

Press and Information Division

PRESS RELEASE No 06/03

6 February 2003

Opinion delivered by Advocate General Ruiz-Jarabo in Cases C-463/00 and C-98/01

Commission v Spain and Commission v United Kingdom

**THE ADVOCATE GENERAL PROPOSES THAT THE COURT OF JUSTICE
SHOULD DISMISS THE ACTION AGAINST SPAIN IN THE "GOLDEN
SHARES" CASES AND UPHOLD THE ACTION AGAINST THE UNITED
KINGDOM**

Mr Ruiz-Jarabo calls on the Court to find in favour of Member States retaining their ability to regulate systems of company ownership in so far as those systems do not discriminate against nationals of other Member States

In 2000 and 2001, the Commission brought actions against Spain and the United Kingdom for infringement of the principles of freedom of establishment and free movement of capital. Both countries have arrangements in place which make certain operations by privatised companies in strategically important parts of the economy subject to prior administrative approval. Those powers are commonly referred to as "golden shares".

The Spanish rules. Law 5/1995 on the legal arrangements for disposal of public shareholdings in certain undertakings lays down the rules for the privatisation of various public-sector undertakings. That law and its implementing Royal Decrees have imposed on undertakings like Repsol (petroleum and energy), Telefónica (telecommunications), Argentaria (banking), Tabacalera (tobacco) and Endesa (electricity) a system of prior administrative approval, which applies to major company decisions (winding-up, demerger, merger, change of company object, transfer of assets or share capital).

The United Kingdom rules. The Articles of Association of British Airports Authority plc (BAA), the privatised company which owns the United Kingdom's international airports, create a Special Share ("golden share") for the Government, whose consent is thus required for certain operations by the company (winding-up, disposal of an airport). The Articles also prevent any person from acquiring more than 15% of the voting shares in the company's capital.

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On 4 June 2002, following actions against Portugal, France and Belgium, the Court of Justice delivered three judgments concerning the area known as "golden shares", in which it stated that:

) a system of intervention which is based on prior administrative approval or rights

of veto is a restriction on the free movement of capital in so far as it impedes the acquisition of shares in the undertakings concerned and deters investors in other Member States. Failure to observe that freedom also entails infringement of the freedom of establishment; and

) such restrictions are permitted if they do not discriminate on grounds of nationality, respond to requirements relating to the general interest and are proportionate to the aim pursued (and therefore must be adopted ex post facto, must be based on objective and precise criteria, made known in advance to those concerned and be subject to review by the courts). The Court found that only the Belgian rules met those requirements.

Advocate General Ruiz-Jarabo is today delivering his Opinion in the Spanish and United Kingdom cases.

The Advocate General's Opinion is not binding upon the Court of Justice. His role is, to propose to the Court, acting with complete independence, a decision on the legal points in order that the cases referred to it may be resolved.

Mr Ruiz-Jarabo refers to the Treaty rule which provides that the Treaty in no way prejudices the rules in Member States governing the system of property ownership and calls on the Court to reconsider how that rule applies to schemes creating special shares for the State. In this way the public authorities can impose specific economic-policy objectives other than the pursuit of the greatest financial gain which is characteristic of private business. Therefore, a national measure concerning the public sector system for adopting decisions must be deemed compatible with the Treaty, unless it is proved that it is being used in an unjustifiably discriminatory manner.

Having made that point, the Advocate General goes on to apply the decisions of 4 June 2002 to the cases in question.

Commission v Spain. Mr Ruiz-Jarabo considers that there are many similarities between the Spanish and Belgian rules:

-) the Spanish rules also pursue overriding requirements relating to the general interest, such as concern for security of supply, economic and social stability and protection of consumers' interest; and
-) under both sets of rules the public authority is given a short period within which to exercise its right of opposition, which is subject to review by the courts.

The differences between the two sets of rules are as follows:

-) the Spanish rules cover a wider range of matters, although this does not affect the objectivity or precision of the criteria to which approval is subject;

) the rules have a specific feature which sets them apart from other similar cases before the Court of Justice: their transitional nature. Each of the Royal Decrees sets an expiry date, thus confirming that the regime is an exceptional one applicable to a privatisation procedure.

The Advocate General considers that the potential restrictions on the free movement of capital provided for by the Spanish rules are justified and proportionate to the objective which they pursue. Mr Ruiz-Jarabo therefore expresses the view that the Commission's action against Spain should be dismissed.

Commission v United Kingdom. The Advocate General takes the view that none of the criteria accepted by the Court of Justice when it considered the Belgian rules is met, given that the decisions which may be taken by the public authority by virtue of the Special Share are not subject to any conditions or to review by the courts. As a consequence, in the Advocate General's opinion, the United Kingdom regime is contrary to the principle of free movement of capital.

Note: The judges of the Court of Justice now begin their deliberation in this case. The judgment will be delivered at a later date.

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Available in English, French, German, Italian and Spanish.

For the full text of the Opinion, please consult our internet page www.curia.eu.int at approximately 3 pm today.

For further information, please contact Christopher Fretwell:
Tel: (00 352) 4303 3355; Fax: (00 352) 4303 2731.

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Cases C-367/98, C-483/99 and C-503/99. See press release No 49/02. All the documents are available on the Court of Justice's web-site at www.curia.eu.int.

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