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Judgment of the Court of Justice in Case C-207/07

Commission v Spain

BY MAKING THE ACQUISITION OF SHAREHOLDINGS IN UNDERTAKINGS IN THE ENERGY SECTOR AND OF CERTAIN OF THEIR ASSETS SUBJECT TO THE PRIOR APPROVAL OF THE NATIONAL ENERGY COMMISSION, SPAIN HAS INFRINGED COMMUNITY LAW

The system of prior notification which has been established undermines the free movement of capital and the freedom of establishment and is not justified by the objective of security of energy supply

The National Energy Commission (NEC) is the Spanish regulatory body responsible for the operation of energy systems. Since 2006, in order to be valid, acquisitions of certain shareholdings in undertakings which carry on regulated activities in the energy sector and acquisitions of assets necessary to carry on such activities have required prior authorisation from the NEC. Spain has applied this system of prior authorisation, in particular, to E.ON's public takeover offer for Endesa and to Acciona's and Enel's bid for Endesa.

Considering that by creating this new system Spain had failed to fulfil its obligations under the free movement of capital and the freedom of establishment, the Commission brought infringement proceedings before the Court in April 2007.

First, the Court considers that Spain's new system of prior authorisation limits both these fundamental freedoms. The system **constitutes a restriction on the free movement of capital** inasmuch as it is capable of deterring investors established in other Member States other than Spain from acquiring shareholdings in Spanish undertakings operating in the energy sector and is therefore liable to prevent or limit the acquisition of shareholdings in those undertakings. Furthermore, this new system entails a restriction on the freedom of establishment.

However, a system which entails such restrictions may be justified by reasons laid down in the EC Treaty or by overriding reasons in the public interest, such as public safety. To that end, the system has to satisfy certain conditions: that it is suitable for securing the attainment of the objective pursued and is proportionate to that objective.

In this regard, the Court points out that the free movement of capital and the freedom of establishment may be restricted by national measures justified on grounds related to public

safety, to the extent that there are no Community harmonising measures to ensure the protection of that interest. The Court notes that harmonisation is not complete in relation to security of energy supply. It also recognises that the objective of ensuring security of energy supply, in the Member State in question, may constitute a public safety reason and possibly justify a restriction on those two freedoms.

However, the Court states that public safety may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. In principle, the mere acquisition of shareholdings in undertakings which carry on regulated activities in the energy sector and the acquisition of assets necessary to carry on those activities cannot in themselves be regarded as a genuine and sufficiently serious threat to security of energy supply. On the other hand, the system of prior authorisation which has been established cannot ensure security of energy supply in every case if a genuine and sufficiently serious threat to that supply arises after authorisation of the transaction in question has been granted. The Court therefore concludes **that Spain has not shown that the system of prior authorisation which has been established is a measure that is suitable for securing the attainment of the objective sought by the Spanish legislature**, that is, security of energy supply.

In any event, the Court considers that **the Spanish system of prior authorisation is not proportionate to the objective of ensuring security of energy supply**. First, the system does not limit the NEC's power to refuse to allow the acquisition of shareholdings or assets referred to above or to make subject them to certain conditions on the sole ground of securing the objective of security of energy supply. On the contrary, the system gives the NEC the power to take account of other objectives of energy policy as well, which are not necessary to security of energy supply. Secondly, the Court finds that Spain has not demonstrated that the objective pursued may not be attained by less restrictive measures, in particular by a system of ex post declarations.

Finally, a system of prior authorisation must be based on criteria which are objective, non-discriminatory and known in advance by the undertakings concerned. Moreover, all persons affected by a restrictive measure of that type must have a legal remedy available to them. In this case, it transpires that the provisions which set out the grounds on which the NEC is empowered to refuse authorisation of the acquisition of a shareholding in an undertaking which carries out regulated activities in the energy sector or of assets necessary to carry out those activities, or to make them subject to certain conditions, are drafted in general and imprecise terms. The Court therefore considers that **the system of prior authorisation which has been established confers on the administration a discretion which is difficult for courts to review, and entails a risk of discrimination**.

Therefore, the Court finds that **by adopting the provisions on the new tasks of the NEC, Spain has failed to fulfil its obligations under the principles of free movement of capital and freedom of establishment**.

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

*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-207/07>*

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

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