



According to Advocate General Jääskinen, five Member States have failed to fulfil their obligations under the rail transport directives

The Advocate General proposes that the Court finds that Poland, Czech Republic, France, Slovenia and Luxembourg have infringed European law in this area

Owing to the liberalisation of railways within the EU, 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, the principal aim of which is to ensure access to the railway network for railway undertakings on a fair and non-discriminatory basis. In the present cases, the Court of Justice must examine the actions brought against Poland, Czech Republic, France, Slovenia and Luxembourg³.

Case C-512/10 Commission v Poland

According to the Commission, Poland has not established an incentive scheme capable of encouraging the manager to reduce costs and charges for the use of the infrastructure or the level of access charges. In that connection, the Advocate General, Niilo Jääskinen, takes the view that the incentive mechanism provided for by Polish law, defining the causal link between the economic objectives to be achieved by the infrastructure manager and the measures taken by the Minister of Transport on financing the cost of renovation and maintenance of the railway infrastructure are not set out therein.

EU law provides that the charges collected for all minimum services and access to infrastructure services by the network are equal to the costs directly attributable to the operation of the railway service. The Commission submits that the definition of those costs refers to the definition of 'marginal cost'. In the Commission's view, marginal cost corresponds solely to the costs generated by the actual movement of trains and not to fixed costs which cover, in addition to the costs related

¹ Case [C-473/10](#), *Commission v Hungary*; [C-483/10](#) *Commission v Spain*; Case [C-512/10](#) *Commission v Poland*; Case [C-528/10](#) *Commission v Greece*; Case [C-545/10](#) *Commission v Czech Republic*; Case [C-555/10](#) *Commission v Austria*; Case [C-556/10](#) *Commission v Germany*; Case [C-557/10](#) *Commission v Portugal*; Case [C-625/10](#) *Commission v France*; Case [C-627/10](#) *Commission v Slovenia*; Case [C-369/11](#) *Commission v Italy*; and Case [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 Directives 2001/12/EC, and 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 (OJ 2001 L 75, p. 29), as amended by Directives 2004/49/EC and 2007/58/EC.

³ The opinion in the cases concerning Hungary, Spain, Austria, Germany and Portugal was delivered on 6 September 2012 (see PR No [109/12](#)).

to railway operations, general costs for the functioning of the infrastructure which must be borne even where there is no movement of trains.

The Advocate General takes the view that the Polish legislation, as regards the determination of the charges collected for all minimum services and for access by the network to infrastructures, results in the taking into consideration of costs which clearly cannot be regarded as being directly attributable to the operation of the railway service.

To the contrary, Advocate General Jääskinen considers that the Commission's action must be dismissed in so far as the complaints alleging lack of independence of the infrastructure manager and the alleged absence of measures able to ensure, in good time, the financial equilibrium of that manager.

C-545/10 Commission v Czech Republic

The Commission submits that by fixing the maximum amount of charges for the use of the railway infrastructure, the Czech Republic has infringed EU law. The Advocate General states that, although the Member States have the power to define the legal framework for the levying of charges, they must entrust the infrastructure manager with the task of determining the charge to be paid for the use of the railway network. Consequently, the Advocate General takes the view that the Czech Republic has failed to comply with Directive 2001/14.

Next, Advocate General Jääskinen proposes that the Court should uphold the Commission's complaint alleging the absence of measures encouraging managers to reduce the costs for the provision of the infrastructure and the level of access charges. However, he proposes that the Court should dismiss the complaint that the charges collected for all minimum services and for access to infrastructure services by the network are not equal to the costs directly attributable to the operation of the railway structure.

The Advocate General proposes that the Court should find that the Czech Republic has failed to fulfil its obligations by not establishing a performance scheme such as to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network.

The Commission asserts that under Czech law, the body responsible for handling appeals against decisions of the review body, that is the Office for Railways, is the Ministry of Transport. The Commission argues that such prior administrative proceedings are contrary to Directive 2001/14, because the latter does not authorise an administrative review of the review body's decisions. In that connection, the Advocate General states that the directive cited is based on the idea that an administrative decision adopted by the review body is subject exclusively to judicial review and not to a prior administrative review, even if that possibility is not expressly excluded. Consequently, by introducing an administrative review of the decisions of the review body by way of appeal before the Ministry of Transport, the Czech Republic has infringed EU law.

C-625/10 Commission v France, C-626/10 Commission v Slovenia and C-412/11 Commission v Luxembourg

Directive 91/440 states that a body which provides railway transport services cannot be entrusted with essential functions. Such functions consist, in particular, in attributing train paths and allocating railway infrastructure capacity. The Commission criticises France, Slovenia and Luxembourg for having infringed the requirement of independence of a body providing railway transport services.

As far as concerns France, the Advocate General considers that the fact that an incumbent service operator, the Société nationale des chemins de fer français (SNCF) (French National Railway Company), the Direction des Circulation Ferroviaires (DCF) (Rail Traffic Department) act on behalf of the Réseau ferré de France (RFF) (French Rail Network), which retains full powers for the drawing up the timetable and the attribution of individual train paths, is not sufficient to validate the

French system. Thus, that system does not fulfil the condition of legal independence. In the same way, as regards Slovenia, the Advocate General states that the fact that the Slovenian Railways act on behalf of the Railway Transport Agency, which retains full powers to draw up the timetable and attribute individual train paths, is not sufficient to ensure compliance of that system with the requirements of EU law. As regards the action against Luxembourg, the Advocate General notes that in the case of disruption of transport, the normal timetable fixed by the Administration des Chemins de Fer (ACF) (Railway Administration) can no longer be observed, since the times set in the timetable have already gone by and it then becomes necessary for the railway undertaking of the Chemins de fer luxembourgeois (CFL) (Luxembourg Railways) to reallocate times for operators who are waiting their turn.

Next, the Advocate General examines the Commission's complaint concerning the levying of charges for the access to railway infrastructure. He observes in that regard that France and Slovenia have not implemented the performance scheme for railway undertakings and infrastructure managers which corresponds to the requirements of EU law. Furthermore, Mr Jääskinen considers that Slovenia has not adopted measures to encourage infrastructure managers to reduce the costs of the provision of the infrastructure and the level of access charges.

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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