



Chapter 4:
CAPITAL MOVEMENTS
AND
PAYMENTS
recent developments

Recent developments



- A. Special rights exercised by the state in privatised companies (“golden shares”)**
- B. Real estate / authorisation procedures**
- C. Investment rules for institutional investors**

A. Special rights exercised by the state in privatised companies. Jurisprudence.



European Court of Justice rulings:

Case C- 58/99 of 23 May 2000, against Italy

Case C-367/98 of 4 June 2002, against Portugal

Case C-483/99 of 4 June 2002, against France

Case C-503/99 of 4 June 2002, against Belgium

Case C-463/00 of 13 May 2003, against Spain

Case C- 98/01 of 13 May 2003, against UK

Case C-174/04 of 2 June 2005, against Italy

Special rights exercised by the state in privatised companies



Article 295: This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

This article does not allow Member States to maintain restrictions on direct and portfolio investments in privatised companies.

Special rights exercised by the state in privatised companies



The EC Treaty prohibits all restrictions on the movement of capital between MS and between MS and third countries (Art 56). Two types of capital

movements are affected:

- direct and
- portfolio investment

Investments in the form of participation constitute a movements of capital and also affect the right of establishment (Art. 43).

Special rights exercised by the state in privatised companies



ECJ case-law states that special powers that are liable to hinder the exercise of fundamental Treaty freedoms must fulfil 4 conditions, i. e. they must:

- be applied in a non-discriminatory manner;
- justified by imperative requirements in the general interest;
- suitable for securing the attainment of the objective they pursue;
- not go beyond what is necessary to attain it.

proportionality

The Italian case

(Case C-58/99 of 23 May 2000)



- The 1994 framework privatisation law stipulates inter alia that the State has
- to **authorise** the acquisition of shares exceeding 5% of the capital and agreements between shareholders representing at least 5% of voting rights;
 - the **right to veto** major strategic decisions (dissolution, merger, ...), and,
 - the **right to appoint** members of the board.

Ruling: Does not fulfill the above conditions and, therefore, incompatible with the free movement of capital and the right of establishment (Art 56 and 43).

The Portuguese case

(Case C-367/98 of 4 June 2002)



The 1990 framework privatisation law sets **limits on foreign participation** and stipulates inter alia that the State has to **authorise the acquisition of shares exceeding 10% of the voting capital.**

Objectives: economic policy objectives/safeguard national interest.

Ruling: Discrimination. Economic grounds can never serve as justification for obstacles prohibited by the Treaty.

the French case

(Case C-483/99 of 4 June 2002)



- 1993 Decree vesting in the State a **golden share** in *Société Nationale Elf-Aquitaine* (petroleum products) **with the right to authorise the acquisition** of shares above certain threshold and the **right to oppose** decisions regarding assets.
- Objective: to guarantee supplies of petroleum products in the event of a crisis.
- **Ruling:** No **clear-cut criteria** for use of special rights; this is contrary to the principle of **legal certainty** and to the principle of **proportionality**.

The Belgian case

(Case C-503/99 of 4 June 2002)



Two decrees issued in 1994 vesting in the State a golden share in *Distrigaz* and *Société National de transport par canalisation*.

Rights attached to the golden share include the right to **veto strategic company's decisions** and the right **to oppose any transfer of technical installations** which could adversely affect the country's interest in the **energy sector**. No restrictions on ownership involved.

Objective: maintain minimum supplies of gas in the event of a national and serious threat

he Belgian case

(Case C-503/99 of 4 June 2002)



Ruling: The Court ruled:

- protection of **legitimate general interest;**
- **not a system of prior approval**, but government action required;
- **strict time limits** for exercise of opposition powers;
- **objective, stable criteria** subject to **judicial review.**

The Spanish case

(Case C-463/00 of 13 May 2003)



The 1995 framework privatisation law stipulates inter alia that the State has to **authorise the acquisition of shares** exceeding 10% of capital and introduced a system of **prior administrative authorisation** for major management decisions (e.g. dissolution, breaking up or mergers). The system is **limited in time** (10 years).

Objective: Need to guarantee continuity in public services.

Ruling: Failure to observe the principle of **proportionality**.

An infringement of Treaty obligations does not cease to be an infringement merely because it is limited in time.

the UK case

(Case C-98/01 of 13 May 2003)



The **Articles of Association** of *British Airport Authority*, created a **special share** held by the UK Government empowering it to **veto** certain of the company's operations (winding-up, disposal of an airport...) and to **prevent the acquisition** of more than 15% of the voting shares in the company.

Ruling: Restrictions on investment operations are **liable to deter investors** from other Member States thus affecting access to the market.

Restrictions at issue do **not** arise as the **result of the normal operation of company law** (approval of AA as stipulated in the privatisation law = state measure).

he Italian case

ase 174/04 of 2 June 2005)



The 2001 law at issue suspended the voting rights attached to shareholdings exceeding 2% in *Italian gas and electricity companies* if the three following criteria are cumulatively met:

- the foreign company is majority-owned by a foreign government or other public institutions;
- it is dominant in the domestic market;
- it is not publicly listed on a stock exchange.

Ruling: restriction of the free movement of capitals, in the absence of any valid justification.

Other similar cases before the Court



- Case C-282/04 KPN (telecommunications), The Netherlands
- Case C-283/04 TNT (postal services), The Netherlands
- Case C-112/05 Volkswagen, Germany

ummary - 1



In brief, the Court has not ruled out golden shares, but it has set out some principle for their use:

- they cannot be used on the grounds that they aid **economic performance**, and,
- their operations should be a response to overriding requirements relating to the **general interest**,
- not be unduly restrictive (**proportionality test**)
- And, should provide **legal certainty** (objective, stable criteria subject to judicial review).

ummary - 2



Commission Staff Working Document:

“Special rights in privatised companies in the enlarged Union—a decade full of developments”

http://europa.eu.int/comm/internal_market/capital/docs/privcompanies_en.pdf

3. Real estate / authorisation procedures



Court cases concern **schemes of prior authorisation** for the acquisition of

building land (secondary residences), or agricultural real estate

stipulated in different Austrian *Länder* Laws (in regions such as Tyrol, Salzburg, Vorarlberg).

Real estate / authorisation procedures



Secondary residences & building land:

Case C-302/97 (*Konle*) & C-300/01 (*Salzmann*)

- prior authorisation scheme is disproportionate.

Case C-515/99 (*Reisch*)

- Articles 56 EC to 60 do not preclude a prior notification procedure (advantage of legal certainty).

Real estate / authorisation procedures (cont.)



Agricultural real estate

Preliminary ruling in case C-452/01 (*Ospelt*)

- any ex-post supervision would not provide the same guarantee and the very principle underlying a **system of prior authorisation not disputable**;
- the condition that the acquirer himself has to cultivate the plot as well as the residence requirement may be disproportionate.

The ECJ, however, leaves it up to national authorities interpret the law in the light of these considerations.

C. Investment rules for institutional investors



The Treaty articles apply. Indirect reference in secondary legislation (insurance companies and pension funds).

Article 56 – Freedom of investment in foreign assets.

Article 102 – No privileged access for public institutions

Any measure, not based on prudential considerations, establishing privileged access by Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

Investment rules for institutional investors



Legislation regulating the financial sector may introduce investment **restrictions, but only if justified on prudential grounds** (c.f. Article 58(1)(b)).

Member States cannot prescribe that an institutional investor (e.g. an insurance company or supplementary pension fund) has to:

- apply a limitation on placements in foreign assets as an aggregate;

- apply quantitative restrictions for certain types of foreign assets that differ from those of corresponding domestic assets;

- place a certain part of its assets in public bonds issued or guaranteed by Community authorities or by national public authorities.

Investment rules for institutional investors



In the life insurance and pension directives, the main restrictions are laid down in the articles on rules for investment (Art 24 and Art 28 respectively). These directives also allow **currency matching rules**:

e.g. « [**Life insurance**] Undertakings are authorised not to hold matching assets to cover an amount not exceeding 20% of their commitments in a particular currency. However, total assets in all currencies combined must be at least equal to total commitments in all currencies combined». (Annex II, to Directive 2002/83/EC).

→ e.g. *At least 80% of the company's assets have to be denominated in £, if the commitments are all in £.*

In the case of the **directive on occupational pensions**, the threshold is 30% (Pension Funds Directive 2003/41/EC).