



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 13 December 2012¹

Case C-412/11

European Commission
v

Grand Duchy of Luxembourg

(Action for failure to fulfil obligations — Directive 91/440/EEC — Development of the Community's railways — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 6(3) of and Annex II to Directive 91/440 — Article 14(2) of Directive 2001/14 — Infrastructure manager — Independence in organisation and decision-making functions — Independence in essential functions)

I – Introduction

1. By the present action for failure to fulfil obligations, the European Commission asks the Court to declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 6(3) of and Annex II to Directive 91/440/EEC,² as amended by Directive 2001/12/EC³ ('Directive 91/440'), and Article 14(2) of Directive 2001/14/EC.⁴ The Grand Duchy of Luxembourg contends that the Commission's action should be dismissed.

2. This action is one in a series of infringement proceedings⁵ brought by the Commission in 2010 and 2011 concerning the application by Member States of Directives 91/440 and 2001/14, the main object of which is to ensure 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 examine the liberalisation of railways within the European Union and, inter alia, to interpret what is known as 'the first railway package'.

3. On 6 September 2012 I delivered my Opinions in *Commission v Portugal* and in *Commission v Hungary*; *Commission v Spain*; *Commission v Austria*; and *Commission v Germany*. In addition to the this Opinion, I will deliver my Opinion today in *Commission v Poland*; *Commission v Czech Republic*; *Commission v France*; and *Commission v Slovenia*, cited above. In so far the present case concerns similar complaints to those which I have already examined in those Opinions, I will simply make reference to the relevant points of the Opinions, without reproducing in full the arguments set out therein.

¹ — Original language: French.

² — Council Directive of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25).

³ — Directive of the European Parliament and of the Council of 26 February 2001 (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).

⁵ — Cases C-557/10 *Commission v Portugal* [2012] ECR; C-528/10 *Commission v Greece*; C-473/10 *Commission v Hungary*; C-483/10 *Commission v Spain*; C-512/10 *Commission v Poland*; 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*; and C-369/11 *Commission v Italy*, pending before the Court.

II – Legal framework

A – EU law

1. Directive 91/440

4. Article 6(3) of Directive 91/440 provides:

‘Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.

Member States may, however, assign to railway undertakings or any other body the collecting of the charges and the responsibility for managing the railway infrastructure, such as investment, maintenance and funding.’

5. Annex II to Directive 91/440 gives the list of ‘essential functions’ referred to in Article 6(3) of the directive:

‘ ...

— decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths,

...’

2. Directive 2001/14

6. Article 14(1) and (2) of Directive 2001/14 provides:

‘1. Member States may establish a framework for the allocation of infrastructure capacity while respecting the management independence laid down in Article 4 of Directive 91/440/EEC. Specific capacity allocation rules shall be established. The infrastructure manager shall perform the capacity allocation processes. In particular, the infrastructure manager shall ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.

2. Where the infrastructure manager, in its legal form, organisation or decision-making functions is not independent of any railway undertaking, the functions referred to in paragraph 1 and described in this chapter shall be performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking.’

B – Luxembourg legislation

7. The Law of 22 July 2009 on railway safety⁶ provides that the newly created Administration des Chemins de Fer (ACF) is responsible for the essential functions of allocation of capacity (allocation of train paths) and levying of charges.

⁶ — *Mémorial* 2009, A-No 169, p. 2465.

8. The Law of 11 June 1999 on the railway infrastructure, as amended by the Law of 3 August 2010,⁷ provides:

‘The task of allocating railway infrastructure capacity shall be entrusted to an allocation body whose function shall be performed by the Administration des Chemins de Fer.’

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

9. On 26 June 2008, the Commission gave the Grand Duchy of Luxembourg formal notice requiring it to comply with the directives in the first railway package. That Member State replied to the letter of formal notice by letter of 27 August 2008.

10. On 9 October 2009, the Commission sent the Grand Duchy of Luxembourg a reasoned opinion in which it claimed that the measures adopted to transpose Directives 91/440 and 2001/14 were insufficient. After a further exchange of correspondence, the Commission sent the Grand Duchy of Luxembourg an additional reasoned opinion dated 25 November 2010 by which, in the light of developments in the national regulatory framework, it limited the proceedings to a single complaint relating to the independence of the essential functions.

11. On 3 February 2011, the Grand Duchy of Luxembourg replied to the additional reasoned opinion.

12. Since it was not convinced by the reply and the information provided by the Grand Duchy of Luxembourg, the Commission decided to bring the present action on 8 August 2011.

IV – Arguments of the parties

13. The Commission claims that Directive 91/440 requires the functions of allocation of railway capacity, inter alia, to be performed by independent bodies. Annex II to Directive 91/440 describes as an ‘essential function’ ‘decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths’.

14. In the view of the Commission, whilst the ACF, which is responsible for allocating train paths, is indeed a body which is independent from Chemins de fer luxembourgeois (CFL), the fact remains that CFL is entrusted with certain essential functions in relation to the allocation of train paths.

15. The Commission considers, in the light of the information provided by the Luxembourg Government, that, in the event of disruption of traffic, allocation of train paths continues to fall to CFL, namely its Network Management Service (‘NMS’), even though that part of CFL is not independent of the parties which manage rail transport services.

16. The Commission takes the view that, in the event of disruption of traffic, the normal timetable set by the ACF can no longer be observed, since the times laid down in the timetable have already passed and it becomes necessary to reallocate timetables for operators awaiting their turn. The Commission considers that such reallocation necessarily constitutes allocation of train paths. However, under the Luxembourg legislation, this can be done only by traffic management, operated by CFL, thereby giving CFL a role in railway capacity allocation, contrary to the requirements laid down in Directive 2001/14.

⁷ — *Mémorial* 2010, A-No 135, p. 2194.

17. The Commission considers that the performance of the essential function of allocation of train paths requires CFL to be subject to the requirements of independence prescribed by the first railway package. However, no measure to ensure that independence has been implemented within CFL to separate, in their legal form, organisation or decision-making functions, the parties which are responsible for the essential functions from those which manage rail transport services.

18. In its reply, the Commission claims that the amendments made by the network statement adopted by the Luxembourg authorities, after the time-limit laid down in the reasoned opinion, are not sufficient to put an end to the infringement.

19. In its defence, the Luxembourg Government takes the view that, even though the national legislation in force was consistent with the wording and the spirit of Directive 2001/14, it was nevertheless adapted, after the present action was brought, in such a way as to eliminate any doubt as to possible non-conformity with EU law. Thus, the network statement was amended to the effect that, in the event of disruption, the reallocation of train paths is also transferred to the ACF.⁸ In its rejoinder, the Luxembourg Government claims that the network statement was amended again (with effect from 1 January 2012) and that it now satisfies the Commission's requirements, by providing that, in the event of unforeseen disruption, new train paths are allocated by the ACF.⁹

V – Analysis of the action for failure to fulfil obligations

20. The Grand Duchy of Luxembourg challenges the Commission's complaint, relying on provisions adopted after the expiry of the time-limit prescribed in the reasoned opinion, namely the amendments to the network statement made after the date of the expiry of that time-limit.

21. It need only be noted in this regard that the Court has repeatedly ruled 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.¹⁰ It is therefore the legislation in force upon the expiry of the two-month time-limit prescribed by the additional reasoned opinion of 25 November 2010 that is crucial in examining the present action.

22. The Commission's action is based on two elements which I have already had the opportunity to examine in my Opinions in Cases C-473/10 *Commission v Hungary*, C-625/10 *Commission v France* and C-627/10 *Commission v Slovenia*, cited above.

23. With regard to the reasons for which a historic operator, like CFL, which is a railway undertaking, a non-independent service of that undertaking or an infrastructure manager which is not independent from any such undertakings cannot be involved in the performance of essential functions, such as the allocation of train paths, I therefore need only refer to my Opinions in Cases C-625/10 *Commission v France* (points 31 to 47) and C-627/10 *Commission v Slovenia* (points 30 to 46), cited above.

24. Similarly, it would seem to be precluded for a historic operator such as CFL, which is a railway undertaking, to be able to be accorded the power to decide on the reallocation of train paths in the event of disruption, and not just to remove them, for the reasons I set out in my Opinions in Cases C-473/10 *Commission v Hungary* (points 49 to 70) and C-627/10 *Commission v Slovenia* (points 38 to 46), cited above.

8 — The reference to version 3.0 of the 2011 edition of the network statement was published in *Mémorial* 2011, B-No 84, p. 1657.

9 — The reference to version 2.0 of the 2012 edition of the network statement was published in *Mémorial* 2011, B-No 103, p. 1985.

10 — See, inter alia, Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, paragraph 72 and the cited case-law; Case C-241/08 *Commission v France* [2010] ECR I-1697, paragraph 59 and the cited case-law; and Case C-50/09 *Commission v Ireland* [2011] ECR I-873, paragraph 102.

25. For those reasons, the Commission's action must be granted.

VI – Costs

26. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

27. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, that application must be granted.

VII – Conclusion

28. In the light of the foregoing, I propose that the Court:

- (1) declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 6(3) of and Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, as amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001, Article 14(2) of 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 and safety certification in so far as a service of a railway undertaking participates in the performance of essential functions such as the allocation of train paths;
- (2) order the Grand Duchy of Luxembourg to pay the costs.