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Judgment of the Court of Justice in Case C-174/04

Commission of the European Communities v Italian Republic

THE ITALIAN LAW SUSPENDING VOTING RIGHTS ATTACHING TO HOLDINGS EXCEEDING 2% OF THE CAPITAL OF UNDERTAKINGS IN THE ELECTRICITY AND GAS SECTORS INFRINGES THE PRINCIPLE OF FREE MOVEMENT OF CAPITAL

The suspension of voting rights prevents investors from participating effectively in the management of undertakings and is not justified on overriding public-interest grounds

The Italian rules, [1] adopted in connection with the liberalisation of the energy market, provide for automatic suspension of voting rights attaching to holdings in excess of 2% of the capital of undertakings in the electricity and gas sectors where such holdings are acquired by public undertakings that are not quoted on the stock exchange and hold a dominant position in their domestic markets.

Taking the view that those rules might infringe the provisions of the EC Treaty on the free movement of capital, the Commission brought an action against Italy before the Court of Justice of the European Communities for failure to fulfil its obligations.

The Court pointed out, first of all, that the EC treaty prohibits all restrictions on capital movements between the Member States themselves and between Member States and third countries. Direct investment, in the form of a shareholding in an undertaking, constitutes a capital movement characterised by the possibility of participating effectively in the management and control of a company.

The suspension of voting rights prevents effective participation by investors in the management and control of Italian undertakings operating in the electricity and gas markets: it therefore constitutes a restriction on the free movement of capital.

[1] Decree-Law No 192 of 25 May 2001, converted into Law No 301 of 20 July 2001, entitled ‘Urgent provisions to ensure the liberalisation and privatisation of particular public service sectors’ (GURI No 120 of 25 May 2001, p. 4, and GURI No 170 of 24 July 2001, p. 4, respectively).

The fact that only public undertakings holding a dominant position in their domestic markets are affected does not detract from that finding. The Treaty provisions on the free movement of capital draw no distinction between private and public undertakings or between undertakings that hold a dominant position and those that do not.

The Court stated that the free movement of capital is a fundamental principle of the Treaty which may, however, be limited by national rules justified by overriding public-interest grounds. The national rules must also guarantee the attainment of the objective pursued and satisfy the criterion of proportionality.

The Italian Government contended that, as a result of liberalisation and privatisation, the energy market in Italy has been opened up to competition. The 2001 rules are intended to ensure sound and fair conditions of competition in those markets. They make it possible to ensure that, pending effective liberalisation of the energy sector in Europe, the Italian market is not subjected to anti-competitive attacks by public undertakings operating in the same sector in other Member States and enjoying advantages by virtue of domestic legislation which has kept them in a privileged position.

The Court found, however, that general strengthening of the competitive structure of the market in question does not constitute valid justification for restricting the free movement of capital.

Consequently, the Court concluded that Italy had infringed the EC Treaty provisions on the free movement of capital.

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

Languages available: EN, FR, DE, IT, PL, ES

The full text of the judgment may be found on the Court's internet site
http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en
It can usually be consulted after midday (CET) on the day judgment is delivered.

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