

Case C-20/09

European Commission

v

Portuguese Republic

(Failure of a Member State to fulfil obligations — Admissibility of the action — Free movement of capital — Article 56 EC — Article 40 of the EEA Agreement — Public debt securities — Preferential tax treatment — Justification — Combating of tax evasion — Combating of tax avoidance)

Opinion of Advocate General Mengozzi delivered on 17 June 2010 I - 2639

Judgment of the Court (Second Chamber), 7 April 2011 I - 2660

Summary of the Judgment

1. *Action for failure to fulfil obligations — Pre-litigation procedure — Formal notice — Definition of the subject-matter of the dispute — Reasoned opinion — Detailed list of complaints*
(Art. 226 EC)
2. *Action for failure to fulfil obligations — Examination of the merits by the Court — Situation to be taken into consideration — Situation on expiry of the period laid down by the reasoned opinion*
(Art. 226, second para., EC)
3. *Free movement of capital — Restrictions — Tax legislation*
(Art. 56 EC; EEA Agreement, Art. 40)

1. Whilst, in the context of a pre-litigation procedure for failure to fulfil obligations, the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice.
3. A Member State which provides, in the context of an extraordinary scheme for the tax regularisation of assets not situated in national territory, for preferential tax treatment in respect of public debt securities issued only by that State fails to fulfil its obligations under Article 56 EC and Article 40 of the European Economic Area Agreement (EEA).

Whilst the objectives of combating tax evasion and tax avoidance may justify a restriction of the free movement of capital, it is necessary also that that restriction be appropriate for attaining those objectives and not go beyond what is necessary for attaining them.

(see paras 17, 20)

2. 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. Thus, an action for failure to fulfil obligations concerning a temporary tax regularisation scheme which is no longer in force at the expiry date of the period laid down in the reasoned opinion but which continues to produce effects at that date, which is the relevant date for assessing the admissibility of the action, is not devoid of purpose.

A scheme providing for different treatment for public debt securities issued by that Member State compared with those issued by other Member States does not meet those requirements. Moreover, such a difference in regularisation rates cannot be justified by the pursuit of an objective of an economic nature, namely, compensation for loss of tax receipts of the Member State concerned. An objective of a purely economic nature cannot justify restriction of a fundamental freedom guaranteed by the Treaty.

(see paras 31, 33-34, 42)

(see paras 60-62, 64-65, 70,
operative part)