

OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 2 December 2009¹

I – Introduction

provides for the possibility of creating privileged shares in the following terms:

1. By the present action, brought on 21 April 2008, the Commission of the European Communities seeks a declaration that, by maintaining special rights for the State and other public sector bodies in Portugal Telecom SGPS SA ('Portugal Telecom') attributed in connection with the State's privileged ('golden') shares in Portugal Telecom, the Portuguese Republic has failed to fulfil its obligations under Articles 56 EC and 43 EC.

'The legislative instrument referred to in Article 4(1) (approving the articles of association of the undertaking to be privatised or transformed into a public limited company) may also, in exceptional cases, where grounds of national interest so require, provide for the existence of privileged shares which are intended to remain the State's property and which, irrespective of their number, confer on the State a right of veto over amendments to the company's statutes and over other decisions in a particular field, duly specified in the articles of association.'

II – Legal framework

3. Article 20(1) of Decree-Law No 44/95 of 22 February 1995 on the first phase of privatisation provides:

2. Article 15(3) of the Framework Law on Privatisations (Lei Quadro das Privatizações)²

'If Portugal Telecom's statutes provide for the existence of shares with special rights, other than preferred dividend shares, the majority of those shares must be held by the State or other public sector shareholders.'

¹ — Original language: French.

² — Law No 11/90 of 5 April 1990.

4. Article 4(2) of the Articles of Association of Portugal Telecom, which is a share management holding company, states that its share capital is made up of 1 025 800 000 ordinary shares and 500 class A shares.

obtain a majority of the votes conferred on class A shares;

5. Under Article 5 of Portugal Telecom's Articles of Association, the majority of the class A shares must be held by the State or other public sector bodies and enjoy certain privileges, in the form of special rights.

- no decision of the general meeting on the matters set out below may be approved against a majority of the votes corresponding to the class A shares:

6. Portugal Telecom's Articles of Association set out those special rights as follows:

- the appropriation of net income for the year,

- at least one third of the total number of directors, including the chairman of the board of directors, must be elected by a majority of the votes conferred on class A shares, that is to say, by the votes of the State and other public sector bodies;

- alterations to the Articles of Association and increases in share capital,

- among the five or seven members of the executive committee chosen from the board of directors, one or two of those members respectively must be elected by a majority of the votes conferred on class A shares;

- any limit on or suppression of preference rights,

- the nomination of at least one of the directors elected to deal specifically with certain management questions must

- fixing the parameters of increases in share capital,

- the issue of bonds or other securities and fixing the value of those which the board of directors is entitled to authorise and the limitation or suppression of preference rights in respect of the issue of bonds convertible into shares and the fixing of the parameters for the issue of those types of bonds by the board of directors,

- relocation of its registered office anywhere within the national territory,
- approval of the acquisition of ordinary shares exceeding 10% of the share capital by shareholders engaged in an activity which competes with those carried on by companies controlled by Portugal Telecom, and

detachment from it of telecommunications activities and their regrouping in an independent company, Telecom Portugal SA. Subsequently, in 1994, several wholly publicly-owned undertakings, namely Telecom Portugal SA, Telefones de Lisboa e Porto SA and Teledifusora de Portugal SA were merged to form Portugal Telecom.

- in addition, a majority of the votes corresponding to those shares shall be necessary even as regards decisions approving the general objectives and fundamental principles of Portugal Telecom's policies or defining the general principles of its policy in respect of the acquisition and disposal of shareholdings in companies or groups, when the general meeting's prior authorisation is required.

8. After 1995, Portugal Telecom was privatised in five successive phases, within the framework of the regime established by the Framework Law on Privatisations.

9. In the first phase, under Decree-Law No 44/95, about 27% of the share capital was disposed of.

10. During the second phase, which occurred between April 1996 and August 1997, about 22% of the share capital was disposed of, thus reducing the State's shareholding to 51% of the capital.

7. Portugal Telecom, which was formed in 1994, represents the culmination of a huge process of restructuring of the Portuguese telecommunications sector. That process began in 1992, with the transformation into a public limited company of the public undertaking Correios e Telecomunicações de Portugal, and was carried on by the

11. As part of the third phase, which started in August 1997 and was completed in April 1999, an additional holding of 26% of the share capital was sold.

III – The facts

12. It is clear from the content of the Court file that the Portuguese Republic retained the majority of the ordinary shares in Portugal Telecom until the end of 1997.

shares with special rights in the share capital of Portugal Telecom.

13. At the end of the fourth phase, the Portuguese Republic reduced its holding in the share capital of Portugal Telecom by an additional 13.5% of the shares.

16. The Commission accused the Portuguese Republic of holding privileged ('golden') shares in Portugal Telecom as well as establishing a right of State veto over any acquisition of a holding exceeding 10% of Portugal Telecom's share capital by shareholders carrying on an activity in competition with that of Portugal Telecom.

14. Finally, at the conclusion of the fifth phase of privatisation, the last tranche of the public shareholding in Portugal Telecom was sold, except for 500 shares with special rights (class A shares) which the State retained.

17. Since it was not satisfied with the Portuguese Republic's response in its letter of 21 February 2006, the Commission served on it a reasoned opinion dated 10 April 2006.

IV – Pre-litigation procedure

18. The Portuguese Republic replied to the reasoned opinion by letter of 24 July 2006 denying the alleged failure to fulfil its obligations.

15. On 19 December 2005, the Commission sent a letter of formal notice to the Portuguese Republic complaining that it had not fulfilled its obligations under Articles 56 EC and 43 EC on the ground that the State and other public sector bodies held privileged

19. Since it considered that the Portuguese Republic had not adopted the measures necessary to comply with the reasoned opinion, the Commission decided to bring the present action on 21 April 2008.

V – Forms of order sought by the parties**VI – The failure to fulfil obligations**

20. The Commission claims that the Court should:

- declare that, by maintaining special rights for the State and other public sector bodies in Portugal Telecom attributed in connection with the State's privileged ('golden') shares in Portugal Telecom, the Portuguese Republic has failed to fulfil its obligations under Articles 56 EC and 43 EC; and

- order the Portuguese Republic to pay the costs of the proceedings.

21. The Portuguese Republic contends that the Court should:

- dismiss the action; and
- order the Commission to pay the costs.

*A – Admissibility of the action***1. Arguments of the parties**

22. In its defence, the Portuguese Republic contends that the action is inadmissible on two grounds. First, it submits that since the Commission has not placed on the Court file either the legislative texts or Portugal Telecom's Articles of Association containing the provisions which embody the alleged failure to fulfil obligations, it has not complied with the rules on the burden of proof and, therefore, has not succeeded in proving the failure which it alleges. Secondly, the Portuguese Republic submits that the Commission, in its application, extended the subject-matter of the proceedings, as defined in the pre-litigation procedure, by then alleging the existence of other special powers of the State, namely that of nominating one or two members of the executive committee chosen from among the directors and the holding of a right of veto over certain strategic decisions, like the sale of substantial assets, merger with

other companies and decisions involving changes in the ownership of the undertaking.

23. The Commission rejects all those contentions.

2. Assessment

24. I consider that the Portuguese Republic's two pleas of inadmissibility cannot succeed.

25. As regards the Commission's alleged obligation to annex the relevant legislative texts and Portugal Telecom's Articles of Association, the Portuguese Republic cannot maintain that, by failing to annex those documents to the originating application, the Commission is relying solely on a presumption without providing the Court with the information necessary for it to determine whether the failure to fulfil obligations is established.³

26. Even though it is true that the Commission did not annex those texts to its

application, it reproduced the content of the provisions of the relevant legislative texts and of Portugal Telecom's Articles of Association both in the documents in the pre-litigation phase and in its application. By so doing, the Commission sufficiently satisfied its obligation to state which provisions, in its submission, give rise to the alleged failure to fulfil obligations.

27. In addition, I observe that the Portuguese Republic has never denied either the existence of those provisions or the fact that they allocate to the State privileged shares with special rights, as stated by the Commission both during the pre-litigation phase and in the proceedings before the Court. On the contrary, in its replies to the letter of formal notice and the reasoned opinion, the Portuguese Republic confirmed several times that, on the basis of those texts, it did indeed hold 500 class A shares with special rights in Portugal Telecom's capital.

28. In any event, even if the Commission failed to comply with one of its obligations, that could not possibly lead, in my view, to the action being inadmissible, such a consequence being manifestly disproportionate to the failure alleged. Moreover, the Court has already in part overruled the Portuguese Republic's objection by ordering, of its own motion, a measure of organisation of the procedure consisting of requesting the parties to the proceedings to lodge Portugal Telecom's Articles of Association at the Court Registry, which they have done. I observe also that, on

³ — See, in that regard, Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, paragraph 21.

reading Portugal Telecom's Articles of Association, they confirm without a shadow of doubt the content of the relevant provisions reproduced by the Commission in its reasoned opinion and in its application.

B – Substance

1. Arguments of the parties

29. As regards the alleged extension of the subject-matter of the proceedings according to which the Commission relied on additional complaints in its application, it is important to note that, according to settled case-law, the requirement not to extend or alter the subject-matter of the proceedings as defined in the reasoned opinion cannot be stretched so far as to mean that in every case the statement of the complaints set out in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same.⁴ The fact that in the application the Commission set out in detail, by referring to additional areas in which the Portuguese Republic had special rights in Portugal Telecom as the holder of the majority of its class A shares, the complaints it had already made in a more general way in the letter of formal notice and the reasoned opinion has, in my view, no effect on the scope of the proceedings.⁵

31. The Commission submits, first of all, that the fact that the Portuguese Republic has the abovementioned special rights by virtue of holding the majority of the class A shares in Portugal Telecom constitutes a restriction on the free movement of capital and on the freedom of establishment. In its submission, those special rights restrict the possibility of the ordinary shareholders participating effectively in the management and control of the company in proportion to the value of their shares and deprive them of the power to take the strategic decisions over which the State has a right of veto.

32. In addition, the privileged shares held by the Portuguese Republic are also liable to prejudice the acquisition of controlling shareholdings in that company, which is incompatible with Article 43 EC.

30. It follows that the present action is, in my opinion, admissible.

33. The Commission states next that the privileged shares in question cannot be regarded as being private in nature for the following two reasons. First, although it is common ground that the special rights which are attached to them are provided for only

⁴ — See Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 56, and Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 19.

⁵ — In that respect, see Case C-185/00 *Commission v Finland* [2003] ECR I-14189, paragraph 87.

in Portugal Telecom's Articles of Association, their creation should however be considered in the light of the relevant provisions of the Framework Law on Privatisations and of Decree-Law No 44/95 according to which the majority of those privileged shares must be allocated to the State and remain its property. Secondly, the articles in question were adopted following the first phase of privatisation, that is to say, when the State still owned a large majority of the shares in Portugal Telecom.

34. Therefore, in the Commission's submission, the creation of privileged shares in Portugal Telecom is not a result of the normal application of company law and is in any event a State measure, falling, consequently, within the scope of Article 56(1) EC.

35. The Commission maintains also that Article 295 EC cannot justify the allocation to the State of privileged shares, since the Court has already emphasised on several occasions that the Member States cannot plead their own systems of property ownership by way of justification for obstacles, resulting from a system of administrative authorisation relating to privatised undertakings, to the exercise

of the freedoms provided for by the EC Treaty.⁶ In the Commission's view, the attribution to the Portuguese State of special rights involving the possibility for it to veto the adoption of certain decisions concerning the undertaking's existence certainly constitutes a system of administrative authorisation.

36. In its reply, the Commission also disputes the classification as a fundamental right attributed by the Portuguese Republic to the right to hold shares with special rights. It states that, while the freedom of association, the right of private economic initiative and the right to property undoubtedly constitute fundamental rights, the same cannot be said for the right to hold privileged shares. As regards the alleged infringement of such fundamental rights in the case of a prohibition on a public authority from holding those shares, the Commission submits that, in accordance with the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000,⁷ the exercise of the above-mentioned rights may be made subject to

6 — The Commission refers, in particular, to Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, paragraph 48; Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraph 44; and Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 66 and 67.

7 — OJ 2000 C 364, p. 1.

restrictions corresponding to objectives in the public interest.

37. The Commission adds finally that the restrictions arising from the Portuguese Republic's special rights in Portugal Telecom cannot be justified by the objectives in the public interest which it invokes and, in any event, they do not comply with the principle of proportionality.

38. It submits that the necessity of ensuring, at all times, the availability to the State of the telecommunications network which plays an essential role, particularly in situations of crisis, war or terrorism, cannot be regarded as a legitimate objective in the public interest since the Portuguese Republic has not shown the presence of a genuine and sufficiently serious threat to a fundamental interest of society, within the meaning of the Court's case-law.⁸

39. The Commission also rejects the Portuguese Republic's argument that, since Portugal Telecom retained the cable and copper-fibre networks as well as all wholesale and retail activities, the retention of the

special rights in Portugal Telecom is justified having regard to the perspective of ensuring a certain level of competition on the telecommunications market, in the absence of a national or Community framework conferring appropriate powers on the Portuguese competition authority and sector regulator. In the Commission's submission, such an argument cannot be accepted since it amounts to justifying an infringement of Community law (of competition, in this case) by another infringement of that law (namely restrictions on the free movement of capital and on the freedom of establishment).

40. As regards the justification that to put in question the Portuguese State's powers in Portugal Telecom in the present economic situation would involve a marked risk of disruption of the capital market, the Commission confines itself to the observation that it is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty.⁹

41. In any event, the Commission adds that the attribution to the Portuguese State of special rights constitutes a measure going manifestly beyond what is necessary to attain the objectives pursued. Among other matters, the special rights cover not specific management decisions, but decisions fundamental to the existence of the undertaking, even though

⁸ — See, in particular, Case C-463/00 *Commission v Spain*, paragraph 72.

⁹ — See, in particular, Case C-367/98 *Commission v Portugal*, paragraph 52.

their exercise is not made subject to any condition limiting the discretionary power of the State authority, beyond the fact that such rights must be used where grounds of national interest so require.

42. The Portuguese Republic argues, first of all, that the right to hold shares with special rights is a fundamental right of shareholders and, as such, a general principle of Community law which the Community Courts are bound to safeguard, as laid down in Article 6 EU and Articles 12 and 14 of the Charter of Fundamental Rights of the European Union. To regard as illegal, as does the Commission in this case, the mere fact that it is a public entity which possesses those shares amounts to an infringement of certain fundamental rights, namely the right to property, the freedom of association and the right of private economic initiative.

43. Next, the Portuguese Republic denies that there is any restriction, maintaining that the creation of the privileged shares is the direct and immediate result of the will of Portugal Telecom itself and, therefore, of the normal application of company law.

44. It submits moreover that, even if the creation of the privileged shares in question must be regarded as a matter for which the State is answerable, it does not infringe Article 56 EC or 43 EC because the purpose of those shares is not to affect trade or to impede the free circulation of capital. It is, in fact, according to the Portuguese Republic, a measure which affects not the detailed rules for the acquisition of shareholdings, but the rules for managing them, which is applied without discrimination, so that the logic underlying the decision in *Keck and Mithouard*¹⁰ is, by analogy, applicable.

45. In any event, founding its argument on the Opinion of Advocate General Poiras Maduro in *Federconsumatori and Others*,¹¹ the Portuguese Republic submits that the simple fact that it holds special rights in Portugal Telecom does not affect the value of that company negatively and, consequently, does not render less attractive the exercise of the right of free movement of capital by investors of other Member States, particularly because the Portuguese State has hitherto never exercised its right of veto.

¹⁰ — Joined Cases C-267/91 and C-268/91 [2003] ECR I-6097.

¹¹ — Point 25 in that Opinion in Joined Cases C-463/04 and C-464/04 [2007] ECR I-10419.

46. The Portuguese Republic argues finally that, even if the State is answerable for the provisions contained in Portugal Telecom's Articles of Association and if there is a restriction on the fundamental freedoms of movement of capital and of establishment, such obstacles are justified by overriding reasons relating to the public interest.

a given quality, for all end-users in its territory, wherever they may be, at an affordable price. Since Portugal Telecom is the operator responsible for that service, the considerable risk of the universal service being compromised were it entrusted to the good intentions of private shareholders justifies the State retaining the possibility of intervening in the company concerned by the retention of special rights.

47. First, the fact that Portugal Telecom owns large infrastructures for transmitting and diffusing telecommunications makes the holding by the State of special rights necessary so that it can safeguard the provision of telecommunications services in case of crisis, war, terrorism, natural disasters and other new threats. In that regard, the Portuguese Republic disputes the Commission's interpretation of the judgment in Case C-463/00 *Commission v Spain*,¹² submitting that the Court did not wish to make the finding that there was a ground of public security conditional on the existence of a genuine and sufficiently serious threat to a fundamental interest of society.

48. Secondly, the Portuguese Republic pleads as a justification the necessity to provide a universal telecommunications service. That universal telecommunications service is one of the services which must be available, at

49. Thirdly, the Portuguese Republic submits that the special rights attributed to the State are necessary and proportionate having regard to the objectives which they are intended to attain. It submits that the special rights conferred on it are no different from a regime of retrospective opposition, that is to say, a power to deprive of any effect a decision adopted by the ordinary general meeting in the cases previously set out in Portugal Telecom's Articles of Association. Moreover, those rights are limited to particular situations defined in advance. Therefore, it is a regime comparable to that which was the subject of *Commission v Belgium*,¹³ a regime which the Court declared compatible with the Treaty.

12 — Paragraphs 71 to 73.

13 — Case C-503/99 [2002] ECR I-4809.

2. Assessment

prohibition on restrictions on the movement of capital between Member States.¹⁵

(a) The existence of restrictions under Article 56 EC

50. The Court finds itself once again confronted with the question of the compatibility with Community law of a legal regime granting the State, following a process of privatisation, company shares to which special rights are attached ('golden shares') enabling it to exercise a marked influence over the activities of the company concerned.¹⁴

51. Such national rules have always been assessed by the Court in the light of the free movement of capital, the infringement of which gives rise, secondarily, to an infringement of the freedom of establishment.

52. First of all, according to settled case-law, Article 56(1) EC lays down a general

53. While the Treaty does not define the concept of 'movement of capital', Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (which article was repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) contains an indicative list of capital movements.¹⁶ Movements of capital for the purposes of Article 56(1) EC thus include in particular investments in the form of a shareholding which confer the possibility of effectively participating in the management and control of an undertaking (direct investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing its management and control (portfolio investments).¹⁷

54. In that regard, the Court has stated that national rules that are liable to impede or restrict the acquisition of shares in the

¹⁴ — It is appropriate to note, as regards the Portuguese Republic, that two other actions for failure to fulfil obligations of the same sort are before the Court (Case C-543/08 *Commission v Portugal* concerning special shares held by the State in the company, Energias de Portugal, and Case C-212/09 *Commission v Portugal* concerning special shares held by the State in GALP Energia SGPS SA).

¹⁵ — See, in particular, *Commission v France*, paragraphs 35 and 40; Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, paragraphs 38 and 43; and Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, paragraph 18.

¹⁶ — See, in particular, Case C-367/98 *Commission v Portugal*, paragraph 37, and Case C-112/05 *Commission v Germany* [2007] ECR I-8995, paragraph 18.

¹⁷ — See Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; *Commission v France*, paragraphs 36 and 37; Case C-98/01 *Commission v United Kingdom*, paragraphs 39 and 40; and *Commission v Netherlands*, paragraph 19.

undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings must be regarded as ‘restrictions’ within the meaning of Article 56(1) EC.¹⁸

55. The Portuguese Republic denies that there is any restriction on the free movement of capital maintaining that the creation of the shares in question is the direct and immediate result of the will of Portugal Telecom itself and, therefore, of the normal application of company law. In other words, the Portuguese Republic is not answerable for the creation of the privileged shares in question, which therefore is not, for the purposes of Article 56 EC, a State measure.

56. I do not find that argument in the least convincing.

57. It is true that neither the Framework Law on Privatisations nor the other legislative texts which govern the various phases of Portugal Telecom’s privatisation require the

allocation to the State of the majority of the privileged shares in that company. Decree-Law No 44/95, implementing the first phase of privatisation, provides only that, *if Portugal Telecom’s statutes provide for the existence of shares with special rights*, the majority of such shares must be held by the State or other public sector shareholders. It is Portugal Telecom’s Articles of Association which expressly establish the presence of privileged shares in its capital, as provided for in Article 24 of the Commercial Companies Code.

58. However, it is common ground that the provisions of Portugal Telecom’s Articles of Association allocating the majority of the privileged shares to the Portuguese State were inserted immediately following the adoption of Decree-Law No 44/95, on 4 April 1995, that is to say, at a time when the State exercised majority control over the undertaking, the Portuguese Republic having indeed confirmed at the hearing that the State held, at that time, 54.2% of Portugal Telecom’s share capital.

59. Therefore, if it was the State acting in its capacity as legislator which authorised the creation of the privileged shares in Portugal Telecom, it was the State acting in its capacity as majority shareholder in that company which effectively created them by amending Portugal Telecom’s Articles of Association, in accordance with the right conferred on it

18 — See *Commission v France*, paragraph 41; Case C-463/00 *Commission v Spain*, paragraph 61; Case C-174/04 *Commission v Italy* [2005] ECR I-4933, paragraphs 30 and 31; and the judgment of 14 February 2008 in Case C-274/06 *Commission v Spain*, paragraph 20.

by the Framework Law on Privatisations and Decree-Law No 44/95.¹⁹

60. In those circumstances, it seems to me impossible to maintain that the creation of the privileged shares can be imputed solely to the will of Portugal Telecom.

61. To accept the opposite argument would enable the Member States to escape the application of the provisions of Article 56 EC on the sole ground that it was not the 'legislator State' which created the privileged shares but the 'shareholder State', following an authorisation granted by the 'legislator State'. It is clear that to endorse such a line of reasoning would largely compromise the practical effect of the prohibition laid down in Article 56(1) EC.

62. As for the part of the Portuguese Republic's argument relating to the fact that the creation of the privileged shares was merely the result of the normal application of company

law, permit me to observe that those shares are intended to remain the property of the State, under Article 15(3) of the Framework Law on Privatisations, in derogation from Article 4 of the Commercial Companies Code, which provides, in fact, that, in public limited companies, special rights may be attributed only to classes of shares and are to be transferred with them.²⁰

63. Accordingly, as the Commission pertinently explained in its reply, without challenge by the Portuguese Republic on the point, there are here company statutes which take as their inspiration contractual forms of private law, on to which the national legislation has grafted effects creating an exception to the general law, in particular the prohibition on putting the privileged shares into free circulation.

64. In addition, the Portuguese Republic's argument alleging the relevance of the distinction between privileged shares created within the framework of the normal application of national company law and privileged shares of public origin does not persuade me.

19 — The interesting question whether, had Portugal Telecom's Articles of Association not been amended, failure to fulfil obligations under Community law could be established is a completely theoretical hypothesis since, in this case, that company's Articles of Association were indeed amended immediately following the adoption of Decree-Law No 44/95 in the way indicated by the legislator and the Portuguese regulatory authority, the Commission having confirmed at the hearing that the failure to fulfil obligations complained of covered all the relevant Portuguese rules, including the reference made to Portugal Telecom's Articles of Association.

20 — It should be added that Article 328(2) of the Commercial Companies Code authorises exceptional clauses excluding the transferability of shares, namely company consent clauses, those relating to the preferential rights of other shareholders and those subjecting transfer to certain conditions. It is common ground that the derogation provided for by the Framework Law on Privatisations does not fall within any of those three categories.

65. Even if the origin of those shares is to be found in private law, the Portuguese Republic is also answerable for their creation. In my view, there can be no doubt that the Member States, in their capacity as signatories to the Treaty, are required to comply with the rules relating to the fundamental freedoms of movement irrespective of whether they act in the capacity of public authorities or private law entities. To maintain a different view would amount to offering the Member States ways of circumventing those rules given that, in their capacity as legislators, they could, without difficulty, amend national private law by requiring, for example, companies in which they hold shares to include in their articles of association provisions conferring certain special rights on them.²¹

it to exercise an influence going beyond the effective value of the shares it holds. By virtue of those shares, indeed, not only a large number of management decisions concerning the undertaking's structure and significant aspects of its activities must previously be authorised by the Portuguese State, but also, as is clear from the content of point 6 of the present Opinion, the acquisition itself of shareholdings in Portugal Telecom's capital is subject in certain cases to such prior approval. The Portuguese rules thus establish a system of prior administrative authorisation for the adoption of certain management decisions and for the acquisition of shareholdings in Portugal Telecom, as the Commission correctly describes.

66. It follows that the Portuguese Republic is without any doubt answerable for the creation of the privileged shares in question.

67. As for the restrictive nature of the Portuguese rules, including the reference made to Portugal Telecom's Articles of Association, it is important to state that the privileged shares which those rules allocate to the State enable

68. Irrespective of the fact that the Portuguese Republic has never made use of the special powers conferred upon it by holding the majority of the privileged shares in Portugal Telecom's capital, the fact that the adoption of decisions of such an importance could be subject to the State's prior authorisation has the effect of discouraging operators of other Member States from making direct investments in Portugal Telecom, since, in such circumstances, they could not aspire to its management or control in proportion to the value of their shares.²²

21 — See also, to that effect, points 22 and 23 of Advocate General Poiares Maduro's Opinion in *Commission v Netherlands*.

22 — See, to that effect, *Commission v Netherlands*, paragraph 27.

69. Likewise, the attribution of those special rights to the State also makes portfolio investments less attractive since any private shareholder could see the stock exchange value of his shares fall as a result of the State's exercise of its right of veto over a decision which corresponded with Portugal Telecom's interests.

70. It seems to me that those considerations cannot be undermined by the other arguments put forward by the Portuguese Republic.

71. First of all, the objection that Article 295 EC confers the right on a Member State to hold privileged shares of the same type as those in the present case does not in the least convince me.

72. In that respect, it is sufficient to state, as the Commission correctly observed,²³ that one should not overestimate certain concerns which, depending on the circumstances, 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. Those concerns cannot, in any event, entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles to the

exercise of the freedoms provided for by the Treaty, resulting from a system of administrative authorisation relating to privatised undertakings. It is established that that article does not have the effect of exempting the Member States' systems of property ownership from the system of fundamental rules of the Treaty.²⁴

73. Next, the Portuguese Republic's argument that the Court should apply the logic underlying the judgment in *Keck and Mithouard* to the present case is no more convincing.

74. In that regard, it is appropriate to point out that, applied to this case, that logic leads, in the Portuguese Republic's submission, to the conclusion that, having regard to the fact that there are here detailed non-discriminatory rules for managing those shareholdings but not detailed rules for the acquisition of the same holdings, there can be no infringement of the right of free movement of capital.

75. First, that argument fails on the facts because it is common ground that, among the decisions subject to the State's prior approval, is the *acquisition* of ordinary shares exceeding a threshold of 10% of Portugal Telecom's share capital by shareholders carrying on an activity in competition with those carried on by companies controlled by Portugal Telecom.

²³ — See point 35 above.

²⁴ — See, to that effect, Case C-367/98 *Commission v Portugal*, paragraphs 47 and 48 and the case-law cited.

Therefore, the failure to fulfil obligations with which the Portuguese Republic is charged would not be completely eliminated.

76. Secondly, and in any event, I consider that the influence exercised by the Portuguese Republic, thanks to the privileged shares, over Portugal Telecom's management decisions, such as those in question in the present case, may also be likely to dissuade investors established in other Member States from taking shareholdings in that company. Moreover, that is the approach which was adopted by the Court in rejecting the Kingdom of the Netherlands' argument, in *Commission v Netherlands*, that there could be no restriction on the free movement of capital because the special shares held by the Netherlands State influenced only management decisions of the postal and telecommunications undertakings concerned in that case.²⁵

the protection of human rights on which the Member States have collaborated or to which they are signatories, in particular the ECHR.²⁶ Yet I observe that the Portuguese Republic has, at no stage of the present proceedings, pleaded that the alleged right to hold special rights in a privatised undertaking is part of the Member States' common constitutional traditions or features in a single international instrument concerning the protection of human rights.

78. In the light of the foregoing observations, I consider that the allocation to the State of the majority of the privileged shares in question constitutes, generally, a restriction within the meaning of Article 56(1) EC.

(b) The possible justification for restrictions

77. Finally, as regards the question of holding special rights being a fundamental right, invoked by the Portuguese Republic, it is important to recall that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, drawing inspiration in that regard from the Member States' common constitutional traditions and from international treaties for

79. It is settled case-law that the free movement of capital may be restricted by national

²⁵ — See the judgment, paragraphs 16 and 24.

²⁶ — See, to that effect, Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 35 and the case-law cited.

measures justified by the reasons set out in Article 58 EC or by overriding reasons in the public interest, in so far as there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests.²⁷

80. In the absence of such Community harmonisation, it is for each Member State to establish the degree of protection it envisages affording to those legitimate interests and the way in which it is to be achieved in compliance with the Treaty and, particularly, the principle of proportionality, by which the measures adopted must be appropriate to secure the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.²⁸

81. The Portuguese Republic submits that there are, in this case, several objectives relating to the public interest which justify restrictions on the free movement of capital, namely grounds of public security, the requirement to ensure the provision of the universal telecommunications service, the necessity of ensuring a certain level of competition on

the telecommunications market and that of avoiding any disturbance of the capital market.

82. As for the last two grounds of justification advanced by the Portuguese Republic, the Court should not linger over their examination since they are not, in my view, legitimate objectives in the public interest capable of justifying restrictions on the free movement of capital.

83. Indeed, as regards, first, the risk of causing disturbance of the capital market, it is an economic ground which, according to the Court's settled case-law, can never serve as justification for restrictions prohibited by the Treaty.²⁹

84. Secondly, as regards the objective of ensuring a certain level of competition on the Portuguese telecommunications market – which, according to the Portuguese Republic, is not wholly competitive because of the retention by Portugal Telecom of ownership of cable and copper-fibre networks as well as all wholesale and retail activities – I must point out that the Court has already held that an interest in generally strengthening the competitive structure of a given market cannot

27 — See to that effect, in particular, Case C-367/98 *Commission v Portugal*, paragraph 49, and Case C-274/06 *Commission v Spain*, paragraph 35.

28 — See, in that regard, Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18; *Commission v Belgium*, paragraph 45; Case C-367/98 *Commission v Portugal*, paragraph 49; and Case C-274/06 *Commission v Spain*, paragraph 36.

29 — See, in particular Case C-367/98 *Commission v Portugal*, paragraph 52.

constitute valid justification for restrictions on the free movement of capital either.³⁰

85. In any event, the assertion that maintaining the privileged shares with special rights in Portugal Telecom is necessary to attain that objective must be rejected since it would be sufficient, in my view, if the Portuguese Republic conferred the necessary powers on the competent regulatory authorities.³¹ In that regard, the Portuguese Republic has failed to explain the reasons for which the conferment of such powers would not be possible.

86. As regards the two valid grounds of justification, based respectively on the requirement to protect public security and that of guaranteeing the provision of the universal telecommunications service, the allocation to the State of privileged shares in Portugal Telecom's capital does not seem to me to be either necessary or proportionate to either of those objectives.

87. As regards the first justification mentioned, whilst it is common ground that Portugal Telecom owns large telecommunications infrastructures which play an essential role in case of crisis, war or natural disasters, the fact remains that, under the Court's settled case-law, the requirements of public security, as a derogation from the principle of free movement of capital, must be interpreted strictly, so that they may not be invoked unless there is a genuine and sufficiently serious threat to a fundamental interest of society.³² Yet, in particular, the Portuguese Government has not begun to show that the procedure of prior administrative authorisation arising from the holding of privileged shares in Portugal Telecom's capital would only be activated if there were a 'genuine and sufficiently serious' threat to a fundamental interest of society.

88. As regards the requirement to guarantee the provision of the universal telecommunications service, the Portuguese Republic's retention of the privileged shares with special rights in Portugal Telecom cannot be regarded as a measure necessary to attain such an objective. Indeed, in my view, the systems of compensation for the costs of providing the universal telecommunications

30 — See Case C-367/98 *Commission v Portugal*, paragraph 52; Case C-174/04 *Commission v Italy*, paragraph 37; and Case C-274/06 *Commission v Spain*, paragraph 44.

31 — Moreover, as regards the objection raised by the Portuguese Republic that the national regulatory framework does not confer on that authority adequate powers to attain that objective, I shall confine myself to citing the established case-law according to which a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see, in particular, the judgment of 20 November 2008 in Case C-94/08 *Commission v Spain*, paragraph 21, and Case C-568/07 *Commission v Greece* [2009] ECR I-4505, paragraph 50).

32 — See, in particular, Case C-463/00 *Commission v Spain*, paragraph 72, and Case C-274/06 *Commission v Spain*, paragraph 39.

service implemented in each Member State, in accordance with secondary Community law,³³ can ensure sufficiently effectively that the universal service for which, in this case, Portugal Telecom is responsible is provided. Moreover, the Portuguese Republic cannot validly and coherently maintain that the privileged shares are intended to prevent such service being exclusively in the hands of private shareholders, especially as it decided, wholly voluntarily, to privatise Portugal Telecom entirely.

89. For the sake of completeness, I consider that the regime in question established by the Portuguese Republic goes far beyond what is necessary to attain the objectives allegedly pursued.

90. The Court should, in my view, reject the Portuguese Republic's assertion that its special rights are analogous to the special rights attributed to the Kingdom of Belgium, which

were the subject of the above-cited case *Commission v Belgium* and which the Court declared to be compatible with Article 56 EC.

91. In that case, the special shares held by the Kingdom of Belgium in the companies SNTC and Distrigaz conferred on it a right of *retrospective opposition* which it exercised in regard to management decisions set out in detail, only in circumstances where the objectives of national policy were compromised. Moreover, the reasons for the exercise of the right of opposition had to be formally stated and subject to effective judicial review.³⁴

92. By contrast, in the present case, as I have already indicated, we have a system of prior administrative authorisation. In addition, such prior authorisation covers not limited management decisions, but a great variety of decisions fundamental to the existence of the company, including the acquisition, in certain cases, of shareholdings exceeding the threshold of 10% of Portugal Telecom's share capital. Likewise, the exercise of those powers by the State is subject in this case only to the condition that 'grounds of national interest so require'.³⁵ Moreover, whilst it is true that a legal action against the right of veto, were it to be exercised by the State, is possible, the relevant legislative texts do not provide the national courts with sufficiently precise criteria

33 — See, in that regard, Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13) and Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

34 — *Commission v Belgium*, paragraphs 49 to 52.

35 — See Article 15(3) of the Framework Law on Privatisations.

for them to be able effectively to review the exercise of the State's discretionary power.

Republic privileged shares with special rights in the privatised undertaking Portugal Telecom constitute a restriction on the movement of capital within the meaning of Article 56 EC.

93. Therefore, I consider that the Portuguese Republic cannot rely, in this case, on the application by analogy of *Commission v Belgium*.

(c) The existence of restrictions under Article 43 EC

94. It follows that the Portuguese Republic has not produced evidence to show that the objectives, which it put forward in attempting to justify the establishment of the system of prior administrative authorisation in question in the present case, could not be attained by less restrictive measures, such as, for example, a system of retrospective declarations.³⁶

96. The Commission submits that the allocation to the Portuguese State of those shares in Portugal Telecom entails also infringement of Article 43 EC.

95. In view of all the foregoing, my conclusion is that the national rules (including the reference made to Portugal Telecom's Articles of Association) granting the Portuguese

97. According to the Court's case-law, in so far as the rules in question contain restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital, to which they are inextricably linked.³⁷ Consequently, it is not necessary to analyse the regime in question in the light of the Treaty's rules on the freedom of establishment.

36 — The Court considers, in fact, that a system of retrospective declarations is, in general, a measure which is less restrictive of the exercise of the right of free movement of capital provided that it is based on objective, non-discriminatory known-in-advance criteria of the undertakings concerned and that anyone adversely affected by a restrictive measure of that type has an effective remedy (see Case C-367/98 *Commission v Portugal*, paragraph 50; Case C-463/00 *Commission v Spain*, paragraph 69; and the judgment of 17 July 2008 in Case C-207/07 *Commission v Spain*, paragraph 48).

37 — See, in particular, *Commission v Belgium*, paragraph 59; Case C-58/99 *Commission v Italy* [2000] ECR I-3811, paragraph 20; Case C-463/00 *Commission v Spain*, paragraph 86; and *Commission v Netherlands*, paragraph 43.

VII – Conclusion

98. On those grounds, I suggest that the Court should:

- declare that, by maintaining special rights for the State and other public sector bodies in Portugal Telecom SGPS SA attributed in connection with the State's privileged shares in Portugal Telecom SGPS SA, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC; and
- order the Portuguese Republic to pay the costs.