Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

25 October 2012 *

(Failure of a Member State to fulfil obligations — Transport — Development of the Community's railways — Directive 91/440/EEC — Article 5(3) — Rail transport undertakings — Freedom of management — Decisions on staff, assets and own procurement — Article 7(3) — Grant of financing to the infrastructure manager — Directive 2001/14/EC — Article 6(1) — Balancing the accounts — Appropriate conditions — Incomplete transposition)

In Case C-557/10,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 26 November 2010,

European Commission, represented by H. Støvlbæk and M. França, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes and A. Pereira de Miranda, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet (Rapporteur), E. Levits, J.-J. Kasel and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

1 By this action, the European Commission asks the Court for a declaration that, by making individual decisions to acquire or transfer holdings in the capital of companies by the public rail transport undertaking CP Comboios de Portugal EPE ('CP') subject to government approval and by failing to adopt the national measures necessary to comply with the obligation to lay down appropriate

* Language of the case: Portuguese.

conditions to ensure that the accounts of the infrastructure manager la Rede Ferroviária Nacional — REFER EP (National Rail Network, 'REFER') are balanced, the Portuguese Republic has failed to fulfil its obligations, first, under Article 5(3) of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25), as amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 (OJ 2001 L 75, p. 1) ('Directive 91/440'), and, second, under Article 7(3) of Directive 91/440 and Article 6(1) 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 (OJ 2001 L 75, p. 29), as amended most recently by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 2001/14').

Legal context

European Union law

2 Under Article 3 of Directive 91/440:

'For the purpose of this Directive:

— "railway undertaking" shall mean any public or private undertaking licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which provide traction only;

…'

3 Article 4(1) of that directive, which appears in Section II thereof, entitled 'Management Independence', provides:

'Member States shall take the measures necessary to ensure that as regards management, administration and internal control over administrative, economic and accounting matters 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.'

4 Article 5(3) of that directive provides:

'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,

…'

5 Article 7(3) of Directive 91/440 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.'

6 Under Article 6(1) of Directive 2001/14:

‘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.’

Portuguese law

7 Decree-Law No 104/97 of 29 April 1997 (*Diário da República* I, Series A, No 99, of 29 April 1997) sets up REFER. Its statutes are published in Annex I to the decree-law.

8 Article 12(2) of the decree-law determines, according to its title, defines the purpose and scope of those statutes as follows:

‘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.’

9 Decree-Law No 270/2003 of 28 October 2003 (*Diário da República* I, Series A, No 250 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 thereof, which provides:

‘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.

…

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.'

10 Decree-Law No 300/2007 of 23 August 2007 (*Diário da República 1ª*, Series A, No 162, of 23 August 2007) amended the regime governing the competitive State sector and public undertakings in Portugal.

11 Article 10 of that decree-law provides:

'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 for 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.'

12 Article 37(1) of the same decree-law concerns the setting up of companies and the acquisition or transfer of shares. That article is worded as follows:

'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 for Finance and the Minister responsible for the sector …

…'

13 Decree-Law No 137-A/2009 of 12 June 2009 (*Diário da República* 1, No 112 Supplement) 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.

14 Article 2 thereof is worded 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.'

15 Article 1(1) of CP's statutes, entitled 'Name and registered office', provides:

'[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 all the obligations necessary or appropriate for pursuit of its objects.'

16 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;

…'

17 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:

…

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

…'

18 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.'

Pre-litigation procedure

19 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 European Union law of the national legislation transposing the first railway package, in particular Directives 91/440 and 2001/14. The Portuguese authorities replied to the letter of formal notice, providing information and arguments concerning the compliance of the Portuguese legislation with those directives.

20 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 and Article 6(1) of Directive 2001/14.

21 On 14 December 2009, the Portuguese authorities replied to the reasoned opinion and provided further clarification.

22 As the Commission found the response provided by the Portuguese authorities to be unsatisfactory, it decided to bring the present proceedings.

The action

The application for a stay of proceedings

23 The Portuguese Government primarily put forward 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.

24 It must be recalled that, according to the settled case-law of the Court, 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 the Court cannot take account of any subsequent changes (see, inter alia, judgment of 27 September 2007 in Case C-9/07 *Commission* v *France*, paragraph 30, and judgment of 18 November 2010 in Case C-48/10 *Commission* v *Spain*, paragraph 39).

25 The arguments put forward by the Portuguese Government must therefore be examined in relation to the period prescribed in the reasoned opinion and the arguments relating to the subsequent development of the national legislation must be disregarded.

26 Accordingly, the application for a stay of proceedings must be dismissed.

The first complaint: infringement of Article 5(3) of Directive 91/440

Arguments of the parties

27 The Commission claims that the Portuguese legislation under which CP is subject to the guidance and supervision of members of the government is contrary to Article 5(3) of Directive 91/440.

28 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.

29 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 and they cannot freely manage their internal affairs in accordance with the requirements of European Union law.

30 It is clear from Article 5(3) of Directive 91/440 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.

31 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 for Finance and Transport on the basis of a separate body of rules applicable to the public sector as a whole.

32 The Portuguese Government challenges the Commission's submissions. It maintains 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.

Findings of the Court

33 It must be held, as the Advocate General observed in point 28 of his Opinion, that Directives 91/440 and 2001/14 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.

34 Furthermore, Article 4(1) of Directive 91/440, which appears in Section II thereof, entitled 'Management independence', provides that the 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.

35 In essence, the Commission criticises Portugal for the fact that its arrangements require prior authorisation by the Minister for Transport for any purchase or transfer of shares by CP, the latter having retained its fully public status, as can be seen from Article 37(1) of Decree-Law No 300/2007. On account of the 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.

36 The Commission takes the view that it is clear from Article 5(3) of Directive 91/440 that the State must not influence individual decisions concerning the transfer or acquisition of shares. That provision provides that railway undertakings are free to take decisions on staff, assets and own procurement.

37 In that connection, the third recital in the preamble to Directive 91/440 and recital 8 in the preamble to Directive 2001/12, amending Directive 91/440, lay down the need to ensure that railway transport undertakings are given a status independent of the State, and freedom to manage their internal affairs.

38 As the Advocate General observed in point 33 of his Opinion, while it is true that Article 5(3) of Directive 91/440 allows the Member States to lay down general policy guidelines, the fact remains that, in order to meet the objective of management independence of railway transport undertakings, the State must not exercise any influence over the individual decisions made by those undertakings concerning the transfer or acquisition of shares.

39 Furthermore, by making any individual decision to acquire or transfer shares in companies subject to government approval, the Portuguese legislation has subjected CP 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.

40 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.

41 Moreover, while it is true 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, it must be observed that according to the case-law set out in paragraph 24 of the present judgment, 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 the Court cannot take account of any subsequent changes.

42 In those circumstances, it must be held that the Commission's first complaint is well founded.

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

Arguments of the parties

43 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 appropriate 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, REFER.

44 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 financial imbalance.

45 The Portuguese Government confirms that it has undertaken to establish with REFER, by means of multi-annual 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 REFER'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.

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

47 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 REFER, rights and obligations relating to the construction, maintenance and funding of infrastructure.

Findings of the Court

48 It must be held that the Portuguese Republic does not deny that, on the expiry of the period prescribed in the reasoned opinion it had not taken the measures necessary in order to comply with the obligations referred to in Article 7(3) of Directive 91/440 and Article 6(1) of Directive 2001/14 which require the Member State to lay down appropriate conditions to ensure that the accounts of the infrastructure manager are balanced.

49 As stated in paragraphs 24 and 25 of the present judgment, the Court is required to examine the facts in the light of the situation prevailing at the end of the period prescribed in the reasoned opinion.

50 In those circumstances, it must be held that the Commission's second complaint is well founded.

Costs

51 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 has applied for costs and the Portuguese Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by making individual decisions to acquire or transfer holdings in the capital of companies by the public rail transport undertaking CP Comboios de Portugal EPE subject to government approval and by failing to adopt the national measures necessary to comply with the obligation to lay down appropriate conditions to ensure that the accounts of the infrastructure manager la Rede Ferroviária Nacional — REFER EP are balanced, the Portuguese Republic has failed to fulfil its obligations under Article 5(3) of 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', and, second, Article 7(3) of Directive 91/440 and Article 6(1) 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, as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]