinction must depend instead on the opportunity available to the State to impose specific economic policies other than the pursuit of the greatest financial gain which characterises private business. [29]

49. I therefore repeat my opinion that the Treaty's observance, enshrined in Article 295 EC, of the system of property ownership in the Member States must extend to any measure which, through intervention in the public sector, understood in the economic sense, allows the State to contribute to the organisation of the nation's financial activity. [30]

50. Although the criticism I expressed in my Opinion in Cases C-463/00 and C-98/01, to the effect that the judgments, without providing reasons, ignore the question of the application and scope of Article 295 EC, is still fully valid, since the judgments delivered subsequently also failed to interpret that article, [31] I acknowledge that this case presents substantial differences in relation to the cases which the Court has determined to date, a factor which calls for an alternative solution.

51. The foregoing cases generally arose in the context of privatisation procedures in undertakings operating in sectors regarded as 'strategic' which had been gradually opened up (hydrocarbons, airports and insurance). The measures which were the subject of those proceedings had one similarity, namely that that they constituted means by which the public authorities could participate in certain activities of vital importance to the national economy, with the purpose of imposing an economic policy strategy. [32]

52. It is clear from the description of its origins that the Volkswagen Law does not fall within that context.

53. On the one hand, the sector concerned is not traditionally one of the key branches of a nation's economy, regardless of its particular

29 — Judgment in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 21.

30 — Opinion in Cases C-367/98 *Commission* v *Portugal*, C-483/99 *Commission* v *France*, and C-503/99 *Commission* v *Belgium*, points 54 and 55; see also the Opinion in Cases C-463/00 *Commission* v *Spain* and C-98/01 *Commission* v *United Kingdom*, points 56 and 57.

31 — Judgments in *Commission* v *Spain*, *Commission* v *United Kingdom*, *Commission* v *Italy*, and *Commission* v *Netherlands*.

32 — Opinion in Cases C-367/98, C-483/99 and C-503/99, point 62.

influence on gross national product, since the motor car industry was already reasonably well developed in Germany in the period between the two world wars and its development was not the result of State involvement.

54. On the other hand, the main purpose of the contested measure was to resolve the dispute that had arisen in relation to the ownership of the company, which, in principle, would mean that it warrants being described as a rule of private law within the meaning of Article 295 EC, a view which has been proposed by a number of parties but one which I do not share. However, the provisions which the Commission complains about in this action for failure to fulfil obligations do not concern the system of property ownership either in general or with regard to the Volkswagen company in particular.

55. Clearly, the three paragraphs of the German law in issue in these proceedings assist those who are vested with control of the company to retain that control by means of typical company law techniques to defend the board of directors of an undertaking against hostile public takeover bids. [33]

33 — On the limitation of voting rights, see Kübler, F., *Gesellschaftsrecht,* 5th ed. revised and extended, C.F. Müller, Heidelberg, 1998, p. 199. See also Krause, H., 'Von "goldenen Aktien", dem VW-Gesetz und der Übernahmerichtlinie', *Neue Juristische Wochenschrift,* No 38/2000, p. 2749.

56. For the reasons given, it is my view that the Volkswagen Law is incompatible with Article 295 EC in accordance with both the interpretation which I have always advocated and the rules of interpretation which restrict that provision to protecting the autonomy of the Member States to regulate private property relationships.

B — *Restrictions on the free movement of capital*

1. A preliminary point

57. The applicant seeks a declaration that the Federal Republic of Germany has infringed the freedom of establishment and the free movement of capital. However, the applicant bases its claim exclusively on the alleged breach of the latter freedom and that is logical in the light of the case-law on golden shares which, in the main, focuses on Article 56 EC and only deals with Article 43 EC as a subsidiary matter.

58. I have not altered my view that the natural and appropriate framework within which to consider the various restrictions deriving from what can, very imprecisely, be described as 'golden shares' is the freedom of establishment, since the defendant Member

State is generally seeking to control, using powers of intervention as regards share structure, the formation of the privatised companies' corporate will (either by intervening in the composition of the membership or by influencing specific management decisions), an aspect which has little to do with the free movement of capital. [34]

59. However, such powers are capable of affecting the right to freedom of establishment, thereby making it less attractive, either directly, where they impinge on access to share capital, or indirectly, where they reduce its allure by restricting the powers of the company organs with regard to the ownership or management. [35] Contrary to the Court of Justice's finding, [36] it is my opinion that the resulting restriction of the free movement of capital is incidental, rather than inevitable. I have previously pointed out that if that is the case as regards measures affecting the composition of the membership, it is even more true as regards measures restricting the adoption of company resolutions (change of company object, disposal of assets), such as the ones in issue in the present case, where the link with the free movement of capital is hypothetical or very tenuous. [37]

60. In any event, I see no point in delving any deeper into an incorrect legal classification of the alleged infringement, which is of no great consequence, since the Court of Justice subjects both Community freedoms to similar scrutiny, and I propose to apply that methodology below in order to establish whether the infringements complained of have taken place, since I have ruled out the applicability of Article 295 EC to the Volkswagen Law.

61. As I explained, the Court has repeatedly focused on Article 56(1) EC, which prohibits restrictions on the movement of capital between the Member States. [38]

62. In the absence of a definition of the term 'movement of capital' in the EC Treaty, the Court has acknowledged the indicative value of the nomenclature annexed to Directive 88/361/EEC, [39] which includes within the concept of capital movements direct invest-

34 — Opinion in *Commission* v *Spain* and *Commission* v *United Kingdom*, point 36.

35 — Velasco San Pedro, L.A. and Sánchez Felipe, J.M., 'La libertad de establecimiento de las sociedades en la UE. El Estado de la cuestión después de la SE', *Revista de derecho de sociedades*, number 19, year 2002-2, p. 31.

36 — Judgments in *Commission* v *Portugal* and *Commission* v *France*, paragraph 56. See also the judgment in *Commission* v *Netherlands*, paragraph 43.

37 — Opinion in *Commission* v *Spain* and *Commission* v *United Kingdom*, point 36.

38 — For example, the judgment in *Commission* v *France*, paragraphs 35 and 40, and the judgment in *Commission* v *United Kingdom*, paragraphs 38 and 43.

39 — 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).

ments, such as investments which entail the purchase of shares in a company through the ownership of shares which confer the right to participate in its management and control, and indirect investments, such as the acquisition of securities on the capital market with the intention of speculating without seeking to influence the management or control of the undertaking (also known as portfolio investments). [40]

63. The Court has previously examined those two categories of transaction and has classified as 'restrictions', within the meaning of Article 56(1) EC, national measures which are liable to preclude or impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. [41]

64. The disputed provisions of the Volkswagen Law must be examined in the light of those principles to determine whether they constitute obstacles to the free movement of capital provided for in Article 56(1) EC. In the event of an affirmative response, it will be necessary to consider whether there are any grounds justifying the contested provisions. [42]

40 — Judgments in Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; *Commission* v *France*, paragraphs 36 and 37; and *Commission* v *United Kingdom*, paragraphs 39 and 40.

41 — Judgments in *Commission* v *France*, paragraph 41; Case C-174/04 *Commission* v *Italy*, paragraphs 30 and 31; and Case C-265/04 *Bouanich* [2006] ECR I-923, paragraphs 34 and 35.

42 — See, for example, the judgments in *Commission* v *Belgium*, paragraphs 42 to 55, and *Commission* v *Netherlands*, paragraphs 32 to 40.

2. Analysis of the contested legislation

(a) The right of the Bund and the Land each to appoint two members of the supervisory board of the company

(i) Introduction

65. The Commission claims that, by conferring on the Federal Republic of Germany and the Land of Lower Saxony the right each to appoint two members of the supervisory board for as long as they are shareholders, Paragraph 4(1) of the Volkswagen Law derogates from the rule laid down in Paragraph 101(2) of the Law on public limited companies. The latter paragraph provides that such a right must be laid down in the articles of association and must be limited to one third of the number of members of the supervisory board appointed by the shareholders in accordance with the law or the articles of association which, in the case of Volkswagen, would equal three members.

66. The Commission argues that the way that right is framed in the Volkswagen Law restricts the possibility for other shareholders to participate in the management and control of the company, which, in

accordance with case-law, amounts to an infringement of the free movement of capital. [43] In the Commission's view, the fact that the Bund has sold all its shares and therefore ceased to exercise its right of appointment, and that the number of representatives of the Land of Lower Saxony may be proportional to, or even less than, the percentage of the share capital which it holds, is immaterial because that does not detract from the fact that special powers are conferred on the State which reduce the attractiveness of investing in Volkswagen.

67. The German Government claims that, since the supervisory board [44] is a monitoring body, it lacks effective decision-making power, except in the limited number of situations where the law or the articles of association provide for it to intervene. The German Government goes on to assert that the number of places on that board is in reasonable proportion to the shareholdings and that in the case of the Land of Lower Saxony this is lower than the percentage of the shares it holds. The German Government concludes by contending that the views put forward by the Commission in connection with deterring investment are not reflected in reality.

(ii) Analysis of the plea in law

68. The correct interpretation of the right to appoint members of the supervisory board, which is conferred on certain shareholders by the articles of association under Paragraph 101(1) and (2) of the German Law on public limited companies, has a dual function. First, it enables large shareholders who wish to participate in the management of the company to secure representation on the board, and, second, it ensures that a number of places are reserved for minority shareholders, whose right of representation is restricted to one third of the total share capital. [45]

69. The derogation from Paragraph 4(1) of the Volkswagen Law which that provision contains demonstrates the excessive nature of the rights conferred on the public authorities concerned.

70. In that connection, it has been pointed out, first of all, that one of the reasons for including Paragraph 101 was to provide a mechanism by which the public authorities could have an influence on companies charged with providing services in the public

43 — Judgments in *Commission* v *United Kingdom*, paragraph 44, *Commission* v *Belgium*, paragraphs 39 to 41, and *Commission* v *Portugal*, paragraphs 44 to 46. In the latter judgment the Court interpreted the silence of the Portuguese Government as an admission, or a tacit acknowledgement, of the infringement, and commenced an examination of whether it was justified. I have already criticised that approach in point 76 of my Opinion in Cases C-367/98, C-483/99 and C-503/99, in which I urged the Court to examine the infringement of its own motion, because I doubt whether the underlying Community interest in such proceedings is compatible with the right of free disposal.

44 — Governed by Paragraphs 95 to 116 of the German Law on public limited companies.

45 — Kübler, F., op. cit., p. 190.

interest without needing to purchase the necessary shareholding. [46] Far from justifying the Volkswagen Law, that fact draws attention to its unusualness since laying down a derogation in respect of its provisions accentuates the exceptional nature of rules which are for the benefit of only one company.

71. Second, it is also clear that the contested provision differs from the general provision with regard to procedure, in that the right to appoint members of the supervisory board is granted *ex lege* [47] rather than in the articles of association, and to substance, in that, under Paragraph 4(1), four of the 10 seats allocated to shareholders are reserved for two public bodies, which constitutes more than the maximum of one third stipulated in Paragraph 101(2) of the Law on public limited companies.

72. In short, in addition to being wholly unconnected to the size of their respective shareholdings, that exclusive right of the Federal State and the Land restricts the possibilities for other investors to obtain similar benefits, which is contrary to the spirit of the provision of ordinary law, and destroys the symmetry between capital strength and possibilities of participation in the management of a company. [48] Even if an investor obtained sufficient power to amend the articles of association and repeal those clauses, he would then face the difficulty of amending the Volkswagen Law, which would require the approval of the national parliament.

73. Accordingly, although Paragraph 4(1) of the Volkswagen Law is regarded as *lex specialis,* it undoubtedly serves to dissuade individuals seeking to acquire a significant number of shares in the company since those individuals would find themselves on the supervisory board with four representatives of the public authorities with only minority shareholdings.

74. The question whether or not those public authorities exercise their rights has no bearing on the investigation of the infringement, since it is enough that neither the excessive right of the Bund and the Land of Lower Saxony to appoint representatives of the supervisory board of Volkswagen, nor their right to intervene when they consider it appropriate, has been removed from the German legal system.

46 — Ibid.

47 — Had the right been provided for in a clause of the articles of association of Volkswagen but not in the Volkswagen Law, the adoption of the Aktiengesetz 1965 would have rendered such a clause invalid, and therefore the stipulation that Paragraph 4(1) would remain in force resolved the problem of incompatibility with Paragraph 101 of the Law on public limited companies.

48 — Sander, F., 'Volkswagen vor dem EuGH — der Schutzbereich der Kapitalverkehrsfreiheit am Scheideweg', *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, No 4/2005, p. 109.

75. Consequently, Paragraph 4(1) of the Volkswagen Law infringes Article 56 EC, although that finding is subject to possible grounds of justification which, since they have also been invoked with regard to the other contested provisions, will be examined together at the end of the remaining pleas in law.

(b) The blocking minority and the limitation of voting rights

(i) Introduction

76. These two grounds of failure were considered separately in the pleadings and were analysed jointly only for the purposes of assessing the combined effect of the three disputed provisions. Nevertheless, for the reasons I will indicate below, it is appropriate to examine the two grounds together.

77. In its separate consideration of these grounds, the Commission maintains that Paragraph 2(1) of the Volkswagen Law, which limits voting rights to one fifth of the share capital, contains a derogation from the principle of one share, one vote, but fails to allow the shareholders the opportunity to state their opinion. Further, the Commission points out that even if it were possible to accept the argument that that is a widespread mechanism for limiting voting rights in companies, it must be clear that there is a difference between providing for the possibility of such a limitation, as German legislation does in the case of unlisted companies, and imposing it on companies by law, as occurs in the case of Volkswagen.

78. The Commission goes on to analyse Paragraph 4(3), which increases to more than four fifths (80%) of the share capital the majority required to adopt certain resolutions of the general meeting, in contrast to the Law on public limited companies which provides that three quarters (75%) of the share capital must vote in favour, thereby enabling the Land of Lower Saxony to oppose and block such resolutions by means of the minority required for that purpose which the Land possesses from the outset. Furthermore, the Commission asserts that the majority concerned is not derived from the free will of the shareholders but rather from the desire of the legislature which fixed that majority for the exclusive benefit of public investors.

79. The German Government addresses the limitation laid down in Paragraph 2(1) by denying that there is a correlation between shareholdings and voting rights, maintaining that the provision has contractual origins, and asserting the freedom of the legislature to enact provisions of company law which differ from general provisions in the case of certain companies.

80. With regard to Paragraph 4(3), the defendant claims that the German Law on public limited companies does not contain a restriction and attributes the number of shares held by the Land of Lower Saxony to the fact that the Land has made successive purchases of shares on the market in the same way as any other private investor.

81. However, as I stated above, I have decided to advocate a joint analysis of the two provisions, since it is not the provisions in isolation but rather their consequences which warrant detailed examination.

82. In that connection, the Commission merely asserts that since all three provisions infringe the Treaty individually, their joint effect simply exacerbates that infringement.

83. In contrast, the German Government relies on a precedent [49] in support of its contention that it is not appropriate to find that the provisions infringe the Treaty either separately or collectively.

49 — Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 55.

(ii) Analysis of the pleas in law

84. It is clear from the history of the Volkswagen Law that a highly sophisticated legal structure was created for the purposes of protecting a particular situation at a very specific time. [50] It would be difficult to interpret in any other way the increase of the quorum required to adopt certain resolutions of the general meeting to over 80% when the ordinary legislation requires a quorum of only 75%. Furthermore, the limitation of voting rights to 20% reflects the percentage of shares distributed to the two institutional investors, the Bund and the Land of Lower Saxony, at the time when the law was enacted.

85. In practice, anyone wishing to acquire a sufficient number of shares in the company to enable participation on the supervisory board would quickly become aware of the obstacles to the amendment of a provision of the articles of association, not to mention the need to call upon the legislature to enact the required amendment of the Volkswagen Law.

50 — A sign of the preferential treatment afforded to Volkswagen by the law may be inferred from the abolition in 1998 of the limitation of voting rights in listed companies by means of the adoption in Germany of the Law on the monitoring and transparency of undertakings, the clear aim of which was to re-establish the correlation between capital and the exercise of voting rights, as noted by Fernández Pérez, N., *La protección jurídica del accionista inversor*, Aranzadi, Navarre, 2000, p. 224. The statement of reasons in that 1998 law asserted that obstacles to voting rights acted as a disincentive with regard to the investment market; Ruge, R., 'Goldene Aktien und EG-Recht', *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, No 14/2002, p. 424.

86. First of all, a prospective investor would have grave doubts about acquiring more than one fifth of the capital because he would have no voting rights in excess of that ceiling.[51] However, even if that individual managed to mobilise all the small shareholders, the blocking minority of the Bund and the Land would render futile any attempt to achieve an amendment approved by more than four fifths of the share capital at the general meeting.

87. In short, the contested provisions aim to preserve the status quo of the large shareholders — that is the Bund and the Land of Lower Saxony — from the outset, thereby bolstering the first ground of failure relating to the right of representation of those bodies on the supervisory board.

88. However, regard must be had to the characteristics of the drafter of the measure which provides for the situation described. It is also important to draw attention to the fact that all the barriers to the involvement of large shareholders were imposed by the public authorities themselves in the 1959 agreement (the Staatsvertrag), by means of a federal law.

89. While the national measure is not discriminatory, it does protect a situation which objectively favours those public authorities because it strengthens the position of the Bund and the Land, thereby preventing any interference in the management of the company. Those protectionist consequences constitute the dissuasive effect of the Volkswagen Law, which, pursuant to the case-law of the Court, infringes the free movement of capital. The arguments of the German Government relating to the free movement of Volkswagen shares, which refer to portfolio investments rather than to investments made with a view to participating in the management of the undertaking, are thus overturned.

90. The difficulties faced by investors who were not parties to the initial agreement are clear and will continue to exist, at least potentially, while the contested provisions remain in force. That situation, which is incompatible with Community law as a matter of fact, would not be remedied by the sale of the shares held by the Land, now the only public investor, because the measure which provides for the situation serves to perpetuate the control exercised by the German regional authority, as has been evident over the last 40 years.

91. The tactic adopted is therefore particularly relevant for the purposes of revealing the public identity of its creators, since it demonstrates that the Volkswagen Law is a

51 — Sołtysiński, S., 'The rise and fall of the golden share concept in privatised companies', Demaret, P./Govaere, I./Hanf, D. (coordinators), *30 Years of European Legal Studies at the College of Europe*, Bruges, 2005, p. 329, describes the widespread view that the limitation of voting rights constitutes a more serious barrier to the free movement of capital than golden shares, which are in decline.

'national measure' in accordance with the case-law of the Court as regards a ruling under Article 56 EC. However, that does not enable other conclusions to be reached; nor, in particular, does it provide a ground for inferring that, if the measure concerned did not exist, the clauses of the articles of association with the same subject-matter as the validity of the provisions disputed in these proceedings would be called in question.

92. Accordingly, the status of the Volkswagen Law as a national measure liable to dissuade investors from acquiring the capital required to participate in the management of the undertaking means that Paragraphs 2(1) and 4(3) of the law infringe the free movement of capital provided for in Article 56(1) EC.

3. Grounds which may justify the infringement

(a) Introduction

93. The German Government has advanced, in the alternative, a number of arguments based on the protection of the public interest which must be examined in some detail in the light of Article 58 EC and the case-law of the Court.

94. The Court has upheld, on a number of occasions, a national restriction on the free movement of capital for the reasons laid down in Article 58 EC or for other overriding reasons in the public interest, [52] provided that that there are no Community harmonising measures aimed at the protection of those interests, [53] and it is for the Member States to decide on the degree of protection of those interests and on the manner of achieving it. However, that right is conferred on the Member States only within the parameters of the Treaty and, in particular, subject to the obligation to respect the principle of proportionality. [54]

95. In the present case, the German Government argues that account must be taken of the specific historical context in which the disputed law was enacted and the social, regional, economical and industrial policy objectives which underpin it.

96. The Commission contends that the historical considerations put forward by the defendant are immaterial and goes on to refute the claim that the contested law is underpinned by all the aforementioned objectives.

52 — Judgments in Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29, and *Commission* v *Netherlands*, paragraph 32.

53 — Judgment in Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 43, and the case-law cited.

54 — Judgment in *Commission* v *Belgium*, paragraph 45, and *Commission* v *Netherlands*, paragraph 33.

(b) Analysis of the arguments

97. The complaints regarding the contested provisions of the Volkswagen Law have not tarnished the success of the company, success which is amazing if one recalls the conditions in which it was forged, in a factory which was all but in ruins after the bombings. The efficiency, the precision, the flexibility [55] and the dynamism which the company has demonstrated are an example of a tenacity and a will to overcome adversity that are both deserving of praise. However, the changes which have taken place in Europe following the consolidation of the process of integration which began with the Treaties of Rome mean that the company must adapt to new times.

98. As a preliminary point, I must admit that I was somewhat astonished to find a general interest plea being relied on to protect a measure enacted for the exclusive benefit of a single undertaking, in keeping with the view held by a number of academic writers to the effect that the public aspect of the activities of large undertakings is particularly important and, where there is no control at all under company law, a system of legal guarantees must be laid down to ensure that the competing public interest is respected regardless of the legal form of such companies. [56]

99. With regard to the grounds put forward as justification for the contested provisions, it is appropriate to find, first, that the events outlined by the German Government demonstrate that there were overriding reasons for settling the dispute relating to the ownership of a company like Volkswagen, but those reasons do not justify the three contested provisions which, as I have stated, are not relevant to the system of share ownership in the strict sense.

100. Second, it is completely misleading to cite the interests of the employees since, as the German Government itself has explained, on the one hand, the aspirations of the employees to control the company were taken into account when the Volkswagen Foundation was set up, from which it follows that the law does not affect, even indirectly, the wishes of those employees. On the other hand, even if the involvement of employees in the administration of the

55 — There is no doubting the versatility of the Beetle. In addition to its adaptability, which meant that it could be converted into a military vehicle, it was also modified to design prototype delivery vans, camper vans, and even ambulances and fire engines. The Beetle inspired the creativity of other engineers such as Karmann, Hebmüller and Rometsch, who created daring variations on the original model which achieved great prestige (Seume, K. and Shall, B., *Volkswagen Beetle — Coachbuilts and cabriolets 1940-1960,* Bay View Books Ltd., Devon, 1993, p. 70 et seq.). Another testimony to the flexibility of Volkswagen vehicles is the model which was manufactured for the emperor of Abyssinia, Haile Selassie I (who ruled Ethiopia from 1930 to 1974) at his personal request, and had seats upholstered in leopard skin (ibid., p. 10).

56 — Reich, N., *Mercado y derecho (Teoría y práxis del derecho económico en la República Federal Alemana),* Spanish translation by Antoni Font, Ariel, Barcelona, 1985, p. 284.

company through co-management required legislative action, it did not call for the beneficial position of the public bodies to be secured by enshrining it in the contested law.

101. Third, the claim that the protection of minor shareholders is based on the irremovability of major shareholders is unfounded. The disputed provisions do not provide any additional security.

102. Finally, it is not appropriate to take account of industrial, economic or regional policy objectives, [57] because such objectives are not compatible with a measure created for a single company. The German Government confuses the public interest with the interests which it and the Land of Lower Saxony have in the smooth operation of the business, interests that are legitimate and understandable given the size of the company which has plants spread around the whole country and employs a huge number of workers. Furthermore, it is not possible to deduce from the Volkswagen Law, and no evidence to that effect has been presented, that the paragraphs complained of actually seek the better attainment of those objectives.

103. The German Government attempts to justify the restrictions of the free movement of capital derived from Paragraphs 2(1) and 4(1) and (3) of the Volkswagen Law by using arguments which are too broad and too far-removed from reality, and which do not satisfy the definition of overriding reasons in the public interest, from which it follows that those arguments must simply be dismissed.

C — The infringement of Article 43 EC

104. The Commission has not advanced any specific claim to the effect that the Volkswagen Law is incompatible with Article 43 EC, doubtless because it has taken account of previous case-law in which the Court has focused on the free movement of capital.

105. In a number of judgments, the Court has held that restrictions on freedom of establishment are a direct consequence of the obstacles to the free movement of capital, to which they are inextricably linked, from which it follows that once 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 freedom of establishment. [58]

57 — The Court held at paragraph 48 of the judgment in Case C-35/98 *Verkooijen* [2000] ECR I-4071 that arguments relating to such aims cannot be accepted.

58 — Judgments in *Commission* v *Spain*, paragraph 86, and *Commission* v *Netherlands*, paragraph 43.

VI — Costs

106. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the claims advanced by the Federal Republic of Germany are unsuccessful, and since the Commission applied for an order for costs against that party, the Federal Republic of Germany must be ordered to pay the costs of these proceedings.

VII — Conclusion

107. In the light of the foregoing considerations, I propose that the Court of Justice:

(1) Declares that, by maintaining in force Paragraphs 2(1) and 4(1) and (3) of the Law on the privatisation of equity in Volkswagen GmbH of 21 July 1960, the Federal Republic of Germany has failed to fulfil its obligations under Article 56(1) EC;

(2) Orders the Federal Republic of Germany to pay the costs.