



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
JÄÄSKINEN  
delivered on 6 September 2012<sup>1</sup>

**Case C-557/10**

**European Commission**

**v**

**Portuguese Republic**

(Action for failure to fulfil obligations — Directive 91/440/EEC — Development of the Community's railways — Article 5(3) — Management independence — Decisions on staff, assets and own procurement — Article 7(3) — Grant of financing to an infrastructure manager — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Levying of charges for the use of railway infrastructure — Article 6(1) — Balancing the infrastructure manager's accounts)

### I – Introduction

1. By the present action, the Commission seeks a declaration from the Court that the Portuguese Republic has failed to fulfil its obligations under Articles 5(3) and 7(3) of Directive 91/440/EEC,<sup>2</sup> as amended by Directive 2001/12/EC,<sup>3</sup> on the development of the Community's railways, and Article 6(1) of Directive 2001/14/EC,<sup>4</sup> as amended by Directive 2007/58/EC,<sup>5</sup> on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. The Portuguese Republic contends that the Commission's action should be dismissed.

2. This action is one in a series of infringement proceedings,<sup>6</sup> brought by the Commission in 2010 and 2011, concerning the application by Member States of Directives 91/440 and 2001/14, in particular with regard to equitable and non-discriminatory access for railway undertakings to infrastructure, that is to say, the rail network. Those actions break new ground since they provide the Court with its first opportunity to rule on the liberalisation of railways within the European Union and, inter alia, to interpret what is known as 'the first railway package'.

1 — Original language: French.

2 — Council Directive of 29 July 1991 (OJ 1991 L 237, p. 25).

3 — Directive of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ 2001 L 75, p. 1).

4 — Directive of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29). The title of Directive 2001/14 was amended by Article 30 of Directive 2004/49/EC of the European Parliament and the Council of 29 April 2004 on the security of the Community's railways (OJ 2004 L 164, p. 44). It is now entitled Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure.

5 — Directive of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2007 L 315, p. 44).

6 — Cases C-473/10 *Commission v Hungary*; C-483/10 *Commission v Spain*; C-512/10 *Commission v Poland*; C-528/10 *Commission v Greece*; C-545/10 *Commission v Czech Republic*; C-555/10 *Commission v Austria*; C-556/10 *Commission v Germany*; C-625/10 *Commission v France*; C-627/10 *Commission v Slovenia*; C-369/11 *Commission v Italy*; and C-412/11 *Commission v Luxembourg*.

## II – Legal framework

### A – *European Union law*

3. Article 5 of Directive 91/440 provides:

‘3. In the context of the general policy guidelines determined by the State and taking into account national plans and contracts (which may be multiannual) including investment and financing plans, railway undertakings shall, in particular, be free to:

...

— take decisions on staff, assets and own procurement;

...’

4. Article 7(3) of the directive provides:

‘Member States may also accord the infrastructure manager, having due regard to Articles 73, 87 and 88 of the Treaty, financing consistent with the tasks, size and financial requirements, in particular in order to cover new investments.’

5. Article 6(1) of Directive 2001/14 states:

‘Member States shall lay down conditions, including where appropriate advance payments, to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other.

Without prejudice to the possible long-term aim of user cover of infrastructure costs for all modes of transport on the basis of fair, non-discriminatory competition between the various modes, where rail transport is able to compete with other modes of transport, within the charging framework of Articles 7 and 8, a Member State may require the infrastructure manager to balance his accounts without State funding.’

### B – *Portuguese law*

6. Decree-law 137-A/2009<sup>7</sup> of 12 June 2009 adopted the legal arrangements governing the public undertaking CP Comboios de Portugal E.P.E. (‘CP’) together with its statutes. That Decree-law establishes the legal nature and objects of CP and lays down in Annex I the statutes of that undertaking.

7. Article 2 of that Decree-law reads as follows:

‘Legal nature

[CP] is an undertaking in the competitive public sector, possessing legal personality, administrative and financial autonomy and its own assets, subject to the guidance and supervision of the members of the government with responsibility for finance and transport.’

<sup>7</sup> — *Diário da República* 1. Supplement No 112, of 12 June 2009.

8. Article 1 of CP's statutes, entitled 'Name and registered office', provides:

'1. [CP] is an undertaking in the competitive public sector, having legal personality, administrative and financial autonomy and its own assets, which has the capacity to possess all the rights and be bound by the all obligations necessary or appropriate for pursuit of its objects.'

9. CP's objects are laid down in Article 2 of the statutes. That provision reads as follows:

'1. The main object of [CP] is to provide rail transport services for passengers and goods on the railway lines, links and branches which comprise, now or in the future, the national rail network.

...

3. As a subsidiary object, [CP] may also engage in the following activities ...

4. For the purposes of the object set out in the preceding subparagraph, [CP] may:

(a) set up companies and acquire shares in accordance with the law;

...'

10. Under Article 9 of those statutes, CP possesses the following powers:

'1. The Board of Directors shall exercise all powers of management and administration in accordance with the law and the company statutes.

2. The Board of Directors shall in particular:

...

(j) discuss the setting up of companies and the acquisition or transfer of shares, in accordance with the law;

...'

11. Article 21 is contained in Chapter IV, entitled 'Guidance'. That article provides as follows, under the heading 'Management guidelines':

'1. The Government shall lay down in accordance with the law, the general objectives to be pursued by [CP], ensuring that they are compatible with the global and sectoral policies laid down by legislation.

2. The Government shall monitor developments in the undertaking's situation in order to ensure that community needs are being adequately met, to protect its economic and financial equilibrium and to ensure that appropriate policies are being implemented to modernise rail transport.

...'

12. Decree-law No 300/2007<sup>8</sup> of 23 August 2007 amended the regime governing the competitive State sector and public undertakings in Portugal. It provides inter alia:

‘Article 10

1. The rights of the State as a shareholder shall be exercised by the Directorate General for the Treasury and Finance under the direction of the Minister of Finance, who may delegate powers, in accordance with the guidelines provided for in the following article and after prior consultation, by joint decree with the ministers responsible for the sector.

...

3. The rights referred to in the preceding subparagraphs may be exercised indirectly through exclusively publicly-owned companies.’

13. Article 37 of the same Decree-law concerns the setting up of companies and the acquisition or transfer of shares. That article is worded as follows:

‘1. ... investment by the State or other State bodies and public undertakings when companies are being set up or when shares are acquired or transferred must be authorised by the Minister of Finance and the Minister responsible for the sector ...

...’

14. Decree-law No 270/2003<sup>9</sup> of 28 October 2003 lays down the conditions governing the provision of rail transport services and the management of railway infrastructure. That Decree-law governs in particular the balancing of the accounts of the infrastructure manager in accordance with the provisions of Article 63 of that Decree-law. According to that article:

‘1. The accounts of the infrastructure manager must ensure a balance between:

- (a) income from infrastructure charges, surpluses from other commercial activities, and State funding, where appropriate in the form of advance payments, on the one hand, and
- (b) the costs of the public service of infrastructure management and maintenance, on the other hand.

2. Without prejudice to the possible long-term aim of progressive user cover of infrastructure costs for all modes of transport on the basis of fair, non-discriminatory competition between the various modes, the infrastructure manager is required to achieve the balance referred to in paragraph (1) without State funding, having due regard to the charging structure provided for in the present chapter, where rail transport is in a position to compete with other modes of transport, inter alia where there is an equivalent level of internalisation of environmental costs in other modes of transport.

3. For the purposes of achieving the balance referred to in paragraph (1) and in order to assess the possible need for compensation to be paid by the State to the public service of infrastructure management, it is appropriate to adopt a method for apportioning costs that shows, in a transparent way, that the only costs taken into account are those incurred in the management and maintenance conservation of infrastructure, and in making it available.

8 — *Diário da República* 1. No 162, of 23 April 2007.

9 — *Diário da República* 1. Série A. No 250, of 28 October 2003.

...

7. For the purposes of paragraph 1(b) of the present article, financial and extraordinary costs are not regarded as costs of the public service of infrastructure management.

8. Extraordinary costs resulting from natural disasters must be compensated by the State.’

15. Lastly, Decree-law No 104/97<sup>10</sup> of 29 April 1997 set up the Rede Ferroviária Nacional, REFER E.P. (the National Rail Network, ‘the REFER’). The statutes of the REFER are published in Annex I to that Decree-law. Article 12, according to its title, defines the purpose and scope of those statutes as follows:

‘2. The Government shall monitor future developments regarding the undertaking in order to ensure it maintains its economic and financial equilibrium and services the debts contracted in order to construct, install and renovate railway infrastructure, according to procedures that will not jeopardise the pursuit of appropriate railway modernisation policies.’

### III – The pre-litigation procedure and the proceedings before the Court

16. In its letter of formal notice of 26 January 2008, the Commission drew the attention of the Portuguese authorities to the fact that it had doubts concerning the compatibility with Community law of the national legislation transposing the first railway package. The Portuguese authorities replied to the letter of formal notice, providing information and arguments concerning the compliance of the Portuguese legislation with those directives.

17. By letter of 9 October 2009, the Commission sent the Portuguese authorities a reasoned opinion, in which it stated that so far as transposition of the first railway package was concerned, the Portuguese Republic had failed to fulfil its obligations under Articles 5(3) and 7(3) of Directive 91/440, as amended by Directive 2001/12/EC, and Article 6(1) of Directive 2001/14/EC.

18. By letter of 14 December 2009, the Portuguese authorities replied to the reasoned opinion and provided some clarification. By letter of 24 June 2010, the Portuguese authorities informed the Commission of the promulgation of national legislation taking into account the criticisms made in the Commission’s reasoned opinion concerning the compatibility of the Portuguese regime for improving performance with European Union law and, inter alia, Article 11 of Directive 2001/14.

19. Not being satisfied with the Portuguese authorities’ reply, the Commission decided to bring the present action, which was received at the Court on 29 November 2010.

### IV – Analysis of the action for failure to fulfil obligations

#### A – *The application for a stay of proceedings*

20. The Portuguese Government put forward, primarily, arguments denying the alleged failure and, as a subsidiary submission, requested the Court to stay proceedings until 31 December 2011, the date on which the legislative and contractual measures were to enter into force which, according to that government, would strengthen the independence of rail undertaking’s management vis-à-vis the State and would amend the system for charging for railway infrastructure.

10 — *Diário da República* 1. Série A. No 99, of 29 April 1997. Amended and republished by Decree-law No 141/2008 of 22 June 2008 (*Diário da República* 1. No 140 of 22 July 2008).

21. In that regard, it should be noted that, according to settled case-law, 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.<sup>11</sup> The arguments put forward by the Portuguese Government must therefore be examined in relation to the period laid down in the reasoned opinion and the arguments relating to the subsequent development of the national legislation must be disregarded.

## B – *The first complaint: infringement of Article 5(3) of Directive 91/440*

### 1. Arguments of the parties

22. The Commission contends that the Portuguese legislation whereby CP is subject to the guidance and supervision of members of the Government is contrary to Article 5(3) of Directive 91/440.

23. The Commission bases its contention in particular on the fact that under the national legislation the Portuguese State makes any individual decision by CP to acquire or transfer shareholdings in companies subject to government approval.

24. The requirement that prior government approval must be obtained before carrying out certain types of actions means that railway companies cannot be regarded as being independent or enjoying autonomy vis-à-vis the State, consequently they cannot freely manage their internal affairs in accordance with the requirements of European Union law.

25. It is clear from that article that the State must not exert any influence over individual decisions to transfer or acquire assets. Although that article provides that such decisions must be taken in the context of the general policy guidelines determined by the State, those guidelines may only lay down the criteria to be taken into account in decisions.

26. The Commission also considers that government intervention in the management of CP goes beyond merely exercising shareholder rights, because the State as shareholder would intervene by means of the control exercised by the Ministers of Finance and Transport on the basis of a separate body of rules applicable to the public sector as a whole.

27. The Portuguese Government challenges the Commission's submissions, maintaining that the requirement of ministerial authorisation in order to acquire or dispose of shares applies to all types of public undertaking. Such a requirement is linked to the State's role as shareholder. The Portuguese Government adds that the discussion concerning the purchase or sale of shares takes place within the responsible bodies of the company so that the railway undertaking's management autonomy is assured in accordance with the requirements of Article 5(3) of Directive 91/440.

### 2. Examination of the first complaint

28. I would point out first of all that Directives 91/440 and 2001/14, which form part of the first railway package, do not require railways to be privatised. On the contrary, Article 3 of Directive 91/440 defines 'railway undertaking' as meaning 'any private or public undertaking'. Consequently, the incumbent rail operator may remain public. However, Section II of Directive 91/440, entitled 'Management independence', provides in Article 4(1) that 'railway undertakings have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State'.

<sup>11</sup> — See, among a number of examples, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7, and Case C-333/01 *Commission v Spain* [2003] ECR I-2623, paragraph 8.

29. I would point out also that Portugal has abolished, under a draft law that had not been adopted at the time the period laid down in the reasoned opinion expired, the condition requiring prior authorisation. None the less, in view of the date which must be taken into account for the purposes of assessing the alleged failure to fulfil obligations, that legislative amendment is irrelevant as regards the assessment to be made.

30. In essence the Commission criticises Portugal for its arrangements, which require prior authorisation by the Minister of Transport for any purchase or transfer of shares by the incumbent operator, the latter having retained its fully public status, as can be seen from Article 37(1) of Decree-law 300/2007. Because of that requirement for rail undertakings to obtain prior authorisation in order to undertake certain measures, those undertakings cannot be regarded as being either independent or autonomous vis-à-vis the State, so they are not free to manage their internal affairs.

31. In that regard, the relevant provision is Article 5(3) of Directive 91/440, which states that rail undertakings are in particular free to take decisions on staff, assets and own procurement. The Commission considers that it is clear from that provision that the State must not exert any influence over individual decisions to transfer or acquire assets. I agree.

32. Moreover that interpretation is supported by the third recital in the preamble to Directive 91/440, and by recital 8 in the preamble to Directive 2001/12 amending Directive 91/440. Those recitals establish inter alia the need to ensure that rail undertakings have a status independent of the State and freedom to manage their internal affairs.

33. Although Article 5(3) of Directive 91/440 permits Member States to draw up general policy guidelines, the fact remains that, in view of the aim of management independence, the State must not exert any influence over individual decisions to transfer or acquire assets.

34. I would add that by making any individual decision to acquire or transfer shares in companies subject to government approval, the Portuguese legislation has subjected the public railway undertaking to external political control which does not correspond in any way to the procedures and means of action and control available to shareholders in an ordinary joint-stock company. Consequently, the Portuguese State has retained an essential role in the internal decision-making procedures of rail undertakings which is not compatible with the freedom afforded to the rail undertaking to take decisions regarding its assets.<sup>12</sup>

35. I therefore conclude that the Commission's first complaint must be upheld.

*C – The second complaint: infringement of Article 7(3) of Directive 91/440 and Article 6(1) of Directive 2001/14*

#### 1. Arguments of the parties

36. The Commission notes that Article 7(3) of Directive 91/440 and Article 6(1) of Directive 2001/14 impose on Member States the obligation to lay down conditions to ensure that the accounts of an infrastructure manager balance. It considers that in Portugal the income from infrastructure charges, State funding and surpluses from other commercial activities are not sufficient to balance the accounts of the infrastructure manager, the REFER.

<sup>12</sup> — See, by analogy, Case C-171/08 *Commission v Portugal* [2010] ECR I-6817, in particular paragraph 60 et seq.

37. The Commission states that, despite the statutory provisions of Portuguese law which impose on the Portuguese State the obligation to monitor developments in the infrastructure manager's situation in order to protect its economic and financial equilibrium and to monitor developments in the infrastructure manager's financial situation, there have been no favourable developments as regards the infrastructure manager's situation of financial disequilibrium.

38. The Portuguese Government confirms that it has undertaken to establish with the infrastructure manager (the REFER), by means of multiannual contracts, standards of public service with regard to infrastructure management, and to determine the corresponding financial compensation. It would thus be possible to achieve a balance of the undertaking's accounts that would establish certain given standards of operational and technical quality, whilst the public authorities would undertake to allocate sums compatible with the volume of investment needed and the nature of the public service.

39. The Portuguese Government notes that there are plans for signing public service contracts with CP and the REFER, taking into account, first, a clear definition of the public service obligations, secondly, the need to rationalise/reduce operating costs and, thirdly, the necessary gradual and progressive convergence of the public service in question and the public financial compensation relating thereto.

40. Lastly, the Portuguese Government contends that it has initiated a procedure which will lead to the adoption of legislative measures designed, first, to improve the management independence of the rail company vis-à-vis the State and, secondly, to help balance the accounts of the infrastructure manager through the adoption of appropriate measures, inter alia, by amending the system of charging for railway infrastructure and by establishing, in contracts with the REFER, rights and obligations relating to the construction, maintenance and funding of infrastructure.

## 2. Examination of the second complaint

41. It is clear from the explanations provided by the Portuguese Government with regard to the second complaint, and that government has not challenged this, that on expiry of the period laid down in the reasoned opinion, Portugal had not taken the measures needed in order to comply with the obligations laid down in Article 7(3) of Directive 91/440 and Article 6(1) of Directive 2001/14 requiring Member States to lay down conditions to ensure that the accounts of the infrastructure manager balance. For that reason, I consider that it is possible for the Court to find that there has been a failure to comply with obligations without carrying out a deeper analysis.

42. I therefore conclude that the Commission's second complaint must be upheld.

## V – Costs

43. 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.

44. As the Commission has claimed that the Portuguese Republic should be ordered to pay the costs, this claim must be upheld if the action for failure to fulfil obligations is allowed in its entirety.

## VI – Conclusion

45. In view of the foregoing considerations, I propose that the Court should:

(1) Declare that the Portuguese Republic has failed to fulfil its obligations under



- Council Directive 91/440/EEC of 29 July 1991, as amended by Directive 2001/12/EC, on the development of the Community's railways, as regards Article 5(3) of that directive, by making any individual decision to acquire or transfer shares in companies by the public rail undertaking CP Comboios de Portugal E.P.E. subject to government approval, and
- Directive 91/440, as regards Article 7(3), and Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001, as amended by Directive 2007/58/EC, on the allocation of railway infrastructure capacity, as regards Article 6(1), by failing to take the measures needed in order to comply with the obligation to lay down conditions to ensure that the accounts of the infrastructure manager balance;

(2) Order the Portuguese Republic to pay the costs.