



Press and Information

Court of Justice of the European Union
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Judgment in Case C-543/08
Commission v Portugal

Portugal's holding of golden shares in Energias de Portugal is contrary to European Union law

The golden shares are an unjustified restriction on free movement of capital

Energias de Portugal (EDP) was converted into a public limited company in 1991, further to the restructuring of the Portuguese electricity sector. Between 1997 and 2006 EDP was privatised in six successive phases. Currently, the Portuguese State holds 25.73% of the share capital.

Under the Portuguese legislation on privatisation, the articles of association of companies which are to be privatised may, in exceptional cases, where grounds of national interest so require, provide for golden shares which are intended to remain the State's property. Irrespective of their number, such shares confer on the State a right of veto over amendments to the company's articles of association and over other decisions in a particular field.

The Decree-laws approving EDP's privatisation conferred on the Portuguese State, in addition to that right of veto, the right to object to the election of directors, and to appoint, in that event, a director to replace the person elected with the fewest votes or last on the list. Moreover, whereas EDP's articles of association provide that the votes of ordinary shareholders holding more than 5% of the share capital will not be taken into account, the State or equivalent bodies are not subject to that ceiling.

By the action before the Court, the Commission challenges those special rights, which it considers to be contrary to the principles of free movement of capital and freedom of establishment.

By its judgment of today's date the Court of Justice declares that **by maintaining in EDP special rights attributed to it by means of golden shares, Portugal has failed to fulfil its obligations in respect of the free movement of capital.**

The Court holds initially that the exercise by the Portuguese State of special rights which it derives from golden shares in EDP's share capital **constitutes a restriction on that fundamental freedom.**

First, the Portuguese State's **right of veto** over a large number of important resolutions and, in particular, over any amendment of EDP's articles of association, means that the influence of the Portuguese State cannot be reduced except with its consent. That influence over EDP's management and control, unwarranted by the size of the State's shareholding, might discourage operators of other Member States from making direct investments since they could not be involved in the management and control of that company in proportion to the value of their shareholdings. Likewise, that right of veto might have a deterrent effect on portfolio investments, since a possible refusal by the Portuguese State to approve an important decision in the company's interests might depress the value of the shares and thus reduce the attractiveness of an investment.

Secondly, **the 5%-ceiling restriction on the voting rights of any shareholder**, with the exception of the State, might hinder both direct and portfolio investments. Voting rights constitute one of the principal ways whereby shareholders can actively participate in the management of an undertaking or in its control and any measure designed to prevent the exercise of those rights or to

subject them to qualifications constitutes, therefore, an obstacle to the free movement of capital. Moreover, voting ceilings are an instrument which may diminish the interest in acquiring a stake in the capital of a company since they limit the ability of direct investors to establish or maintain lasting and direct economic links with the company which would make possible effective participation in its management or in its control.

Thirdly, **the right to appoint a director**, available solely to the State and to the exclusion of all other shareholders, restricts, in the same way, the ability of shareholders other than the State to participate effectively in the management or control of the company and may render direct investments in its capital less attractive to investors from other Member States.

Next, the Court holds that **those restrictions cannot be justified**. First, while the objective of ensuring a secure energy supply in case of crisis, war or terrorism can indeed be characterised as one of the overriding reasons in the public interest which may justify restrictions on the free movement of capital, that ground can be relied upon only if there is a genuine and sufficiently serious threat to an interest of society. The Court accepts in that regard that Portugal's argument that such a threat does not have to be immediate is not entirely without merit. However, Portugal has not clearly stated why its special rights can ensure that public security is not jeopardised. Secondly, the task conferred on EDP of providing a service of general economic interest cannot be relied on to justify the provisions concerned. In that regard, the Court observes that the Commission does not, in this action, challenge EDP's special or exclusive rights, but those attributed to the Portuguese State as a shareholder of that company.

The Court also holds that the provisions at issue do not define the specific circumstances in which the State's special powers can be exercised and, accordingly, confer on the national authorities a latitude with a very high degree of discretion. The provisions thereby create an uncertainty which entails serious interference with the free movement of capital. Consequently, those measures cannot, in any event, be proportionate to the objectives pursued.

Lastly, the Court states that, since an infringement of the principle of free movement of capital has been established, it is unnecessary to examine whether those measures constitute also an infringement of the principle of freedom of establishment.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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