



Court of Justice of the European Union

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Advocate General's Opinion in Joined Cases C-473/10, C-483/10, C-555/10,
C-556/10 and C-557/10
Commission v Hungary, Kingdom of Spain, Republic of Austria, Federal
Republic of Germany and Portuguese Republic

Press and Information

Advocate General Jääskinen delivers his Opinions in the infringement actions brought against a number of Member States concerning rail transport

He proposes that the Court declare that Spain, Hungary and Portugal have failed to fulfil their obligations under EU law in that field

Owing to the liberalisation of railways within the European Union, the Member States are required to ensure that undertakings in that sector have access to the railway network on a fair and non-discriminatory basis. In that context, the performance of certain 'essential functions' can no longer be carried out by the incumbent railway companies of the Member States, but must be outsourced to independent managers. Those functions include, inter alia, issuing the railway companies with licences giving them access to the railway network, allocating the infrastructure capacities and determining the charge which is to be paid by the transport undertakings for use of the network.

The present cases form part of a series of actions for failure to fulfil obligations¹ brought by the Commission against a number of Member States for failure to fulfil their obligations under the directives governing the functioning of the railway sector². In the present cases, the Court of Justice must examine the actions brought against Hungary, Spain, Austria, Germany and Portugal.

C-473/10 Commission v Hungary

In the submission of the Commission, traffic management in Hungary, carried out by the incumbent operators (MÁV and GySEV) includes path allocation – that is to say, allocation of the infrastructure – which should be carried out by an independent body.

In his Opinion delivered today, Advocate General Jääskinen notes that, since traffic management is not an essential function, it can be delegated to railway companies. Furthermore, the Advocate General points out that MÁV and GySEV do not derive any competitive advantage from the fact that they are, as traffic managers, informed of infrastructure allocation decisions. That information is also available to their competitors.

However, Mr Jääskinen considers that Hungary has failed in its obligations under Directive 2001/14 in so far as it has not laid down conditions to ensure that the accounts of infrastructure managers are in balance and has failed to adopt measures giving incentives to reduce costs and charges for operating and using the infrastructure. Similarly, the Advocate General suggests that the Court hold that, by failing to ensure that charges received by the infrastructure managers are equal to the direct costs of providing the railway network, Hungary has infringed that directive.

¹ Cases [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-557/10 Commission v Portugal](#), [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](#).

² 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, and 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 by Directives 2004/49/EC and 2007/58/EC.

C-483/10 Commission v Spain

In this case, Mr Jääskinen notes, first, that although the Member States have the power to establish a charging framework, they must, none the less, give the infrastructure managers the task of determining the charge to be paid for the use of the railway network. Consequently, Mr Jääskinen takes the view that Spain, by reserving to the State the right to determine that charge, has failed to comply with Directive 2001/14.

Next, the Advocate General recalls that the Member States must establish a scheme to improve performance to reduce disruption to a minimum and improve the efficiency of use of the railway network. However, in the view of the Advocate General, the measures adopted by Spain for that purpose do not form a coherent and transparent system but are mere specific measures that are independent of each other.

Finally, Mr Jääskinen proposes that the Court hold that Spain has failed to fulfil its obligations by its discriminatory treatment of new entrants in the Spanish railway market, who are disadvantaged in comparison to the incumbent operator, which has the benefit of preferential access to the infrastructure. Such preferential access cannot be granted to railway companies in the absence of a framework agreement concluded with the State. In the present case, no agreement which could justify such treatment has been concluded. In the view of the Advocate General, nor can the Spanish State retain discretionary powers as regards allocation of the infrastructure, since those powers must be given solely to the independent network manager.

C-555/10 Commission v Austria and C-556/10 Commission v Germany

The Commission argues that the directives do not permit the Member States to place an independent manager in a holding company to which the railway companies also belong, unless they adopt additional measures to ensure the independence of the management. In the Commission's submission, those two Member States did not adopt such measures when they placed their respective infrastructure managers, ÖBB-Infrastruktur and Deutsche Bahn Netz, in holding companies.

In that regard, the Advocate General points out that, in that case, the Commission's action does not concern the incorrect application but merely the incorrect or incomplete transposition of the directives.

In Mr Jääskinen's view, Directive 91/440 does not require the Member States to make an institutional separation between the manager and the incumbent operator. On the contrary, that directive allows those States to integrate them in a single holding company. Furthermore, the Advocate General points out that the additional measures called for by the Commission are not referred to in the directives in question, so their adoption cannot be required of the Member States. Mr Jääskinen also rejects the Commission's arguments that Germany failed to fulfil its obligations as regards the fixing of charges and the implementation of a system to limit infrastructure costs and reduce the level of access charges.

In those circumstances, Mr Jääskinen considers that the Commission's actions must be dismissed.

C-557/10 Commission v Poland

The Advocate General proposes that the Court declare that Portugal has failed to fulfil its obligations under Directives 91/440 and 2001/14. Firstly, the Portuguese State has retained an essential role in the internal decision-making procedures of the public rail undertaking, CP Comboios de Portugal, which is not compatible with the freedom afforded to rail undertakings by the directives to take decisions regarding their assets. Secondly, Portugal has not taken the measures needed in order to ensure that the accounts of the infrastructure manager balance.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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