JUDGMENT OF THE COURT

4 June 2002 *

In Case C-503/99,

Commission of the European Communities, represented by M. Patakia, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by F. de Montpellier, M. Picat and A. Theissen, avocats,

defendant,

supported by

* Language of the case: French.

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, with J. Crow, Barrister, and D. Wyatt QC, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, by maintaining in force

— the provisions of the Royal Decree of 10 June 1994 vesting in the State a 'golden share' in Société nationale de transport par canalisations (*Moniteur belge* of 28 June 1994, p. 17333), which carries the following rights:

(a) 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 must be given to the Minister responsible, who shall be entitled to oppose such operations if he considers that they adversely affect the national interest in the energy sector;

(b) the Minister may appoint two representatives of the Federal Government to the board of directors of the company. Those representatives may propose to the Minister the annulment of any decision of the board of directors which they regard as contrary to the guidelines for the country's energy policy, including the Government's objectives concerning the country's energy supply;

— the provisions of the Royal Decree of 16 June 1994 vesting in the State a 'golden share' in Distrigaz (*Moniteur belge* of 28 June 1994, p. 17347), which carries the following rights:

(a) advance notice of any transfer, use as security or change in the company's strategic assets must be given to the Minister responsible, who shall be entitled to oppose such operations if he considers that they adversely affect the national interest in the energy field;

(b) the Minister may appoint two representatives of the Federal Government to the board of directors of the company. Those representatives may propose to the Minister the annulment of any decision of the board of directors or of the management committee which they regard as contrary to the guidelines for the country's energy policy,

and by failing to lay down precise, objective and stable criteria for approval of, or opposition to, the operations referred to above, the Kingdom of Belgium has failed to comply with its obligations under Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann (Rapporteur), N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 May 2001, at which the Commission was represented by M. Patakia and by F. de Sousa Fialho, acting as Agent, the Kingdom of Belgium by F. de Montpellier and O. Davidson, avocat, and the United Kingdom of Great Britain and Northern Ireland by R. Magrill and D. Wyatt,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2001,

gives the following

Judgment

1 By application received at the Court Registry on 22 December 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining in force

— the provisions of the Royal Decree of 10 June 1994 vesting in the State a 'golden share' in Société nationale de transport par canalisations (*Moniteur belge* of 28 June 1994, p. 17333, hereinafter 'the Royal Decree of 10 June 1994'), which carries the following rights:

(a) 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 must be given to the Minister responsible, who shall be entitled to oppose such operations if he considers that they adversely affect the national interest in the energy sector;

(b) the Minister may appoint two representatives of the Federal Government to the board of directors of the company. Those representatives may propose to the Minister the annulment of any decision of the board of directors which they regard as contrary to the guidelines for the country's energy policy, including the Government's objectives concerning the country's energy supply;

— the provisions of the Royal Decree of 16 June 1994 vesting in the State a 'golden share' in Distrigaz (*Moniteur belge* of 28 June 1994, p. 17347, hereinafter 'the Royal Decree of 16 June 1994'), which carries the following rights:

(a) advance notice of any transfer, use as security or change in the company's strategic assets must be given to the Minister responsible, who shall be entitled to oppose such operations if he considers that they adversely affect the national interest in the energy sector;

(b) the Minister may appoint two representatives of the Federal Government to the board of directors of the company. Those representatives may propose to the Minister the annulment of any decision of the board of directors or of the management committee which they regard as contrary to the guidelines for the country's energy policy,

and by failing to lay down precise, objective and permanent criteria for approval of, or opposition to, the operations referred to above, the Kingdom of Belgium has failed to comply with its obligations under Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC).

2 By applications received at the Court Registry on 22 and 27 June 2000 respectively, the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in the case in support of the form of order sought by the Kingdom of Belgium. By orders of the President of the Court of 12 and 13 July 2000 respectively, those Member States were granted leave to intervene. By letter of 2 October 2001, the Kingdom of Denmark withdrew its intervention.

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 Treaty (OJ 1988 L 178, p. 5) 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 financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

...

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person or another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

...'

7 The nomenclature appearing in Annex I to Directive 88/361 also refers to the following movements:

'III — Operations in securities normally dealt in on the capital market

...

A — Transactions in securities on the capital market

1. Acquisition by non-residents of domestic securities dealt in on a stock exchange

...

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange

...'

8 Article 222 of the EC Treaty (now Article 295 EC) provides:

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

National law

9 Articles 1, 3 and 4 of the Royal Decree of 10 June 1994 provide as follows:

'Article 1

On the day on which the shares currently held by the State in the capital of the Société nationale d'investissement are actually transferred to one or more natural or legal persons in the private sector, the Société nationale d'investissement shall assign one share in the capital of the public company known as Société nationale de transport par canalisations (hereinafter "SNTC") to the State. The special rights defined in Articles 2 to 5 shall attach to that share, in addition to the information rights attaching to ordinary shares in SNTC, only for as long as that share is owned by the State, which may transfer or assign it only pursuant to prior legislative authorisation. Those rights shall be exercised by the Minister responsible for energy, hereinafter referred to as "the Minister".

...

Article 3

The "golden share" shall confer on the Minister the right to oppose any transfer, use as security or change in the intended destination of SNTC'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, if the Minister considers that the operation in question adversely affects the national interest in the energy sector. ...

Prior notice of the operations referred to in the above paragraph must be given to the Minister. The Minister may lay down detailed rules concerning the form and contents of the notice to be given. The Minister may exercise his right of opposition within 21 days after receiving notice of the operation in question.

Article 4

The "golden share" shall confer on the Minister the right to appoint two representatives of the Federal Government to the board of directors of SNTC. Those representatives of the Government shall sit on the board in a non-voting advisory capacity.

The representatives of the Government may in addition apply to the Minister, within four working days, for annulment of any decision of the board of directors of SNTC which they regard as contrary to the guidelines for the country's energy policy, including the Government's objectives concerning the country's energy supply. That time-limit of four working days shall run from the date of the meeting at which the decision in question was adopted, if the representatives of

the Government were duly invited to attend that meeting, or, if they were not, from the date on which the representatives of the Government or any one of them became aware of the decision. The application to the Minister shall have suspensory effect. If the Minister does not annul the decision in question within eight working days from the date of that application, the decision shall become final.'

10 Articles 1, 3 and 4 of the Royal Decree of 16 June 1994 lay down essentially identical rules concerning Société de distribution du gaz SA (hereinafter 'Distrigaz').

Pre-litigation procedure

11 By two letters of 8 July 1998 the Commission informed the Belgian Government that, in its view, the 'golden shares' vested by the Royal Decrees of 10 and 16 June 1994 could be contrary to the provisions of the Treaty concerning the free movement of capital and freedom of establishment.

12 The Belgian Government replied by two letters of 15 September 1998, in which it stated that the special rights attaching to those shares had not hitherto been exercised and that the competent authorities were willing to guarantee to the Commission that none of those rights would be exercised in a discriminatory manner to the detriment of nationals of other Member States.

13 The Commission was not satisfied by those replies, and therefore sent two reasoned opinions to the Kingdom of Belgium on 18 December 1998, calling on it to comply with those opinions within a period of two months.

14 The Belgian Government replied to the reasoned opinions by a single letter of 4 March 1999, in which it announced that it intended to restructure the special rights attaching to the 'golden shares' in issue. Thereafter, a number of structural adaptations were made, but these did not in any way alter Articles 1, 3 and 4 of the Royal Decrees of 10 and 16 June 1994.

15 The Commission therefore decided to bring the present action before the Court.

Pleas and arguments of the parties

16 The Commission states, as a preliminary point, that the phenomenon of widespread intra-Community investment has prompted certain Member States to adopt measures to control that situation. Those measures, most of which have been adopted in the context of privatisations, are liable, in certain circumstances, to be incompatible with Community law. For that reason, it adopted on 19 July 1997 its Communication on certain legal aspects concerning intra-EU investment (OJ 1997 C 220, p. 15, hereinafter 'the 1997 Communication').

17 In that communication, the Commission interpreted the relevant Treaty provisions concerning the free movement of capital and freedom of establishment, *inter alia* in the context of procedures for the grant of general authorisation or the exercise of a right of veto by public authorities.

18 Point 9 of the 1997 Communication is worded as follows:

'The analysis undertaken above concerning measures having a restrictive character on intra-Community investment has concluded that discriminatory measures (i.e. those applied exclusively to investors from another EU Member State) would be considered as incompatible with Articles 73b and 52 of the Treaty governing the free movement of capital and the right of establishment unless covered by one of the exceptions of the Treaty. As regards non-discriminatory measures (i.e. those applied to nationals and other EU investors alike), they are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.'

19 According to the Commission, the rules vesting in the Kingdom of Belgium 'golden shares' in SNTC and Distrigaz, entitling that Member State to oppose, first, any transfer, use as security or change in the intended destination of lines and conduits or of certain other strategic assets and, second, certain management decisions regarded as contrary to the guidelines for the country's energy policy, are contrary to the criteria laid down by the 1997 Communication and thus infringe Articles 52 and 73b of the Treaty.

20 Those national rules, although applicable without distinction, create obstacles to the right of establishment of nationals of other Member States and to the free movement of capital within the Community, inasmuch as they are liable to impede, or render less attractive, the exercise of those freedoms.

21 According to the Commission, authorisation and opposition procedures can be held to be compatible with those freedoms only if they are covered by the exceptions contained in Article 55 of the EC Treaty (now Article 45 EC), Article 56 of the EC Treaty (now, after amendment, Article 46 EC) and Article 73d of the Treaty, or if they are justified by overriding requirements of the general interest and qualified by stable, objective criteria which have been made public, in such a way as to restrict to the minimum the discretionary power of the national authorities.

22 The provisions in issue do not meet any of those criteria. Consequently, they are liable, by reason of their opacity, indirectly to introduce an element of discrimination and legal uncertainty. Furthermore, Article 222 of the Treaty is irrelevant in the present case, since the national rules concerning the privatisation of companies must in any event respect Community law.

23 Whilst the continuity of supplies of natural gas constitutes a matter of public concern and may in principle, like the need to maintain the infrastructures for the conveyance of energy products, fall within the scope of overriding requirements of the general interest, the measures in question must nevertheless be shown to be necessary and proportionate to the objective pursued.

24 A negative measure such as a right of opposition cannot guarantee adequate supplies, by contrast with positive measures such as planning designed to encourage natural gas undertakings to conclude long-term supply contracts and to diversify their sources of supply, or a system of licences. By the same token, the existence of infrastructures for the conveyance of energy products could be ensured not by a general right of opposition but by rules precisely defining the standards required of the undertakings concerned. Moreover, the rights attaching to the 'golden shares' in issue preclude the conclusion of long-term contracts and diversification of sources of supply. Similarly, the remedies available to contest the measures in issue are inadequate, on account of the length and cost of the procedure involved.

25 The Commission also refers to Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1, hereinafter 'the gas directive'), which lays down the rules for the organisation of the internal market in natural gas and the time-limit for transposition of which expired on 10 August 2000. That directive provides a Community framework for the exercise by Member States of powers in respect of the public service obligations imposed on undertakings in that sector. By laying down strictly defined parameters, it ensures the maintenance of a balance between, on the one hand, competition between economic operators and, on the other, the objective of security of supply.

26 The Kingdom of Belgium denies the alleged failure to comply with its obligations. It maintains that any restrictions on freedom of establishment and the free movement of capital which may result from the legislation in issue are in any event justified, first, by the public-security exception laid down in Articles 56 and 73d(1)(b) of the Treaty and, second, by overriding requirements of the general interest. Moreover, they are proportionate and adequate in relation to the objective pursued by them.

27 First of all, the safeguarding of a country's energy supplies constitutes an overriding requirement of the general interest, as the Court has previously held, with regard to electricity supplies, in Case C-393/92 *Almelo* [1994] ECR I-1477, paragraphs 46 to 50, and, as regards petroleum products, in Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 34.

28 Second, the measures in question fulfil the criteria of necessity and proportionality. SNTC and Distrigaz occupy a strategic position as regards the country's energy supplies, especially in view of Belgium's dependence on foreign energy resources. SNTC is, in particular, the owner of a system of lines and conduits that constitute major infrastructures for the domestic conveyance of energy products,

whilst the strategic assets of Distrigaz comprise, *inter alia*, infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. A degree of control of those assets by the authorities is necessary within the framework of the rules in issue. The measures provided for to that end are likewise proportionate. The prior notification procedure simply constitutes, in the absence of any suspensory effect, a means of keeping the authorities informed. Similarly, the Minister's powers in the context of that procedure are not of a general nature; instead, they relate solely to very specific matters and are extremely limited in time. As to the annulment procedure, this can be set in motion only in a very precise and clearly identified situation, namely where the national policy with regard to energy supplies is adversely affected. As in the case of the first procedure, the Minister has an extremely limited period in which to react. Consequently, it cannot be argued that there has been a failure to establish precise, objective and stable criteria.

29 Moreover, where it is decided to exercise the rights conferred by the legislation in issue, a formal statement of reasons for that decision must be provided, setting out the considerations of fact and law on which it is based. In addition, a right of appeal lies to the Belgian Conseil D'État for the annulment or suspension of such a decision. The costs involved are very low, and there exists a procedure for obtaining interlocutory relief. There is a strict limitation in time, inasmuch as the Minister is required to act within 21 days from the date of notification.

30 According to the Belgian Government, there is no less restrictive way of attaining the objectives pursued. For the purposes of examining the criterion of proportionality, it is for the Commission to produce evidence showing the existence of alternative, less restrictive solutions (Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraphs 101 and 102). As it is, the Commission has merely mentioned in that regard the possibility of long-term planning, which is inappropriate given the need for rapid action, and of 'rules precisely defining the standards required of the undertakings concerned', namely a licensing system the outlines of which remain hazy. It is highly doubtful that such measures would

provide investors with a level of legal certainty greater than that resulting from the legislation in issue.

31 As to the Commission's argument founded on the gas directive, the Belgian Government considers that this is inadmissible, since it was raised for the first time in the application itself. In any event, that directive harmonises public service obligations from a material standpoint but not in procedural terms. Consequently, the Member States remain free to take such measures as they may consider appropriate.

32 Third, the Belgian Government argues that the rights conferred by the legislation in issue are justified by the public- security exception laid down in Articles 56 and 73d(1)(b) of the Treaty. National gas supplies are a matter of public security, since the country's economy and its institutions and essential public services, and even the survival of its inhabitants, depend upon them. An interruption of supplies of natural gas, with the risks that would pose for the country's existence, could seriously affect its public security.

33 In the alternative, the Belgian Government argues that any impediments to the freedoms enshrined in the Treaty which may result from the legislation in issue are justified by Article 90(2) of the EC Treaty (now Article 86(2) EC), according to which undertakings entrusted with the operation of services of general economic interest are subject to the Treaty rules on competition only in so far as the application of those rules does not obstruct the performance of the particular tasks assigned to them.

34 It follows from Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12, that Article 90(2) of the Treaty expresses the general principle that

the Treaty rules must be subject to derogations where there exists a threat to the interests involved in the performance of the tasks carried out by services of general interest.

35 The United Kingdom shares, in essence, the views expressed by the Kingdom of Belgium.

Findings of the Court

Article 73b of the Treaty

36 It must be recalled at the outset that Article 73b(1) of the Treaty gives effect to free movement of capital between Member States and between Member States and third countries. To that end it provides, within the framework of the provisions of the chapter headed 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

37 Although the Treaty does not define the terms 'movements of capital' and 'payments', it is settled case-law that Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraphs 20 and 21).

38 Points I and III in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes appearing in that annex, indicate that direct investment in

the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitute capital movements within the meaning of Article 73b of the Treaty. The explanatory notes state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.

39 In the light of those considerations, it is necessary to consider whether the rules vesting in the Kingdom of Belgium 'golden shares' in SNTC and Distrigaz, entitling that Member State to oppose, first, any transfer, use as security or change in the intended destination of lines and conduits or of certain other strategic assets and, second, certain management decisions regarded as contrary to the guidelines for the country's energy policy, constitute a restriction on the movement of capital between Member States.

40 The Belgian Government does not deny, in principle, that the restrictions to which the legislation in issue gives rise fall within the scope of the free movement of capital.

41 The United Kingdom Government likewise concedes, at least partially, that the Belgian legislation is restrictive in nature.

42 Consequently, it is necessary to consider whether, and in what circumstances, the legislation in issue may be justified.

43 As is also apparent from the 1997 Communication, it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (see today's judgments in Case C-367/98 *Commission* v *Portugal*, ECR I-4731, paragraph 47, and Case C-503/99 *Commission* v *Belgium*, ECR I-4781, paragraph 43).

44 However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.

45 The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 23, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18).

46 In the present case, the objective pursued by the legislation at issue, namely the safeguarding of energy supplies in the event of a crisis, falls undeniably within the ambit of a legitimate public interest. Indeed, the Court has previously recognised

that the public-security considerations which may justify an obstacle to the free movement of goods include the objective of ensuring a minimum supply of petroleum products at all times (*Campus Oil*, cited above, paragraphs 34 and 35). The same reasoning applies to obstacles to the free movement of capital, inasmuch as public security is also one of the grounds of justification referred to in Article 73d(1)(b) of the Treaty.

47 However, the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, in particular, *Église de scientologie*, cited above, paragraph 17).

48 It is necessary, therefore, to ascertain whether the legislation in issue enables the Member State concerned to ensure a minimum level of energy supplies in the event of a genuine and serious threat, and whether or not it goes beyond what is necessary for that purpose.

49 First of all, it should be noted that the regime in issue is one of opposition. It is predicated on the principle of respect for the decision-making autonomy of the undertaking concerned, inasmuch as, in each individual case, the exercise of control by the minister responsible requires an initiative on the part of the Government authorities. No prior approval is required. Moreover, in order for that power of opposition to be exercised, the public authorities are obliged to adhere to strict time-limits.

50 Next, the regime is limited to certain decisions concerning the strategic assets of the companies in question, including in particular the energy supply networks, and to such specific management decisions relating to those assets as may be called in question in any given case.

51 Lastly, the Minister may intervene pursuant to Articles 3 and 4 of the Royal Decrees of 10 and 16 June 1994 only where there is a threat that the objectives of the energy policy may be compromised. Furthermore, as the Belgian Government has expressly stated in its written pleadings and at the hearing, without being contradicted on the point by the Commission, any such intervention must be supported by a formal statement of reasons and may be the subject of an effective review by the courts.

52 The scheme therefore makes it possible to guarantee, on the basis of objective criteria which are subject to judicial review, the effective availability of the lines and conduits providing the main infrastructures for the domestic conveyance of energy products, as well as other infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. Thus, it enables the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of legal certainty.

53 The Commission has not shown that less restrictive measures could have been taken to attain the objective pursued. There is no certainty that planning designed to encourage natural gas undertakings to conclude long-term supply contracts, to diversify their sources of supply or to operate a system of licences would be enough, on its own, to permit a rapid reaction in any particular situation. Moreover, the introduction of rules precisely defining the standards required of undertakings in the sector concerned, as proposed by the Commission, would appear to be even more restrictive than a right of opposition limited to specific situations.

54 As to the Commission's arguments concerning the gas directive, suffice it to note that the time-limit for transposition of that directive did not expire until 10 August 2000. Consequently, the Community framework which, according to the Commission, the directive is intended to establish as regards the exercise by Member States of powers in relation to the public service obligations imposed on undertakings in the sector concerned cannot in any event affect the present action, since the reasoned opinions were dated 18 December 1998 and the application was lodged on 22 December 1999.

55 The legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis.

56 In those circumstances, there is no need to consider the alternative plea put forward by the Belgian Government, alleging the existence of a principle derived from Article 90(2) of the Treaty.

57 Accordingly, the Commission's application must be dismissed in so far as it concerns Article 73b of the Treaty.

Article 52 of the Treaty

58 The Commission also seeks a declaration of failure to comply with Article 52 of the Treaty, namely the Treaty rules regarding freedom of establishment, in so far as they concern undertakings.

59 It should be noted in that regard that Article 56 of the Treaty, like Article 73d, provides for a ground of justification based on public security. Thus, even if it were assumed that the power of a Member State to oppose any transfer, use as security or change in the intended use of certain assets of an existing undertaking, or certain management decisions taken by that undertaking, may constitute a restriction on freedom of establishment, such a restriction would be justified for the reasons set out in paragraphs 43 to 55 of this judgment.

60 It follows that the Commission's application must also be dismissed in so far as it concerns Article 52 of the Treaty.

Costs

61 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Belgium has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of those Rules, the United Kingdom, which has intervened in the dispute, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Rodríguez Iglesias Jann Colneric

von Bahr Gulmann Edward

La Pergola Puissochet Schintgen

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 4 June 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President