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Advocate General's Opinion in Case C-112/05

Commission of the European Communities v Federal Republic of Germany

ADVOCATE GENERAL RUIZ-JARABO TAKES THE VIEW THAT THE VOLKSWAGEN LAW RESTRICTS THE FREE MOVEMENT OF CAPITAL

In his opinion the German legislation strengthens the position of the Federal Government and the Land of Lower Saxony, preventing any intervention in the management of the firm

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 4 March 2005 by the Commission of the European Communities, claiming that the Volkswagen Law is an infringement of the free movement of capital.

Specifically, the Commission criticises:

- The right of the Federal Government — notwithstanding that it has sold its entire holding — and of the Land of Lower Saxony, as long as they are shareholders, to each appoint two members of the supervisory board of the company;
- The limitation of voting rights to 20% of the share capital where any shareholder exceeds that percentage; and
- The increase to more than 80% of the share capital represented for the adoption of resolutions of the general shareholders' meeting.

In his opinion delivered today, Mr Ruiz-Jarabo makes the point, first, that any means by which, through the intervention of the public sector, a State influences the productive activity of a country is also subject to the requirement of respect for the system of property ownership in the national legal order, enshrined in the EC Treaty. However, he finds that in the present case, that requirement is not respected, given that the provisions of the German law tend to keep property in the hands of those who own it in the face of a hostile take-over bid.

The Advocate General goes on to analyse the restrictions of which the Commission complains.

As regards the representation of the Federal Government and the Land on the supervisory board of the company, Mr Ruiz-Jarabo takes the view that **the German law dissuades those wishing to acquire a significant number of shares in the company**, given that, amongst the

ten members assigned on the basis of capital to the supervisory board, there would be four representatives of public authority, owning a marginal number of shares.

The fact that the Federal Government has sold its shares and, therefore, does not exercise its right to appoint is irrelevant, the point being that the German legal order upholds the right of the Federal Government and the Land of Lower Saxony to appoint members of the supervisory board and their prerogative to intervene when they consider it appropriate.

As regards the blocking minority and the limitation of voting rights, Mr Ruiz-Jarabo points out that the reduction of the voting rights to 20% coincides with the percentage of shares held by the Federal Government and the Land of Lower Saxony at the time the law was passed.

The Advocate General takes the view that, in those circumstances, anyone wishing to acquire a sufficient number of shares in the company to sit on the management bodies would have serious doubts about acquiring more than a fifth of the capital because he would have no voting rights above that ceiling. Moreover, if he did succeed in mobilising every small shareholder, there would be no real possibility of achieving any change with more than four fifths of the company capital in the shareholders' meeting because the Federal Government and the Land could block it with their minority holding.

The national legislation therefore **strengthens the position of the Federal Government and the Land**, preventing any intervention in the management of the company. The situation is not remedied by the sale of the shares of the Land, since the mere existence of the legislation bolsters the dominance of the German regional body in the future.

As regards the justification of restrictions on the free movement of capital based on the historical background to the law and its objectives in terms of social, regional, economic and industrial policy, Mr Ruiz-Jarabo considers that the **German Government's approach** is too wide and too far removed from reality and is **not based on overriding reasons relating to the public interest**.

Accordingly, the Advocate General proposes that the Court of Justice should find against Germany.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

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

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

*The full text of the Opinion 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>*

It can usually be consulted after midday (CET) on the day of delivery.

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*Pictures of the delivery of the Opinion are available on EbS "Europe by Satellite",
a service provided by the European Commission, Directorate-General Press and
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