

Press and Information Division

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Judgments of the Court of Justice in Cases C-463/00 and C-98/01

Commission v Spain and Commission v United Kingdom

**THE COURT FINDS AGAINST THE SPANISH AND UNITED KINGDOM RULES
REGULATING SPECIAL SHARES ("GOLDEN SHARES")**

*The arrangements applicable to the undertakings Repsol, Telefónica, Argentaria,
Tabacalera, Endesa and BAA are precluded by the principle of free movement of capital*

The Commission brought actions against Spain and the United Kingdom for infringement of the principle of free movement of capital.

Spanish Law 5/1995 on "the legal arrangements for disposal of public shareholdings in certain undertakings" governs the conditions on which several Spanish public-sector undertakings were privatised. Law 5/1995 and the Royal Decrees implementing it apply to undertakings such as Repsol (petroleum and energy), Telefónica (telecommunications), Argentaria (banking), Tabacalera (tobacco) and Endesa (electricity). The system of prior administrative approval introduced by the Spanish legislation extends to major decisions relating to the winding-up, demerger, merger or change of corporate object of certain undertakings or to the disposal of certain assets of, or shareholdings in, those undertakings.

The Articles of Association of BAA plc (BAA), a privatised undertaking which owns certain international airports in the United Kingdom, create a special share held by the United Kingdom Government which empowers it to give consent to certain of the company's operations (winding-up, disposal of an airport). BAA's Articles of Association also prevent the acquisition of more than 15% of the voting shares in the company.

The Court of Justice points out, first, that the EC Treaty prohibits all restrictions on the movement of capital between Member States and between Member States and third countries. Investments in the form of participation constitute movements of capital under the Community legislation. The Court thus draws attention to the fact that both **the Spanish and**

United Kingdom rules entail restrictions on the movement of capital between Member States.

However, it observes that there is justification for Member States having a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services. **Such restrictions, when they apply without distinction to nationals of the Member State concerned and to other Community nationals, may be justified by overriding requirements of the general interest.** To be justified in that way, the restrictions must accord with the **principle of proportionality**, i.e. they may not go beyond what is necessary in order to attain the objective which they pursue.

As the Court has previously held, a system of prior administrative approval is consonant with the principle of proportionality if:

- it is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned; and
- all persons affected by a restrictive measure of that type have a legal remedy available to them.

The Spanish rules

The Court does not accept that, in the case of **Tabacalera** (tobacco) and **Argentaria** (commercial banking group operating in the traditional banking sector), the legislation may be justified by general-interest reasons linked to strategic requirements and the need to ensure continuity in public services. Those undertakings **are not undertakings whose objective is to provide public services.**

As regards **Repsol (petroleum)**, **Endesa (electricity)** and **Telefónica (telecommunications)**, the Court acknowledges that obstacles to the free movement of capital may be **justified** by a public-security reason. The Court endorses the objective of **safeguarding supplies of such products or the provision of such services** in the event of a crisis where there is a genuine and sufficiently serious threat to a fundamental interest of society.

However, there has been a **failure to observe the principle of proportionality** because:

- the administration has a very broad discretion, exercise of which is not subject to any condition;
- investors are not apprised of the specific, objective circumstances in which prior approval will be granted or withheld;
- the system incorporates a requirement of prior approval;
- the operations contemplated are decisions fundamental to the life of an undertaking; and
- although it appears possible to bring legal proceedings, the Spanish legislation does not provide the national courts with sufficiently precise criteria to review the way in which the administrative authority exercises its discretion.

Likewise, the Court points out that the fact that the regime was to last for a limited period of time (10 years) does not mean that it ceases to constitute an infringement.

The United Kingdom rules

The **United Kingdom Government** argued that its case does **not** entail a **restriction** on the free movement of capital, since **access to the market is not affected** and **BAA's Articles of Association are governed by private company law** and not by public law. It thus specifically stated that it did not wish to rely on any overriding requirements of the general interest to justify its rules. **The Court rejects the United Kingdom Government's arguments** and does not examine the issue of justification.

In those circumstances, **the Court declares that the Spanish and United Kingdom rules are contrary to the free movement of capital.**

N.B.: The Court delivered three judgments on 4 June 2002: *Commission v Portugal* (C-367/98), *Commission v France* (C-483/99) and *Commission v Belgium* (C-503/99) which relate to "Golden Shares". See Press Release No 49/02.

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Languages available: : French, English, German, Italian, Spanish, Danish and Dutch.

*For the full text of the judgment, please consult our Internet page
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at approximately 3pm today.*

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*Pictures of the hearing are available on "Europe by Satellite"
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