JUDGMENT OF THE COURT
13 May 2003 *

In Case C-463/00,

Commission of the European Communities, represented initially by M. Patakia and M. Desantes, and, subsequently, by M. Patakia and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by

* Language of the case: Spanish.

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, and D. Wyatt QC and J. Crow, Barrister, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that the provisions of Article 2 and Article 3(1) and (2), together with Article 1, of Ley 5/1995 de régimen jurídico de enajenación de participaciones públicas en determinadas empresas (Law 5/1995 of 23 March 1995 on the legal arrangements for disposal of public shareholdings in certain undertakings (BOE No 72 of 25 March 1995, p. 9366) and the implementing royal decrees enacted under Article 4 of Law 5/1995 (Royal Decree No 3/1996 of 15 January 1996 concerning Repsol SA (BOE No 14 of 16 January 1996, p. 1133), Royal Decree No 8/1997 of 10 January 1997 concerning Telefónica de España SA and Telefónica Servicios Móviles SA (BOE No 10 of 11 January 1997, p. 907), Royal Decree No 40/1998 of 16 January 1998 concerning Corporación Bancaria de España SA (Argentaria) (BOE No 15 of 17 January 1998, p. 1851), Royal Decree No 552/1998 of 2 April 1998 concerning Tabacalera SA (BOE No 80 of 3 April 1998, p. 11370), and Royal Decree No 929/1998 of 14 May 1998 concerning Endesa SA (BOE No 129 of 30 May 1998, p. 17939)), in so far as they implement a system of prior administrative approval

— which is not justified by any overriding requirements of the general interest,

— which does not lay down objective and stable criteria which have been made public, and

— which does not comply with the principle of proportionality,

are incompatible with Article 43 EC and Article 56 EC,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur), V. Skouris, F. Macken, N. Colneric, S. von Bahr and A. Rosas, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 November 2002, at which the Commission was represented by M. Patakia and G. Valero Jordana, the Kingdom of Spain by N. Díaz Abad and the United Kingdom of Great Britain and Northern Ireland by J.E. Collins, acting as Agent, and by D. Wyatt and J. Crow,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 December 2000, the Commission of the European Communities brought an action under Article 226 EC against the Kingdom of Spain for a declaration that the provisions of Article 2 and Article 3(1) and (2), together with Article 1, of Law 5/1995 of 23 March 1995 on the legal arrangements for disposal of public shareholdings in certain undertakings (BOE No 72 of 25 March 1995, p. 9366, 'Law 5/1995') and the implementing royal decrees enacted under Article 4 of Law 5/1995 (Royal Decree No 3/1996 of 15 January 1996 concerning Repsol SA (BOE No 14 of 16 January 1996, p. 1133, 'Royal Decree No 3/1996'), Royal Decree No 8/1997 of 10 January 1997 concerning Telefónica de España SA and Telefónica Servicios Móviles SA (BOE No 10 of 11 January 1997, p. 907, 'Royal Decree No 8/1997'), Royal Decree No 40/1998 of 16 January 1998 concerning Corporación Bancaria de España SA (Argentaria) (BOE No 15 of 17 January 1998, p. 1851, 'Royal Decree 40/1998'), Royal Decree No 552/1998 of 2 April 1998 concerning Tabacalera SA (BOE No 80 of 3 April 1998, p. 11370, 'Royal Decree No 552/1998'), and Royal Decree No 929/1998 of 14 May 1998 concerning Endesa SA (BOE No 129 of 30 May 1998, p. 17939, 'Royal Decree No 929/1998')), in so far as they implement a system of prior administrative approval

— which is not justified by any overriding requirements of the general interest,

— which does not lay down objective and stable criteria which have been made public, and

— which does not comply with the principle of proportionality,

. . . .

are incompatible with Article 43 EC and Article 56 EC.

2 By order of the President of the Court of 1 June 2001, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Kingdom of Spain.

Legal background to the proceedings

Community law

3 Article 56(1) EC is worded as follows:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

4 Article 58(1)(b) EC provides:

'The provisions of Article 56 shall be without prejudice to the right of Member States:

...

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.'

5 Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) contains a nomenclature of the capital movements referred to in Article 1 of that directive. In particular, it lists the following movements:

'I — Direct investments

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links.

...'

6 The explanatory notes appearing at the end of Annex I to Directive 88/361 provide that 'direct investments' means:

'Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

...

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person or another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

...'

7 The nomenclature appearing in Annex I to Directive 88/361 also refers to the following movements:

'III — Operations in securities normally dealt in on the capital market

...

A — Transactions in securities on the capital market

1. Acquisition by non-residents of domestic securities dealt in on a stock exchange

...

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange

...'

8 Article 295 EC provides:

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

National law

9 Law 5/1995 lays down the rules concerning the privatisation of undertakings in the Spanish public sector. Articles 1 to 4 provide:

'Article 1. Substantive scope

This Law shall apply to:

1. Commercial undertakings in which, on the date on which this Law enters into force, the State holds, directly or indirectly, more than 25% of the share capital and which are controlled by the State member in any of the ways laid down by the applicable commercial legislation, provided that, as regards the activity carried out by the undertaking, on its own account or as a result of a holding in other companies, any of the following conditions are met:

(a) essential services or public services formally defined as such are supplied;

(b) activities are carried out which by law and for reasons of public interest are subject to specific administrative review procedures, applying particularly to the persons carrying out the activities;

(c) the activity is exempt in whole or in part from the rules on competition under Article 90 of the Treaty Establishing the European Economic Community.

2. Commercial undertakings which are part of a group, as defined in Article 4 of Law 24/1988 of 28 July 1988 on the Stock Market, in which any of the undertakings falling within paragraph (1) above has a dominant position, provided that they meet any of the conditions referred to in subparagraphs (a), (b) or (c) of paragraph (1).

Article 2. Conditions for application

The system of prior administrative approval set out in Article 3 et seq. of this Law shall apply where the public holding of the State member of the undertakings referred to in the preceding article falls within either of the following cases:

1. Where, in one transaction, or a series of transactions, the holding is disposed of in such a way that it is reduced by a percentage equal to, or greater than, 10% of the share capital, provided that the resulting direct or indirect State holding in that capital is less than 50%.

2. Where as the direct or indirect consequence of any act or transaction the holding is reduced to less than 15% of the share capital.

Article 3. Prior administrative approval

1. Where one of the conditions for application referred to in the preceding article has arisen and as established in the Royal Decree referred to in Article 4 of this Law, decisions on the following matters by the managing organs of the undertakings mentioned in Article 1 of this Law may be subject to prior administrative approval:

(a) the voluntary winding-up, demerger or merger of the undertaking;

(b) any kind of disposal or charging, under any name whatsoever, of the assets or shareholdings necessary for the attainment of the undertaking's object and which are defined as such;

(c) a change in the undertaking's object.

2. Likewise, where one of the conditions for application set out in Article 2 of this Law has arisen, and as provided in the Royal Decree referred to in the following article, the following transactions may be subject to prior administrative approval:

(a) operations consisting in dealings in the share capital which result, following one transaction or a series of transactions, in the State's shareholding, as regards the undertaking subject to the special regime laid down by this Law, being reduced by a percentage equal to, or greater than, 10%;

(b) the direct or indirect acquisition, including through a trustee or other third party, of shares or other securities capable of conferring a right, directly or indirectly, to subscribe for or acquire shares or securities, where the acquisition results in a holding of at least 10% of the share capital.

...

Article 4. System of administrative approval

1. The system of prior administrative approval shall be established by Royal Decree made in the Council of Ministers on a proposal from the Minister competent in the relevant sphere and following an opinion from the Council of State.

2. The Royal Decree establishing the system to which this article refers shall enter into force prior to the transactions mentioned in Article 2 and shall specify:

(a) its substantive scope;

(b) those of the transactions mentioned in Article 3 which are specifically to be subject to prior administrative approval;

(c) the authority which is competent to grant approval;

(d) the period throughout which the system of prior administrative approval is to apply.

3. Except in the case mentioned in paragraph (2)(d) above, the procedures laid down in paragraph (1) of this article shall apply if the system of prior administrative approval is modified or withdrawn.'

10 The general provisions implementing Law 5/1995 were laid down by Royal Decree No 1525/1995 of 15 September 1995 (BOE No 230 of 26 September 1995, p. 28616, 'Royal Decree No 1525/1995').

11 Furthermore, pursuant to Article 4 of Law 5/1995, Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998 lay down the system of approval applying to undertakings operating in the petroleum, telecommunications, banking, tobacco and electricity sectors respectively. Each of the royal decrees defines (as is required by Article 4(2) of Law 5/1995) its substantive scope by reference to that law, the transactions which are subject to prior administrative approval, the administrative body which is competent to grant approval and the date on which the system ceases to apply, the various decrees setting dates between 5 October 2000 and 8 June 2008.

Pre-litigation procedure

12 By letter of 26 October 1998, the Commission informed the Spanish Government that the system of prior administrative approval established by Law 5/1995 and Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998 might infringe the provisions of the EC Treaty on free movement of capital and freedom of establishment. The Commission therefore asked the Spanish Government to submit its observations within two months.

13 The Spanish Government replied to that letter of formal notice by letter of 27 January 1999, in which it contended that the measures at issue were compatible with Community law. The government explained its point of view in a further letter of 18 March 1999.

14 Since it was not convinced by the answers thus provided, the Commission sent the Kingdom of Spain a reasoned opinion on 2 August 1999, requiring it to comply with it within a two-month period.

15 The Spanish Government replied to the reasoned opinion by letter of 3 November 1999. In its letter it gave a detailed explanation of the arrangements for the privatisation of certain undertakings operating in the Spanish public sector and reiterated its view that the measures at issue were compatible with Community law, in particular with Articles 43 EC, 56 EC and 295 EC.

16 The Commission was unconvinced by those explanations and brought the present action before the Court of Justice.

Admissibility

Pleas in law and arguments of the parties

17 The Spanish Government raises three pleas of inadmissibility.

18 First, it argues that the regimes introduced by Royal Decree No 40/1998 and Royal Decree No 552/1998, as amended by Royal Decree No 67/2000 of 21 January 2000 (BOE No 28, of 2 February 2000, p. 4700), ceased to apply on 17 February 2001 and 5 October 2000 respectively. Therefore, the action should be declared inadmissible in relation to those regimes.

19 As regards the regimes introduced by Royal Decrees Nos 3/1996, 8/1997 and 929/1998, which are still applicable, the Spanish Government requests, second, that the action should be dismissed as inadmissible, since there is inconsistency in the legislative provisions mentioned by the Commission in its application. The Commission refers solely to Article 1(1) of Law 5/1995, whilst the regimes actually take effect under Article 1(2), which deals with groups of undertakings.

20 The Spanish Government submits, third, that the application must be declared inadmissible as regards Article 3(1) of Law 5/1995, which concerns decisions of the managing organs, since the Commission refers in its observations to 'transactions' falling within Article 3(2) and not to 'decisions'.

21 The Commission asks the Court to reject the pleas of inadmissibility.

22 The Commission argues that the regimes introduced by Royal Decrees Nos 40/1998 and 552/1998, as amended, came to an end after expiry of the period laid down in the reasoned opinion for compliance therewith, namely after 2 October 1999. It is apparent from settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of that period.

23 As regards the alleged failure to mention Article 1(2) of Law 5/1995 in its application, the Commission maintains that it referred generally to Article 1 on several occasions, without drawing any distinction between the two paragraphs thereof. Even if the Court were to find that groups were excluded from the action, that would not render it inadmissible *vis-à-vis* the parent companies. In any event, Royal Decree No 8/1997 concerning Telefónica de España SA and Telefónica Servicios Móviles SA does not relate to the whole group but specifically covers two undertakings within the group.

24 As regards decisions of the managing organs, both the first page of the application and the form of order sought by the application contain a reference to paragraphs (1) and (2) of Article 3 of Law 5/1995. Furthermore, there is a specific reference in the body of the application to corporate decisions and more general references to the transactions which, as a whole, are subject to approval. There are therefore no grounds for contending that the applications lacks precision.

Findings of the Court

25 As regards the first plea of inadmissibility, it is sufficient to state that it is clear from the Court's case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-174/01 *Commission* v *Luxembourg* [2002] ECR I-11171, paragraph 18). Given that the reasoned opinion was dated 2 August 1999 and that there was a two-month period within which to comply with it, the fact that the regimes introduced by Royal Decrees Nos 40/1998 and 552/1998, as amended, expired on 17 February 2001 and 5 October 2000 respectively does not affect the question whether an infringement existed at the end of that period.

26 The first plea of inadmissibility must therefore be rejected.

27 As regards the second and third pleas of inadmissibility, Article 38(1)(c) of the Rules of Procedure provides that the application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. In this instance, it is sufficiently clear from the application that the action deals specifically with the implementing royal decrees enacted pursuant to Law 5/1995, some of which concern independent undertakings and others of which concern groups of undertakings, and that the provisions of Law 5/1995 are cited only in so far as they form the legal basis for the decrees in question. It is therefore of no relevance that the Commission did not refer on each occasion specifically to paragraph (1) or paragraph (2) of Article 1 of Law 5/1995. As regards the decisions of the managing organs referred to in Article 3(1) of Law 5/1995, it is quite clear from the application that the action is concerned with measures taken under Article 3(1) of Law 5/1995 as well as with those taken under Article 3(2). The application is consequently clear and unambiguous.

28 The second and third pleas of inadmissibility must therefore be rejected.

29 It follows that the action is admissible in its entirety.

Substance

Pleas in law and arguments of the parties

30 In its application, the Commission refers, first, to its Communication 97/C 220/06 of 19 July 1997 on certain legal aspects concerning intra-EU investment (OJ 1997 C 220, p. 15; 'the 1997 Communication'). It observes that in the Communication it publicised its view on the interpretation of the Treaty

provisions concerning the free movement of capital and freedom of establishment in the context of measures taken by a Member State in the course of privatisation of a public undertaking.

31 Under paragraph 7 of the 1997 Communication, any measure which subjects to prior administrative approval exercise of the right to acquire controlling shareholdings, unrestricted exercise of the voting rights attaching thereto or management of an undertaking is to be considered as a restriction on direct investment operations by investors from another Member State and on portfolio investment operations, since the approval procedures could be used to restrain investors wishing to carry out portfolio investment operations from buying non-controlling stakes above the established thresholds.

32 In the Commission's submission, the national law in question, by making it possible to subject certain actions to prior administrative approval, does not comply with the conditions set out in the 1997 Communication and thus infringes Articles 43 EC and 56 EC.

33 As regards more specifically the free movement of capital, the Commission refers to Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 14, from which it is clear that a provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the movement of capital.

34 Although it is true that the Member States may, by reason of exceptions provided for by the Treaty, impose restrictions on the free movement of capital and freedom of establishment in certain circumstances linked to the exercise of

official authority, to public order, to public security and to public health, the exceptions are to be restrictively interpreted and their scope cannot be determined unilaterally by the Member States. Furthermore, they must pass the proportionality test, be in conformity with the principle of legal certainty and not be implemented for purely economic ends (see Case C-19/92 *Kraus* [1993] ECR I-1663; and Case C-55/94 *Gebhard* [1995] ECR I-4165).

35 Considerations of a purely economic or administrative nature cannot in any event constitute an overriding requirement of the general interest such as to justify restricting the freedoms laid down by the Treaty. Thus, the tobacco manufacturer, Tabacalera SA, and the banking association, Corporación Bancaria de España SA (Argentaria), could not, prima facie, be the subject of justification based on overriding requirements of the general interest. The rules relating to approval which concern the other undertakings at issue do not provide for any conditions and could be applied in any situation as the administration wishes. Moreover, as regards Telefónica de España SA and Telefónica Servicios Móviles SA, Royal Decree No 8/1997 also covers mobile telephony services outside Spain. Endesa SA was formed specifically to promote the development in international markets, particularly in South America, of the group to which it belongs. It clearly does not play a part in maintaining a strategic service within the Spanish economy.

36 In the Commission's submission, the regime at issue, in particular paragraph (2) of Article 3 of Law 5/1995 but also paragraph (1) thereof, in any event infringes the principle of proportionality. A system of prior administrative approval, which is necessarily more restrictive than a system of *ex post facto* control, must be subject to very strict conditions. However, that is not the case in this instance: the system at issue is not transparent, the conditions on which approval is granted are neither defined nor foreseeable and the system does not allow individuals to be apprised of the exact extent of their rights and obligations.

37 The Spanish Government has not shown either that prior administrative approval is the least restrictive means at its disposal or that it is the only effective way of supervising, reviewing and possibly prohibiting certain investments which are incompatible with the objectives pursued. Furthermore, the regime allows the administration an unfettered discretion *vis-à-vis* investors who are nationals of other Member States.

38 At the hearing the Commission indicated that it concurred with the findings made by the Court in its judgments in comparable cases delivered after commencement of this action, namely the judgments of 4 June 2002 in Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, Case C-483/99 *Commission* v *France* [2002] ECR I-4781; and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809. The Court held in those judgments that systems of prior approval such as that at issue here are incompatible with the free movement of capital.

39 The Spanish Government argues (in the alternative since it contends that the action is inadmissible) that there is no basis for the Commission's finding and that the action must be dismissed as to substance. It starts by giving a detailed explanation of the privatisation process in the Spanish public sector and of the constitutional background to that process in order to show that they are perfectly legal under national law. The Kingdom of Spain's sole intention was to enact, at the start of the privatisation process, ancillary measures which would ensure that the specific responsibilities of each of the undertakings concerned would be successfully carried out.

40 The government then refers to Royal Decree No 1525/1995, the preamble to which states that 'the system of approval set up by Law 5/1995 of 23 March and, therefore, this Royal Decree shall be applied consistently with the provisions of the Treaty establishing the European Community concerning the right of establishment and the free movement of capital'. It follows that Community law is also fully complied with.

41 The Spanish Government also refers to the principle of the neutrality of the Treaty as regards the system of property ownership, enshrined in Article 295 EC. It shares the view expressed by Advocate General Ruiz-Jarabo Colomer in his Opinion in the cases cited above, *Commission* v *Portugal*, *Commission* v *France* and *Commission* v *Belgium*, that similar rules applying in Portugal, France and Belgium ought to be regarded as compatible with Community law as a result of Article 295 EC. Since the Member States may lawfully decide to privatise public-sector undertakings, it is appropriate to apply the legal maxim that he who can do most can also do least.

42 In any event, the system of prior administrative approval deriving from Law 5/1995 is compatible with the free movement of capital and freedom of establishment. All the managing organs' decisions listed in Article 3(1) of Law 5/1995 relate to the continued performance of the undertaking's object or to its property and can therefore be justified on the basis that they secure the undertaking's continuity. Furthermore, the conditions on which an investor who is a national of another Member State may acquire controlling stakes, referred to in Article 3(2) of Law 5/1995, are the same as those applying to Spanish nationals. The system in question does therefore not give rise to discrimination on grounds of nationality.

43 Although the rules at issue might be capable of affecting freedom of establishment, the free movement of capital is certainly not restricted. The objective of the system of prior administrative approval is not to limit the access to national financial markets of capital from other Member States or to regulate the legal system applying to transactions carried out for that purpose. The law in force in each Member State is one factor of the market and cannot be deemed contrary to the free movement of capital. Furthermore, the regime at issue concerns solely shareholders' political rights, such as the right to vote, as opposed to their economic rights.

44 The system of prior administrative approval can in any event be justified by overriding requirements of the general interest, which relate to strategically

important interests and to the need to guarantee continuity in public services. References to that guarantee appear in each of the royal decrees at issue. It is the responsibility of the Member States to ensure security of supplies, economic and social stability and protection of consumers' interests.

45 The system at issue also complies with the principle of proportionality. Securing continuity in public services is a clear, objective and non-discriminatory criterion, which is also consonant with the principle of legal certainty even if it gives rise to exercise of a discretionary power. Furthermore, the authorities are always subject to rules of law when exercising such a power.

46 An exhaustive list of the grounds for refusing the administrative approval at issue, such as the Commission requires, is unnecessary and would paralyse administrative action.

47 Moreover, all the measures implementing the legislation at issue are subject to review by the courts in accordance with national legal procedures, the basis of which is to be found in Articles 9.3, 103 and 106 of the Spanish constitution. The rules with which this action is concerned therefore do not lack transparency.

48 Finally, the Spanish Government refers to Article 86(2) EC. Without explaining its argument in detail, it maintains that that provision constitutes a general rule authorising Member States to adopt measures which derogate not only from the Treaty articles on competition but also from other provisions of the Treaty.

49 The United Kingdom Government, which has intervened in support of the form of order sought by the Spanish Government, submits that a distinction must be drawn between a statutory power to make the acquisition of shares in a company subject to prior approval, as provided for in Article 3(2) of Law 5/1995, and statutory powers of veto over corporate decisions relating to the disposal of property and assets or to other decisions relating to the day-to-day management of the company, as provided for in Article 3(1). Unlike the first type of power, the second is certainly not capable of constituting a restriction on freedom of establishment or on the free movement of capital and thus does not require justification.

50 The Commission's analysis is incorrect in so far as it considers that any measure which hinders, or makes less attractive, the exercise of freedoms laid down in the Treaty must be not only non-discriminatory but also justified on grounds of proportionate recourse to overriding requirements. The Court's case-law clearly shows that measures which do not restrict access to the market need not be justified in that way (see, in particular, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 17).

Findings of the Court

Article 56 EC

51 It must be recalled at the outset that Article 56(1) EC gives effect to free movement of capital between Member States and between Member States and third countries. To that end it provides, within the framework of the provisions of the chapter of the Treaty headed 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

52 Although the Treaty does not define the terms 'movements of capital' and 'payments', it is settled case-law that Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraphs 20 and 21).

53 Points I and III in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes appearing in that annex, indicate that direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitute capital movements for the purposes of Article 56 EC. The explanatory notes state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.

54 In the light of those considerations, it is necessary to consider whether the rules deriving from Law 5/1995 and Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998 constitute a restriction on the movement of capital between Member States: those rules submit to the prior approval of the national authorities decisions of commercial undertakings relating to:

— the undertaking's winding-up, demerger or merger;

— the disposal or charging of the assets or shareholdings necessary for the attainment of the undertaking's object;

— a change in the undertaking's object;

— dealings in the share capital which result in the State's shareholding being reduced by a percentage equal to or greater than 10%;

— a share purchase resulting in a holding of at least 10% of the share capital,

where the State's shareholding in the undertaking has been reduced by at least 10% and has fallen below 50% or where the holding has been reduced to less than 15% of the share capital.

55 The Spanish Government argues, as a preliminary point, that the measures provided for in Article 3(2) of Law 5/1995 apply without distinction on grounds of nationality. There is thus no discriminatory treatment of nationals of other Member States. Consequently, the measures at issue do not constitute a restriction on the free movement of capital.

56 That argument cannot be accepted. It is clear from paragraphs 44 and 40 of the judgments in *Commission* v *Portugal* and *Commission* v *France* respectively that the prohibition laid down in Article 56 EC goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.

57 Rules which, like Article 3(2) of Law 5/1995, limit the acquisition of shareholdings constitute a restriction on the free movement of capital.

58 The United Kingdom Government, relying in this respect on *Keck and Mithouard*, argues that the measures provided for in Article 3(1) of Law 5/1995 do not restrict access to the market and that they are therefore incapable of affecting the free movement of capital.

59 That argument cannot be accepted. The measures at issue do not have comparable effects to those of the rules which the judgment in *Keck and Mithouard* regarded as not falling within the scope of Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

60 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, second, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).

61 In this instance, although the relevant restrictions on investment operations apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market (see, also, the judgment of today's date in Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraph 47).

62 In those circumstances, it must be held that both the rules based on Article 3(2) of Law 5/1995 and those based on Article 3(1) thereof constitute a restriction on the movement of capital for the purpose of Article 56 EC.

63 The fact, pleaded by the Spanish Government, that Royal Decree No 1525/1995 provides in its preamble that the rules in question are to be applied consistently with Community law does not make any difference to that finding.

64 First, a statement of that kind cannot, in the absence of appropriate justification, render a requirement for prior approval compatible with Community law. Second, such an abstract rule cannot ensure with any certainty that when the system at issue is actually applied, its application will always be consistent with the requirements of Community law.

65 It is therefore appropriate to consider whether, and if so on what conditions, the restriction at issue may be permitted so far as the various undertakings covered by the relevant royal decrees are concerned.

66 As the Court has held (see the judgments cited above in *Commission* v *Portugal*, paragraph 47, *Commission* v *France*, paragraph 43, and *Commission* v *Belgium*, paragraph 43), it is undeniable that, depending on the circumstances, 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.

67 However, those concerns cannot entitle Member States to 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. That article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see *Commission* v *France*, paragraph 44, and *Commission* v *Belgium*, paragraph 44).

68 The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 58(1) EC or by overriding requirements of the general interest. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, *Commission* v *Portugal*, paragraph 49, *Commission* v *France*, paragraph 45, and *Commission* v *Belgium*, paragraph 45).

69 As regards a system of prior administrative approval of the kind at issue in the present case, the Court has previously held that such a system must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto* (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35; *Commission* v *Portugal*, paragraph 50; and *Commission* v *France*, paragraph 46). Such a system must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (*Analir*, paragraph 38; *Commission* v *Portugal*, paragraph 50; and *Commission* v *France*, paragraph 46).

70 In this case, the Spanish Government contends that the regime at issue is justified by overriding requirements of the general interest linked to strategic imperatives and the need to ensure continuity in public services. In that regard, it should be stated at the outset that Tabacalera SA, which produces tobacco, and Corporación Bancaria de España SA (Argentaria), a group of commercial banks which operate in the traditional banking sector and which are not claimed to carry out any of the functions of a central bank or similar body, are not undertakings whose objective is to provide public services. In merely referring to 'certain lines of business' which in the past fell within the remit of public savings banks, the Spanish Government does not establish that there are particular circumstances as a result of which the banking group takes responsibility for a public-service function. It follows that the regimes relating to Tabacalera SA and Corporación Bancaria de España SA (Argentaria) cannot be justified.

71 As regards the three other undertakings concerned, which are active in the petroleum, telecommunications and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason (see, for similar situations, *Commission* v *France*, paragraph 47, and *Commission* v *Belgium*, paragraph 46) and therefore may justify an obstacle to the free movement of capital.

72 However, the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, in particular, *Église de Scientologie*, paragraph 17; *Commission* v *France*, paragraph 48; and *Commission* v *Belgium*, paragraph 47).

73 It is therefore appropriate to ascertain whether the rules at issue relating to those three entities provide assurance within the Member State concerned, in the event of a genuine and serious threat, that there would be a minimum supply of petroleum products and electricity and a minimum level of telecommunications services and do not go beyond what is necessary for that purpose.

74 In that regard, so far as the Commission's complaint relating to Article 3(2) of Law 5/1995 is concerned, it must be borne in mind that the rules introduced by that provision provide, first, that dealings in the share capital which result in the State's shareholding being reduced by a percentage equal to, or greater than, 10%, provided that the holding has fallen below 50% or that the holding has been reduced to less than 15% of the share capital, and, second, that share purchases resulting in a stake of at least 10% of the share capital, must be approved by a public authority. Exercise of the State's right is not subject, under the relevant provisions, to any conditions. The investors concerned are given no indication of the specific, objective circumstances in which prior approval will be granted or withheld.

75 Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 56 EC, with the result that such rules must be regarded as contrary to the principle of legal certainty (*Commission* v *France*, paragraph 50).

76 The administrative authorities have in this sphere a particularly broad discretion which represents a serious threat to the free movement of capital and may end by negating it completely. The rules concerned therefore go beyond what is necessary to attain the objective relied on by the Spanish Government, namely preventing any impairment of supplies of petroleum products or electricity or of telecommunication services.

77 As regards the Commission's complaint relating to Article 3(1) of Law 5/1995, which concerns prior administrative approval of decisions on the winding-up, demerger or merger of the undertaking, on the disposal or charging of the assets or shareholdings necessary for the attainment of the undertakings' objects and on any change in the undertakings' objects, the Spanish Government submitted at the hearing that the rules thus introduced must be upheld because they are similar to those examined in *Commission* v *Belgium*, which were approved by the Court since they concerned solely certain assets of the companies at issue and certain management decisions rather than restrictions as to the persons who may invest or their shareholdings as such.

78 In that regard, it is clear from paragraphs 49 to 52 of *Commission* v *Belgium*, first, that the system examined in that judgment was one of *ex post facto* opposition, which is less restrictive than a system of prior approval such as that in the present case (see, to that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 37). Furthermore, a feature of the Belgian system was that it listed specifically the strategic assets concerned and the management decisions which could be challenged in any given case. Finally, any intervention by the administrative authorities was strictly limited to cases in which the objectives of the energy policy were jeopardised. Any decision taken in that context had to be supported by a formal statement of reasons and was subject to an effective review by the courts.

79 The rules deriving from the combined application of Article 3(1) of Law 5/1995 and the royal decrees relating to the relevant undertakings in the petroleum, telecommunications and electricity sectors do not satisfy those criteria. The 'assets or shareholdings necessary for the attainment of the undertaking's object and which are defined as such', to which Article 3(1)(b) of Law 5/1995 refers, are precisely defined only in certain of the decrees. The voluntary winding-up, demerger or merger of the undertaking or a change in its object, to which subparagraphs (a) and (c) of Article 3(1) refer, are not, unlike the decisions at issue in *Commission* v *Belgium* (paragraph 50), decisions concerning specific

management matters but decisions fundamental to the life of an undertaking. Similarly, the administrative authority's power to intervene is not in this case, as it was in the case relating to the Kingdom of Belgium, subject to any condition fettering the authority's discretion. The fact that it appears to be possible to bring legal proceedings against such decisions makes no difference to that finding, since neither the law nor the decrees at issue provide the national courts with sufficiently precise criteria to enable them to review the way in which the administrative authority exercises its discretion.

80 Given the lack of any objective, precise criteria deriving from the rules at issue, it must be held that the latter go beyond what is necessary to attain the objective relied on by the Spanish Government.

81 That finding cannot be called in question by the fact that the three royal decrees concerned introduced regimes which will last only 10 years. An infringement of Treaty obligations does not cease to be an infringement merely because it is limited in time.

82 Nor can that finding be called in question by the argument which the Spanish Government bases on Article 86(2) EC. In that regard, although it is true that paragraph (2) of Article 86 EC, read with paragraph (1) thereof, seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12; and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39), it is none the less the case that the Member State must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has

entrusted to an undertaking would, in its view, be jeopardised (*Commission* v *Netherlands*, paragraph 58).

83 The Spanish Government has given no explanation of why that would be the case here. Consequently, the argument based on Article 86(2) EC must also be rejected.

84 It must therefore be held that, by maintaining in force the provisions of Article 2 and Article 3(1) and (2) of Law 5/1995 as well as Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998, in so far as they implement a system of prior administrative approval, the Kingdom of Spain has failed to fulfil its obligations under Article 56 EC.

Article 43 EC

85 The Commission is also seeking a declaration that there has been an infringement of Article 43 EC, namely the freedom of establishment in so far as it concerns undertakings.

86 In that regard, it is appropriate to point out that in so far as the legislation in issue entails restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Consequently, since an infringement of Article 56 EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.

Costs

87 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission sought an order for costs against the Kingdom of Spain and the latter has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those Rules, the United Kingdom, which has intervened in these proceedings, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by maintaining in force the provisions of Article 2 and Article 3(1) and (2) of Ley 5/1995 de régimen jurídico de enajenación de participaciones públicas en determinadas empresas (Law 5/1995 on the legal arrangements for disposal of public shareholdings in certain undertakings) of 23 March 1995, as well as Royal Decree No 3/1996 of 15 January 1996 concerning Repsol SA, Royal Decree No 8/1997 of 10 January 1997 concerning Telefónica de España SA and Telefónica Servicios Móviles SA, Royal Decree No 40/1998 of 16 January 1998 concerning Corporación Bancaria de España SA (Argentaria), Royal Decree No 552/1998 of 2 April

1998 concerning Tabacalera SA, and Royal Decree No 929/1998 of 14 May 1998 concerning Endesa SA, in so far as they implement a system of prior administrative approval, the Kingdom of Spain has failed to fulfil its obligations under Article 56 EC;

2. Orders the Kingdom of Spain to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Rodríguez Iglesias Puissochet Wathelet

Schintgen Gulmann

Edward La Pergola Jann

Skouris Macken

Colneric von Bahr Rosas

Delivered in open court in Luxembourg on 13 May 2003.

R. Grass G.C. Rodríguez Iglesias

Registrar President