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Judgment of the Court of Justice in Case C-112/05

Commission of the European Communities v Federal Republic of Germany

THE VOLKSWAGEN LAW RESTRICTS THE FREE MOVEMENT OF CAPITAL

By maintaining in force the provisions of the Volkswagen Law concerning the capping of voting rights at 20% and the fixing of the blocking minority at 20%, and the right of the Federal State and the Land of Lower Saxony each to appoint two representatives to the supervisory board, the Federal Republic of Germany has failed to fulfil its obligations

On 4 March 2005, the Commission brought an action against Germany on the ground that the Volkswagen Law¹ adversely affects the free movement of capital and the freedom of establishment.

In particular, the Commission criticises the following points:

- The right of the Federal State and the Land of Lower Saxony each to appoint two representatives to the undertaking's supervisory board, on condition that they hold shares in the company;
- the limitation on the exercise of voting rights to 20% of the share capital in the case where the holding of a shareholder exceeds that percentage; and
- the increase to 80% of the shares represented for the majority required to pass resolutions of the general assembly of shareholders, which, under the Law on public limited companies, require only a majority of 75%.

In its judgment delivered today, the Court grants the Commission's application in so far as it invokes a breach of the free movement of capital. As regards the breach of the freedom of establishment alleged by the Commission, the Court dismissed the action by reason of the Commission's failure to make specific arguments on this point.

Restrictions on the free movement of capital

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

The Court holds that the Volkswagen Law, as an expression of the Federal State's legislative power, constitutes a national measure. The disputed provisions of the Law are attributable to the Federal State since it alone can amend those provisions in its capacity as legislator.

The Court points out that the EC Treaty prohibits any restriction on movements of capital between Member States. A national measure which is liable to deter direct investments by limiting the possibility for shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control constitutes such a restriction.

The Court finds that the provisions at issue are liable to have such a deterrent effect.

The capping of voting rights at 20% and the fixing of the blocking minority at 20%

The Court does not exclude the possibility that those two provisions, taken individually, may operate both to the benefit and to the detriment of any shareholder in the company. However, it points out that, when the Volkswagen Law was adopted, the Federal State and the Land of Lower Saxony were the main shareholders in the recently privatised company, in which they each held 20% of the capital, and that the Land of Lower Saxony still retains an interest in that amount. The Court holds that, taken together, the provisions in question enable the Federal State and the Land of Lower Saxony to exercise considerable influence over the affairs of Volkswagen on the basis of a lower level of investment than would be required under general law. This situation is liable to deter direct investors from other Member States.

The right to appoint two representatives to the supervisory board

The possibility for the Federal State and the Land of Lower Saxony, on condition that they are shareholders in the company, each to appoint two representatives to the supervisory board places those public shareholders in a privileged position as compared with that under general company law, under which they would together be entitled to appoint only a maximum of three representatives. Furthermore, on condition that they hold shares in the company, they enjoy the right of appointment irrespective of the level of their shareholding. It is thus possible for the Federal State and the Land of Lower Saxony to exercise influence which exceeds their levels of investment and thus to reduce the influence of the other shareholders to a level below that commensurate with those shareholders' own levels of investment.

The restrictions on the free movement of capital are not justified

The Court points out that the free movement of capital may be limited by national measures that are justified by legitimate interests. However, the Federal Republic of Germany, beyond setting out general considerations concerning the need for protection against a large shareholder which might by itself dominate the company, has in the present case failed to explain why the provisions at issue are necessary to protect the interests relied on.

First of all, it has been unable to explain why, in order to meet the objective of protecting workers, it is appropriate and necessary for the Federal and State authorities to maintain a strengthened and irremovable position in the capital of Volkswagen.

Secondly, it has also failed to demonstrate why such a position has to be maintained in order to protect the general interests of minority shareholders.

Finally, the Federal Republic of Germany has not explained why the provisions of the Volkswagen Law are appropriate and necessary to preserve the jobs generated by Volkswagen's activity.

The Court accordingly finds that the Federal Republic of Germany has failed to fulfil its obligations in respect of the free movement of capital.

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

Languages available: BG, ES, CS, DE, EN, FR, HU, NL, PL, PT, RO, SK, SL

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

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-112/05>

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

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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