

OPINION OF ADVOCATE GENERAL

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delivered on 6 April 2006¹

1. The present cases concern ‘golden shares’ held by the Netherlands State in KPN NV (‘KPN’) and TPG NV (‘TPG’) respectively. The Commission contends that, by retaining its golden shares in these undertakings, the Netherlands has failed to fulfil its obligations under Articles 43 EC and 56 EC. These cases require the Court to provide further clarification concerning the limits which Community law imposes on Member States when they act as market participants.

I — Facts and pre-litigation procedure

2. In 1989 the Netherlands State undertaking for post, telegraph and telephone became a public limited company, Koninklijke PTT Nederland NV (‘PTT’). The stock-market flotation of PTT took place in 1994.

The Netherlands State sold a first tranche of shares, representing 30% of subscribed capital.

3. In connection with the flotation, the company’s Articles of Association were amended to include provision for golden shares to be held by the Netherlands State. Rights of prior approval of a range of company decisions were attached to the golden shares. An agreement was drawn up between PTT and the Netherlands State (the so-called ‘Afspraak op Hoofdlijnen’, ‘the Agreement’) relating to the exercise of these rights. According to the Agreement, the Netherlands State is not to use its rights to shield the company from hostile takeover bids. In 1995 the Netherlands State sold a second tranche of shares, representing approximately 20% of subscribed capital.

4. In 1998 PTT was divided into two separate companies: KPN, for telecommunication activities, and TPG, for logistics and distribution. The rights attaching to the Netherlands State’s golden shares remained essentially unchanged.

¹ — Original language: Portuguese.

5. The golden shares held by the Netherlands in KPN (Case C-282/04) carry a right of prior approval for the following types of decisions:
- a decision by the Board of Directors to make investments which will result in the company's own capital, calculated on a consolidated basis, representing less than 30% of total resources;
 - a proposal by the Board of Directors to pay a share dividend and/or a dividend from the reserves;
 - any merger or demerger in which the company is involved;
 - the dissolution of the company;
 - any amendment of the Articles of Association when one of the aims of the amendment is to alter the company's object in so far as the amendment concerns the operation of concessions or authorisations, cancellation of the special share, cancellation of the B preference shares, determination of the number of commissioners of the Supervisory Board by the Minister for Communications and Public Works and the alteration of the rights attaching to the special share;
 - the redemption of the golden shares.
 - the issue of shares in the company and the restriction or removal of the priority right of ordinary shareholders;
 - a supplementary call on holders of Type A preference shares;
 - the acquisition or disposal by the company of shares in its own capital which represent more than 1% of the ordinary shares placed;
 - the exercise of voting rights in relation to the legal persons set out in Article 11 of the Telecommunications Law in respect of dissolution, merger and demerger, the acquisition of shares in the company's capital by such legal persons and amendment of the Articles of Association of such legal persons in so far as any such amendment concerns the foregoing matters;

6. The golden shares held by the Netherlands in TPG (Case C-283/04) carry rights that are identical or similar to those attaching to the golden shares in KPN, namely the right of prior approval of the following types of decisions:

- the issue of shares in the company and the restriction or removal of any priority right of ordinary shareholders;
- a supplementary call on holders of Type A preference shares;
- the acquisition or disposal by the company of shares in its own capital which represent more than 1% of the ordinary shares placed;
- the exercise of voting rights in relation to the legal persons set out in Article 11 of the Telecommunications Law in respect of dissolution, merger and demerger, the acquisition of shares in the company's capital by such legal persons and amendment of the Articles of Association of such legal persons in so far as any such amendment concerns the foregoing matters;
- a decision by the Board of Directors to make investments which will result in the company's own capital, calculated on a consolidated basis, representing less than 15% of total resources;
- a proposal by the Board of Directors to pay a share dividend and/or a dividend from the reserves;
- any merger or demerger in which the company is involved;
- the dissolution of the company;
- any amendment of the Articles of Association when one of the aims of the amendment is to alter the company's object in so far as the amendment concerns the operation of concessions or authorisations, cancellation of the special share, cancellation of the B preference shares, determination of the

number of commissioners of the Supervisory Board by the Minister for Communications and Public Works and the alteration of the rights attaching to the special share;

that the Netherlands State's involvement in KPN through its golden shares and by means of government-appointed commissioners on the Supervisory Board restricted neither the free movement of capital nor the right to freedom of establishment.

— the redemption of the golden shares.

7. On 28 July 2000 the Commission sent two letters of formal notice to the Kingdom of the Netherlands, one concerning KPN and the other concerning TPG. Proceedings subsequently ensued in respect of both companies.

10. Not satisfied with that reply, the Commission, on 5 February 2003, issued the Kingdom of the Netherlands with a reasoned opinion in which it argued that, by retaining its golden shares in KPN and its right to appoint commissioners to KPN's Supervisory Board, the Netherlands had failed to fulfil its obligations under Article 43 EC and Article 56 EC. The Netherlands, still disagreeing with the Commission, replied by letter of 28 April 2003.

8. By its letter of 28 July 2000 regarding KPN, the Commission informed the Netherlands Government that, in its view, provisions in KPN's Articles of Association relating to the rights attaching to the golden shares held by the Netherlands and to the representation of the Netherlands State in the Supervisory Board of KPN were contrary to the provisions of the Treaty concerning the free movement of capital and freedom of establishment.

11. The Commission brought the matter before the Court on 30 June 2004. However, it did not maintain its claim relating to the appointment of commissioners, since that right had been removed from the Articles of Association.

9. The Netherlands Government replied by letter of 8 November 2000 in which it stated

12. By its letter of 28 July 2000 regarding TPG, the Commission informed the Netherlands Government that, in its view, provisions in TPG's Articles of Association relating to the rights attaching to the golden

shares held by the Netherlands and to the representation of the Netherlands State on TPG's Supervisory Board were contrary to the provisions of the Treaty concerning the free movement of capital and freedom of establishment.

13. The Netherlands Government replied by letter of 8 November 2000 in which it stated that the Netherlands State's involvement in TPG through its golden shares and by means of government-appointed commissioners on the Supervisory Board restricted neither the free movement of capital nor the right to freedom of establishment. As a subsidiary point the Netherlands Government stated that, even if a restriction on the free movement of capital or the right to freedom of establishment did exist, such restriction would be justified by the objective of ensuring the availability of a universal postal service.

14. Not satisfied with that reply, the Commission, on 5 February 2003, issued the Kingdom of the Netherlands with a reasoned opinion. The Netherlands, still unpersuaded by the Commission's point of view, replied by letter of 28 April 2003.

15. The Commission brought the matter before the Court on 1 July 2004. As in the case of KPN, the Commission did not

maintain its claim in so far as it related to the appointment of commissioners, since that right had been removed from the Articles of Association.

16. By order of 30 June 2005, the two cases were joined for the purposes of the oral procedure and the judgment, pursuant to Article 43 of the Rules of Procedure.

II — Appraisal

17. According to the Commission, the Netherlands has infringed both Article 43 EC and Article 56 EC. In keeping with established practice of the Court, I shall first assess the arguments pertaining to Article 56 EC.²

18. The Commission submits that the rights attaching to the golden shares held by the Netherlands State in KPN and TPG may make it more difficult to acquire a shareholding in the companies and are liable to deter investors from other Member States from making such investments. The exercise

² — Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-483/99 *Commission v France* [2002] ECR I-4781; Case C-503/99 *Commission v Belgium* [2002] ECR I-4809; Case C-463/00 *Commission v Spain* [2003] ECR I-4581; Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641.

of those rights may restrict effective participation in the management or control of the companies. In that way the Netherlands shareholding in KPN and TPG may hinder, or render less attractive, direct investments from other Member States. The golden shares consequently constitute an impediment to the free movement of capital within the meaning of Article 56 EC.

19. In its defence, the Netherlands has argued, first of all, that Article 56 EC is not applicable because, in its capacity as a shareholder in KPN and TPG, the State is acting as a market participant and not as a public authority. I shall begin by addressing this argument.

A — *Does Article 56 EC apply to the State when it acts as a market participant?*

20. The Netherlands Government argues that the golden shares in KPN and TPG do not fall within the scope of Article 56 EC, because the Netherlands State does not hold them in its capacity as a public authority, but instead as a private shareholder. Golden shares or ‘priority shares’ are common under Netherlands private company law. The rights

attaching to the golden shares of the Netherlands State in KPN and TPG do not differ from rights that are usually agreed upon by private parties. The State has used the possibilities available to it under private company law in the same way that others would have used them.

21. I do not share this point of view.

22. The Treaty rules on the free movement of persons, services and capital impose obligations on the Member States’ national authorities, regardless of whether those authorities act in their capacity as a public authority or as an entity under private law.³ Member States are subject to the rules on free movement, of which they are clearly addressees, not on account of their functional capacity as public authority, but on account of their organic capacity as signatory of the Treaty.⁴ To the extent to which those

3 — This issue should not be confused with the question whether private entities are subject to the free movement rules. When a private entity carries out a public function, it may be concluded that the State is acting through that entity and that, as a consequence, the free movement rules apply *ratione personae*. See, for example, Joined Cases 266/87 and 267/87 *Association of Pharmaceutical Importers* [1989] ECR 1295; Case C-16/94 *Dubois* [1995] ECR I-2421, paragraph 20; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; and the Opinion of Advocate General Kokott in Case C-470/03 *AGM-COS.MET*, currently pending before the Court, at point 87.

4 — See also, by analogy, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; and Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 17.

rules do not create obligations for individuals, Member States, when operating as a market participant, may be subject to constraints that do not apply to other market participants.⁵

23. Moreover, for the purpose of determining whether the free movement of capital is restricted where the State enjoys special powers in an undertaking, it is immaterial how those powers are granted or what legal form they take. The fact that a Member State acts within the framework of its domestic company law does not mean that its special powers cannot constitute a restriction within the meaning of Article 56 EC.⁶

24. Furthermore, even if it were the case that the Netherlands public authorities were exempt from Article 56 EC when acting, like any other shareholder, under general company law, the question should be raised as to whether legislation which enables some shareholders to obtain certain special rights in order to shield them from the market process, may itself constitute a restriction on

the free movement of capital. Legislation of this type may restrict access to capital in the national market by protecting the position of certain operators who have acquired a stronghold in that market. Such operators, moreover, are likely to be domestic shareholders. Legislation of this kind may therefore hinder access to the national market for investors established in other Member States.⁷

25. Consequently, the argument that, since priority shares are not unusual under private company law, the Netherlands State's special powers in KPN and TPG fall outside the scope of Article 56 EC, should be rejected.

B — *The application of Article 56 EC to the special rights in issue*

26. In these cases the Court is asked, in essence, to define the limits which Commu-

5 — See Case 222/82 *Apple & Pear Development Council* [1983] ECR 4083, paragraph 17. The public procurement rules provide another example of constraints that apply to Member States when they operate as market participants, but not to other market participants.

6 — To that effect: Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-463/00 *Commission v Spain* and Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4581, point 48.

7 — See, to that effect, my Opinion in Case C 446/03 *Marks & Spencer* [2005] ECR I-10837, points 37 to 40, as well as points 55 and 56 of my Opinion in Joined Cases C-94/04 and C-202/04 *Cippolla and Macrino*, currently pending before the Court, and points 54 and 55 of my Opinion in Joined Cases C-158/04 and C-159/04 *Trofu Super Markets*, currently pending before the Court.

nity law places on Member States when they intervene in the market as market participants. This form of intervention, which is in contrast to classic forms of State intervention, such as regulation or public ownership, is an attempt to retain some form of public control in a privatised economic sector.

where questions arise as to the limits imposed on the State when it acts as a market participant. When a State decides to open a certain sector of the market, it must act in a manner which is consistent with that decision. This requirement for consistency arises from the need to ensure that the State acts in conformity with either the market process or the political process.¹⁰

27. Advocate General Ruiz-Jarabo Colomer deduced from Article 295 EC that, since a State can in theory retain full control over companies through public ownership, *a fortiori* it can retain more limited control in privatised companies through certain special rights.⁸ The Court did not follow this reasoning. It held that Member States could not 'plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty'.⁹

29. In the case of the privatisation of former State owned companies, this requirement is particularly important. The Treaty entitles the Member States to maintain public ownership of certain companies. Nevertheless, it does not entitle them to curtail selectively the access of market operators to certain economic sectors once those sectors have been privatised. If the State were entitled to maintain special forms of market control over privatised companies, it could easily frustrate the application of the rules on free movement by granting only selective and potentially discriminatory access to substantial parts of the national market.

28. In my view, the Court's position is consonant with its case-law in other areas

30. When the State privatises a company, therefore, the free movement of capital

8 — Opinion in Cases C-367/98, C-483/99 and C-503/99, particularly at point 66. See also points 54 to 57 of his Opinion in *Commission v Spain* and *Commission v United Kingdom*.

9 — *Commission v Spain*, paragraph 67.

10 — See, to that effect, my Opinion in Case C-205/03 P, *Fenin*, currently pending before the Court, at point 26, as well as points 31 and 32 of my Opinion in *Cippolla and Macrino*.

requires that the company's economic autonomy be protected, unless there is a need to safeguard fundamental public interests recognised by Community law. In this way, any State control, given that it is outside the normal market mechanism, of a privatised company must be linked to carrying out the activities of general economic interest associated with that company.

31. The Court's judgment of 4 June 2002 in *Commission v Belgium* should also be read in this way. The Court has recognised that 'certain concerns may justify the retention by Member States of 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'.¹¹ However, it is clear that such influence must be strictly limited to guaranteeing fundamental public interest obligations.¹² Hence, the Court has emphasised the 'principle of respect for the decision-making autonomy of the undertaking concerned'.¹³ The State must thus identify the specific public interest which warrants protection. Moreover, the rules granting special rights to the State should be based on objective and precise criteria which do not go beyond what is necessary

for the purpose of securing that public interest and guarantee the possibility of effective judicial review.¹⁴

32. It seems to me that, in light of the previous case-law, there can be little doubt that the golden shares in KPN and TPG constitute a restriction on the free movement of capital. They confer upon the State a right of prior approval in a range of important decisions, including decisions by the general meeting of shareholders concerning the merger, demerger, or dissolution of the company, and concerning various amendments to the company's Articles of Association. Such a system of prior approval 'affect[s] the position of a person acquiring a shareholding as such'¹⁵ and is therefore liable 'to dissuade investors in other Member States from investing in the capital of those undertakings'.¹⁶ The special powers of the State in KPN and in TPG accordingly restrict the free movement of capital.¹⁷

33. It is therefore necessary to consider, in each case, whether the restriction is justified by a legitimate objective and, if so, whether

11 — *Commission v Belgium*, paragraph 43.

12 — See, in that regard, *Commission v Belgium*, paragraph 47, and *Commission v Spain*, paragraph 82.

13 — *Commission v Belgium*, paragraph 49.

14 — *Commission v Belgium*, paragraphs 51 and 52.

15 — *Commission v United Kingdom*, paragraph 47; *Commission v Spain*, paragraph 61.

16 — *Commission v France*, paragraph 41.

17 — See, in that regard, *Commission v France*, paragraph 37 and, most recently, Case C-174/04 *Commission v Italy* [2005] ECR I-4933, paragraph 28.

the principle of proportionality is complied with.¹⁸

34. In the case of KPN, the Netherlands Government does not rely on any justification based on possible overriding requirements relating to the general interest. As regards its golden shares in KPN, the Netherlands has therefore failed to fulfil its obligations under Article 56 EC.¹⁹

35. In the case of TPG, however, the Netherlands Government relies on the need to safeguard the proper provision of a universal postal service. The Netherlands submits that its golden shares in TPG allow it to protect the solvency and continuity of the company. It argues that, since TPG is at present the only undertaking capable of providing a universal postal service on the scale, and of the quality, required by national law, it is necessary to secure TPG's solvency and continuity in order to safeguard the provision of that service.

36. It is not disputed that the interest of safeguarding the proper provision of a universal postal service may constitute an

overriding requirement relating to the general interest.²⁰ It must therefore be ascertained whether the special powers of the Netherlands State are necessary in order to ensure the provision of a universal postal service and whether that objective might be attained by measures less restrictive of the free movement of capital.²¹

37. In that regard, I agree with the Commission that there is no reason to assume that, in the absence of the special powers under consideration, TPG's managing organs would not be able to protect the company's solvency and continuity adequately. The likelihood that precipitate investments might plunge TPG into financial difficulties which would jeopardise the survival of a proper universal postal service has not been shown to be such as to justify the wide and general system of prior approval at issue in the present proceedings.

38. It should be noted, in this connection, that the special powers of the Netherlands State in TPG are not limited to the activities of TPG as provider of a universal postal service.²² In any event, as the Commission

18 — To that effect: Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 23; *Commission v Portugal*, paragraph 50; *Commission v Italy*, paragraph 35; and Case C-213/04 *Burtscher* [2005] ECR I-10309, paragraph 44.

19 — See, by analogy, *Commission v United Kingdom*, paragraphs 49 and 50.

20 — See, by analogy, Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 43. See also, in this regard, Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15, where the Court held that universal postal services constituted a service of general economic interest.

21 — See, for instance, *Sanz de Lera and Others*, paragraph 23 and *Commission v Belgium*, paragraph 48.

22 — See, in contrast, *Commission v Belgium*, paragraph 50.

has correctly pointed out, the proper functioning of a universal postal service can be safeguarded by more appropriate and less restrictive means, in conformity with the Community regulatory framework in this field.²³

39. Furthermore, the scheme of prior approval is not based on clear and objective criteria which are subject to judicial review. The general rules of private law, as well as the Agreement which applies as between TPG and the State, merely require the latter to exercise its powers in a reasonable manner. Moreover, TPG's Articles of Association do not oblige the holder of the golden shares to provide a formal statement of reasons in support of the exercise of its rights. In that sense, the system of special rights under consideration is different from the scheme that was upheld by the Court in *Commission v Belgium*.²⁴

40. Accordingly, it must be concluded that the system of special powers attaching to the golden shares in TPG goes beyond what is necessary in order to safeguard the proper provision of a universal postal service. By retaining its golden shares in TPG, the

Netherlands has therefore failed to fulfil its obligations under Article 56 EC.

C — The Commission's complaint under Article 43 EC

41. The Commission submits that the special rights in KPN and TPG also constitute an infringement of Article 43 EC. However, it is common ground among the parties that an analysis on the basis of Article 43 EC would produce the same result as an analysis under Article 56 EC. Indeed, in its previous case-law on golden shares, the Court took the view that there was no need for a separate examination under Article 43 EC.²⁵ The Court held that, in so far as the special powers in issue gave rise to restrictions on freedom of establishment, those restrictions were 'a direct consequence of the obstacles to the free movement of capital ... to which they [were] inextricably linked'.²⁶ I suggest that the Court adopt the same approach in the present cases.

23 — Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC of 10 June 2002 (OJ L 176, p. 21).

24 — Cited above. See, in particular, paragraphs 51 and 52 of the judgment in that case.

25 — See, for example, *Commission v Belgium*, paragraph 59 and Case C-58/99 *Commission v Italy* [2000] ECR I-3811, paragraph 20.

26 — *Commission v Portugal*, paragraph 56; *Commission v France*, paragraph 56; *Commission v Spain*, paragraph 86; *Commission v United Kingdom*, paragraph 52.

III — Conclusion

42. On those grounds, I propose that the Court:

in Case C-282/04,

- declare that, by retaining certain provisions of the Articles of Association of the company Koninklijke KPN NV, namely that the company's shares are to include a special share which is owned by the Netherlands State and to which special rights attach with regard to the approval of certain decisions taken by the appropriate company organs, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 56 EC;

and in Case C-283/04,

- declare that, by retaining certain provisions of the Articles of Association of the company TPG NV, namely that the company's shares are to include a special share which is owned by the Netherlands State and to which special rights attach with regard to the approval of certain decisions taken by the appropriate company organs, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 56 EC.