OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 17 June 2010 1(1)

**Case C?20/09**

**European Commission**

**v**

**Portuguese Republic**

(Failure by a Member State to fulfil its obligations – Admissibility – Continuance of the effects of the failure to fulfil obligations – Free movement of capital – Articles 56 CE and 40 of the EEA Agreement – Public debt securities – Preferential tax treatment)

## I – **Introduction**

1. In the present case, the European Commission has brought before the Court an application under Article 226 EC for a declaration that, by providing, in the context of tax regularisation, for preferential tax treatment only in favour of public debt securities issued by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC and Article 40 of the Agreement on the European Economic Area ('EEA Agreement').

## II – **Legal background**

2. The 'exceptional tax regularisation scheme' ('Regime Excepcional de Regularização patrimoniais Tributária de elementos que não se encontrem no território português', 'the RERF') was adopted by the Assembly of the Republic by Law No 39-A/2005 of 29 July 2005 published in the *Diário da República* of the same date. (2)

3. The RERF was introduced to combat tax evasion and avoidance by providing a temporary incentive to defaulting taxpayers who are natural persons, so that they voluntarily regularise their tax situation as regards the failure to declare, through omission or fraud, taxable income or property located abroad.

4. In order to achieve that objective, Article 1 of the RERF applies to assets consisting of deposits, certificates of deposit, securities and other financial instruments that are not on Portuguese territory. Under the RERF such assets are subject to a general rate of 5% calculated on their value as stated in the tax regularisation declaration, in accordance with Articles 2 and 5 of the RERF.

5. Under Article 6(1) of the RERF, this general rate of 5% is reduced by half if the assets comprise Portuguese State securities. A rate reduction applies also to other assets if their value is

reinvested in Portuguese State securities by the date of submission of the tax regularisation declaration, pursuant to Article 6(2).

6. However, under Article 6(1) of the RERF, in order to benefit from the reduced rate of 2.5% provided for in Article 6(1) thereof, the Portuguese State securities must remain the property of the declarant for at least three years from the date of submission of the regularisation declaration irrespective of the date of their acquisition. Non-compliance with this minimum period entails, under Article 6(5) of the RERF, payment of the difference resulting from application of the general rate of 5%.

7. The RERF expired on 31 December 2005.

## III – **The pre-litigation procedure**

8. Following a complaint and before the repeal of the RERF, the Commission sent the Portuguese Republic a letter of formal notice on 19 December 2005. In that letter, it claimed that the Portuguese Republic had failed to fulfil its obligations under Article 56 EC and Article 40 of the EEA Agreement inasmuch as it applied a more favourable rate to the regularisation of assets comprising public debt securities of the Portuguese State, and to the value of assets reinvested in such securities, as compared to the regularisation of assets not invested in public debt securities of the Portuguese State by the date of the tax regularisation declaration.

9. On 27 February 2006, the Portuguese Government replied to the letter of formal notice. As a preliminary point, the Portuguese Government challenged the timeliness of the criticisms made by the Commission since the alleged infringement of obligations under Article 56 EC and Article 40 of the EEA Agreement were, it argued, no longer subsisting. Furthermore, the Portuguese Government considered that the RERF did not infringe Community law. In any event, the contested scheme was justified on public-interest grounds, in order to combat tax evasion and avoidance.

10. Dissatisfied with that reply, by letter of 11 May 2007, the Commission issued a reasoned opinion pursuant to Article 226 EC, by which it requested the Portuguese Republic to comply with its obligations under Articles 56 EC and 40 of the EEA Agreement within a period of two months of receipt of the said opinion.

11. The Portuguese Government maintained its position set out in reply to the letter of formal notice.

## IV – **Procedure before the Court and forms of order sought**

12. In those circumstances, by originating application lodged at the Registry of the Court on 15 January 2009, the Commission brought this action.

13. The Commission claims that the Court should:

– declare that, by providing, in the context of tax regularisation under Law No 39-A/2005, for preferential fiscal treatment in favour only of public debt securities issued by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC and Article 40 of the EEA Agreement;

– order the Portuguese Republic to pay the costs.

14. The Portuguese Republic contends that the Court should dismiss the application and order the Commission to pay the costs.

15. Oral argument was heard on behalf of the parties at the hearing on 11 May 2010.

## V – **Legal analysis**

### A – *Admissibility of the application*

#### 1. Arguments of the parties

16. In its defence, the Portuguese Republic argues that the application is inadmissible for two reasons. First, it says that an action for failure to fulfil obligations should not be adjudged admissible when the alleged contravention ceased well before the time-limit laid down in the reasoned opinion (in this case, more than a year and a half), since the law enacting the RERF expired on 31 December 2005. The action is therefore inadmissible since it is devoid of purpose. Secondly, according to the defendant Member State, the failure alleged in the reasoned opinion does not coincide with the failure set out in the letter of formal notice. Only in the reasoned opinion did the Commission explain that the alleged failure was not due, as was stated in the letter of formal notice, to the preferential treatment accorded to public debt securities issued by the Portuguese State in comparison with other assets, but only as compared to public debt securities issued by other Member States.

17. The Commission rejects all these allegations and argues that the action is entirely admissible. As to the purpose of the action, the Commission states that there continues to be an interest in pursuing the proceedings. It submits that, in the present case and contrary to the case-law relied on by the Portuguese Government, (3) it acted in good time, which enables the Court, a contrario, to adjudge the present action admissible. Furthermore, the effects of the RERF continue since persons who have not been able to obtain more favourable tax treatment remain financially disadvantaged compared to those who have had that opportunity. At the hearing, the Commission added that the effects of the contested law are demonstrated by the obligation imposed on taxable persons who hold public debt securities issued by the Portuguese State and wish to benefit from the rate (of regularisation) of 2.5% to retain those securities for a period of at least three years after submission of their tax regularisation declaration, pursuant to Article 6(4) of the RERF. As regards the alleged discrepancy between the letter of formal notice and the reasoned opinion, the claim set out in the reasoned opinion merely gives further particulars of the claim set out in the letter of formal notice. This claim was already necessarily contained in the letter of formal notice. It therefore in no way comprises an amendment of the claim, as originally formulated.

#### 2. Assessment

##### a) Second plea of inadmissibility: discrepancy between the letter of formal notice and the reasoned opinion

18. At the outset, I consider that this second bar to the action raised by the Portuguese Republic based on the discrepancy between the letter of formal notice and the reasoned opinion must clearly be rejected.

19. In that regard, it is worth noting the difference between these two stages in the pre-litigation procedure. According to the Court’s case-law, the reasoned opinion referred to in Article 226 EC must contain a coherent and detailed presentation of the reasons which led the Commission to the conviction that the State concerned has failed to fulfil one of its obligations under the Treaty.

Conversely, the letter of formal notice cannot be subjected to such strict requirements of precision, since it can necessarily only be an initial brief summary of objections. There is nothing, therefore, to prevent the Commission, in the reasoned opinion, from further particularising the claims that it has already outlined in general terms in the letter of formal notice. (4)

20. In the present case, the Commission does not dispute the fact that, while the letter of formal notice compared the preferential treatment of public debt securities of the Portuguese State in relation to all other assets, the reasoned opinion, for its part, contrasted those securities with public debt securities issued by other Member States.

21. None the less, the concept of assets is more general than the concept of public debt and necessarily includes the latter. The reasoned opinion issued in the present case only provides further particulars of the objections set out in the letter of formal notice, or even an entirely legitimate delimitation of the alleged failure to fulfil obligations. (5) Thus, the allegation of a failure to fulfil obligations has not been altered in the reasoned opinion; rather the opinion has been particularised, or delimited, in line with the case-law mentioned at point 19 of this Opinion.

b) First plea of inadmissibility, based on the absence of any current infringement of the Treaty and of the EEA agreement

22. The resolution of the first objection of inadmissibility, in my view, raises more difficulties and entails a review of the case-law concerning the admissibility of an action for failure to fulfil obligations brought against temporary national measures – an issue some aspects of which I already considered in my Opinions in *Commission* v *Greece* (6) and *Commission* v *Germany.* (7)

23. I would point out that, under the procedure laid down in Article 226 EC, the Commission's task is, inter alia, to be able to establish the existence of any failures to fulfil obligations under Community law. (8)

24. Furthermore, in accordance with Article 226 EC and the case-law, the existence of a failure to fulfil obligations must be assessed in the light of the Member State's position at the end of the period laid down in the reasoned opinion. (9) As Advocate General Lenz stated in *Commission* v *Italy*, (10) there is no interest in obtaining a declaration from the Court of a Treaty infringement when the infringement has ceased before expiry of the time-limit laid down in the reasoned opinion issued by the Commission. (11)

25. This must of course be the solution where the cessation of the alleged infringement of Community law is the result of intervention by the Member State concerned in order to comply with the reasoned opinion.

26. Thus, the Court dismissed as inadmissible an action for failure to fulfil obligations in which the Member State concerned was accused of having adopted several legislative measures which, when the Court checked with the parties, turned out to have been repealed before expiry of the period laid down in the reasoned opinion issued by the Commission. (12)

27. However, that is not the situation in the present case. Indeed, the provisions of the RERF have not been formally repealed and the Portuguese Republic has not intervened to comply with the reasoned opinion before expiry of time-limit laid down in the reasoned opinion.

28. It is undisputed that the law enacting the RERF expired on 31 December 2005, that is to say well before the end of the period laid down in the reasoned opinion of 11 May 2007.

29. Consequently, it has to be verified whether, as the Commission maintains, on the date of

expiry of that period, the alleged infringement of Article 56 EC and Article 40 of the EEA agreement continued to produce effects.

30. In this connection, the Court's case-law appears to be equivocal and varies according to the sectors concerned, with certain judgments requiring that the disputed provisions continue to have effect but others not.

31. Noteworthy among the latter category are the judgments delivered in the field of fishing quotas in which several actions for failure to fulfil obligations have been deemed admissible even though the Commission initiated the pre-litigation procedures well after the end of the annual fishing seasons at issue. (13) In particular, in *Commission* v *France*, cited above, the French Republic had pleaded inadmissibility of the action for failure to fulfil obligations on the ground that the action related to fishing seasons that dated back more than a decade previously and in respect of which it could no longer ensure compliance. (14)

32. In response to that argument, the Court pointed out, primarily, that the Commission does not have to show that there is an interest in bringing an action, and that it is for it to assess the expediency of proceeding against a Member State and to choose the time when it brings the action for failure to fulfil obligations, and finally that the Commission is not required, under Article 226 EC, to observe a specific time-limit for bringing its action. (15)

33. It will be noted that the Court did not therefore even verify whether the alleged infringement persisted on the date of expiry of the period laid down in the reasoned opinion, even though that appeared to be the real criticism made by France in respect of the admissibility of the action. Instead, the reasoning of the Court is based solely on the three arguments mentioned in the preceding paragraph of this Opinion.

34. That reasoning does not deal adequately with the plea of inadmissibility that was raised by France essentially on the basis that the alleged failure to fulfil obligations was no longer current.

35. First of all, the margin of discretion undeniably enjoyed by the Commission in regard to bringing an action for failure to fulfil obligations and the absence of any obligation on its part to show that there is an interest in bringing that action are not in any way related to the question whether the breach is current or its legal effects are continuing where there has been a specific breach of Community law; while the Commission's margin of discretion and the absence of any obligation to demonstrate an interest in bringing the action concern the subjective rights of the Commission, the existence of a breach as at the date of expiry of the time-limit laid down in the reasoned opinion is an objective condition governing admissibility which must be determined at the outset by the Court and, if need be, of its own motion. (16) In addition, the case-law requiring the demonstration on the part of the Commission of an interest in bringing the action in the context of an action for failure to fulfil obligations applies only when the alleged infringement is eliminated after expiry of the time-limit laid down in the reasoned opinion (17) and not before.

36. Next, the references to the judgments in *Commission* v *Germany* (18) and *Commission* v *Italy* (19) made by the Court at paragraph 24 of the *Commission* v *France* judgment cited above in order to justify the margin of discretion conferred on the Commission for choosing the time for bringing infringement proceedings, do not seem to me to be relevant.

37. In the judgments in *Commission* v *Germany* and *Commission* v *Italy* cited by the Court, the pleas of inadmissibility raised by the defendant Member States were very different from those invoked by the French Government in *Commission* v *France* cited above. In the first case, the German Government challenged the admissibility of the action alleging that the reasoned opinion was in the course of being complied with, that bringing the action infringed the principle of the

protection of legitimate expectations and interfered with the negotiations in progress within the Council. (20) In the second case, the Italian Republic relied in particular on infringement of the rights of the defence, claiming that the Commission had wrongly introduced a second set of infringement proceedings which contained, in essence, the same objections as those set out in an action for failure to fulfil obligations brought against it previously. (21) Although it is possible to understand the reasoning of the Court based on the Commission's discretion as to the choice of time to bring the infringement proceedings in the circumstances described, such reasoning is not likely to be extended to a situation where, as in *Commission* v *France* cited above, the objection of inadmissibility raised by the defendant State concerned the question whether a Treaty infringement persisted on expiry of the period laid down in the reasoned opinion.

38. I therefore consider that it is not appropriate, in the present case, to follow the judicial line of reasoning on the fishing quotas just analysed. (22)

39. In contrast, I suggest that the Court should be guided by the more abundant case-law developed in other areas and according to which the Court assesses the admissibility of the action for failure to fulfil obligations by examining the question whether, as at the time-limit laid down for compliance with the reasoned opinion, the alleged infringement of Community law, which has apparently ceased, continues to produce effects.

40. This case-law originated in the field of public procurement. Thus, the Court declared the Commission's actions for failure to fulfil obligations admissible when the contracts allegedly concluded in contravention of the relevant provisions of secondary Community law had not been wholly performed on expiry of the period laid down in the reasoned opinion, and therefore, continued to produce their effects. (23) Conversely, actions for failure to fulfil obligations have been deemed inadmissible when those contracts had already exhausted all their effects (24) or where a national order authorising the award of contracts in cases not provided for by the 'public procurement' directives had exhausted 'all its own effects'. (25)

41. This judicial line of reasoning has also been extended to other areas.

42. Thus, the Court has made reference to the judgments which have been cited in regard to consideration of the admissibility of actions for failure to fulfil obligations relating, on the one hand, (26) to the transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (27) and, on the other, (28) to observance of the provisions of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. (29)

43. More recently, the Court has also applied this case-law in the judgment of 6 December 2007 in *Commission* v *Germany*, cited above, which concerned an infringement of freedom of establishment of psychotherapists in Germany. (30)

44. At issue in that case was the compatibility with Article 43 EC of national transitional provisions which reserved only to psychotherapists having practised under the German sickness schemes in a region of Germany during a specified period, the possibility of practising under the statutory scheme, and refused to grant this possibility to psychotherapists who had practised during the same period outside Germany under the sickness schemes of another Member State. The German Government denied that the alleged infringement of the freedom of establishment was ongoing inasmuch as the Commission had issued the reasoned opinion more than two years after expiry of the transitional provisions.

45. In reply to that objection of inadmissibility, the Court, after stating that it was for it to verify whether, in accordance with the case-law, at the end of the period laid down in the reasoned

opinion ‘the contested legislation continued to produce effects’, (31) found that the exclusion of psychotherapists who had not practised in Germany during the reference period from the benefit of the transitional provisions at issue was not limited in time, was permanent in nature and, in particular, lasted beyond the expiry of the period laid down in the reasoned opinion. (32) It therefore rejected the objection of inadmissibility raised by the German Government, stating that the transitional provisions at issue continued to produce effects at the date relevant for assessing whether the action for failure to fulfil obligations is admissible. (33)

46. This case-law seems to me coherent and consistent with the objective of Article 226 EC which is to put the Member States in a position to be able to comply with the reasoned opinion and, more generally, with their obligations under Community law at the end of the period laid down in that opinion. (34) However, a Member State can benefit from such a situation only if, on the date laid down in the reasoned opinion, there is a real possibility for that State to arrange for the alleged infringement to cease, including its effects, by amending its conduct *lato sensu*.

47. Therefore, I am of the opinion that it is important, in accordance with the case-law, to examine, in the present case, if the RERF continued to produce effects on expiry of the period laid down in the reasoned opinion.

48. In that connection, I note that the Law of 29 July 2005 enacting the RERF expired on 31 December 2005 and that the period laid down in the reasoned opinion to comply with it expired in July 2007.

49. It should be also noted that under Article 6(4) of the RERF, the public debt securities issued by the Portuguese State and held by Portuguese taxable persons entitled to the preferential scheme at issue, had to remain the property of the declarant for at least three years from the date of submission of the tax regularisation declaration and irrespective of the date of their acquisition, failing which the declarant had to pay the difference between the preferential rate and the general rate. Furthermore, under Article 5(2) of the RERF, the tax regularisation declaration had to be lodged by 16 December 2005. Accordingly, the benefit of preferential treatment could be acquired fully only on expiry of the period of three years from presentation of the tax regularisation declaration, that is to say between the end of July 2008 at the earliest, and 16 December 2008, at the latest.

50. It follows that, very clearly, the RERF was continuing to produce effects in July 2007, namely at the time of expiry of the period laid down in the reasoned opinion. Moreover, at that time, the Portuguese Republic still had the real possibility of complying with the reasoned opinion, for example, by restoring a single rate applicable to all public debt securities issued by the Member States and by the States of the European Free Trade Association (EFTA) contracting parties to the EEA Agreement.

51. The fact that the RERF was still producing effects after expiry of the law enacting it seems to me to be corroborated by the option given to the Portuguese tax authorities to apply the general rate of 5% to taxable persons who have disposed of the public debt securities issued by the Portuguese State during the three years period referred to in Article 6(4) of the RERF. In fact, this option, which is dependent on the assignment of the securities at issue, in a way enabled the Portuguese tax authorities to mitigate, albeit in a specific and circumscribed manner, the effects beyond 31 December 2005 of its failure to fulfil its obligations, by correcting in specific cases equal treatment as between taxable persons depending on whether they held securities issued by the Portuguese State, or by other Member States (or by the EFTA States, contracting parties to the EEA Agreement). Therefore, the mere existence of this ability to intervene on the part of the Portuguese tax authorities well after 31 December 2005 which was still applicable at the time of expiry of the period for compliance with the reasoned opinion in my view supports the fact that the

benefit of preferential tax treatment had not been fully acquired at the date of expiry of the law establishing the RERF.

52. Nor, finally, can I endorse the argument of the Portuguese Republic put forward at the hearing according to which, in substance, the alleged infringement does not cover the period of three years relating to the retention of the securities issued by the Portuguese Republic, inasmuch as the Commission only asks the Portuguese Republic to extend preferential treatment to holders of securities of Member States other than Portugal, whereas the period for retention of securities imposed on taxable persons holding public debt securities issued by the Portuguese State constitutes not an advantage, but a disadvantage as far as those taxable persons are concerned.

53. Regardless of whether or not the retention period for the securities in question is advantageous to the taxpayers concerned, the Portuguese Republic's argument seems to me not relevant in considering whether the law which established the RERF had or had not exhausted all its effects at the end of the period laid down in the reasoned opinion for the purpose of ascertaining the admissibility of the action. In addition, the alleged infringement concerns the legislation enacting the RERF in its entirety, without, therefore, excluding Article 6(4) and (5) thereof.

54. In addition, I would observe that infringement proceedings are objective in nature and seek to obtain a declaration of infringement of Treaty obligations. They do not therefore authorise the Commission to enjoin a Member State to adopt a particular course of conduct. Therefore, the Portuguese Republic cannot in my opinion argue that, in the proceedings initiated against it, the Commission was only asking it to extend the preferential treatment reserved to holders of public debt securities issued by the Portuguese State to holders of such securities issued by the other Member States. In the present case, the Portuguese Republic could not be mistaken as to the fact that the Commission could only invite it to end the unequal treatment identified in the pre-litigation procedure and which, according to it, infringed the provisions of the Treaty. The Portuguese Republic therefore had a margin of discretion that was wide enough to enable it to amend the conduct criticised in the reasoned opinion, so as to restore the equality of treatment allegedly infringed, including after expiry of the contested law during the period when it continued to produce effects. (35)

55. In these circumstances, I propose that the Court should reject the plea of inadmissibility raised by the Portuguese Republic and, consequently, declare the present action admissible.

c) In the alternative, as to whether the action of the Commission was brought in good time

56. However, if the Court should not accede to the proposal to declare the present action admissible inasmuch as the RERF continued to produce effects at the end of the period laid down in the reasoned opinion, it would be for it to rule on the Commission's allegation that it is sufficient that the Commission initiated its action in due time in order to uphold its admissibility.

57. In that connection, the Commission relies, by way of a contrario reasoning, on the judgment of 31 March 1992 in *Commission* v *Italy,* cited above, (36) concerning public procurement, in which the Court held an action for failure to fulfil obligations to be inadmissible, in particular on the grounds that, first, the Commission did not act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects, and did not even invoke the existence of circumstances preventing it from concluding the pre?litigation procedure laid down in Article 226 of the Treaty before the infringement ceased to exist. (37)

58. The Commission therefore claims that, since it acted in good time, it is appropriate to declare its application admissible.

59. I consider that the Commission's arguments should be upheld precisely because the situation in the present case corresponds exactly to the situation envisaged in point 54 of my Opinion in *Commission* v *Germany*, cited above. (38)

60. As l stated, in substance, in that point of the Opinion, the fact that an action for failure to fulfil obligations is brought after expiry of a national measure that has also ceased to produce effects cannot prevent the Court from upholding the admissibility of an action against such a measure when it appears that the Commission had not had the time to go through all the steps in the pre-litigation procedure before the infringement ceased. To declare the action inadmissible in such a situation would amount to rewarding the fact that the infringement had been 'consummated', even though the Commission could not have taken action before it had ceased and thereby prevent the infringement from producing effects, *a fortiori* when the Commission has done its utmost to act in good time.

61. In the present case, as the RERF remained in force only for about five months, and the Commission sent its letter of formal notice before the law enacting the RERF had even lapsed, it has, in my opinion, acted in good time.

62. On the first point, it is certainly possible to imagine in theory, as the Portuguese Republic argued at the hearing, that the Commission could have conducted the entire pre-litigation procedure within the period of five months preceding expiry of Law No 39-A/2005.

63. Nevertheless, it is also well known that, according to the case-law, the Commission is subject to the obligation to allow a reasonable time to Member States to respond to the letter of formal notice and to comply with the reasoned opinion, and that the assessment of the reasonableness of that period must be conducted in the light of all the circumstances of the case. Thus, the Court has held very short deadlines to be justified in special situations, particularly when it is urgent for a breach to be remedied or where the Member State concerned has full knowledge of the Commission's point of view well before the beginning of the proceedings. (39)

64. Given the limited nature of the alleged failure to fulfil obligations and the fact that the Commission was informed of the adoption of the contested law only in September 2005, it is hardly conceivable that the present case could have satisfied the requirements of that case-law developed to deal with sensitive and serious cases, such as the refusal by the French authorities to terminate the embargo on British beef (40) or the award of major public contracts in the territory of a Member State. (41)

65. On the second point, I wish to observe that the situation in the present case is clearly distinguishable in this connection from that in *Commission* v *Germany* cited above, (42) in which the Commission had initiated the pre-litigation procedure almost two years after expiry of the transitional provisions. (43)

66. In the light of these circumstances, the application should, in my view, be declared admissible on the sole ground that the Commission acted in good time.

B – *Substance*

1. Arguments of the parties

67. The Commission considers that the provisions of the RERF constitute a restriction on the

free movement of capital, within the meaning of Article 56 EC and Article 40 of the EEA Agreement. According to it, taxable persons benefiting from the RERF were deterred from keeping their assets regularised under forms other than public debt securities issued by the Portuguese State. Nevertheless, the Commission does not dispute the fact that public debt securities can benefit from a more favourable treatment, but the particular problem in the present case is whether a national provision may favour the public debt securities issued by a single Member State. Thus, the Commission is of the opinion that the application of a lower rate of taxation on the regularised assets that are public debt securities issued by the Portuguese State constitutes a discriminatory restriction on movements of capital.

68. Referring to the *Verkooijen* judgment, (44) the Commission considers that there is no objective justification for the difference between the preferential rate of 2.5% and the general rate of 5% as the taxable persons are in an identical situation. Moreover, neither the reports of the Organization for Economic Cooperation and Development (OECD) (45) relied on by the Portuguese Government in its defence, nor Council Directive 2003/48/EC of 3 June 2003, on taxation of savings income in the form of interest payments (46) warrant the preferential treatment accorded to public debt securities issued by the Portuguese State.

69. The Portuguese Government considers that, if the action is declared admissible, the preferential treatment reserved to public debt securities issued by the Portuguese State under the RERF is justified under Article 58(1)(b) EC. On this subject, the general-interest justification is the combating of tax avoidance and evasion.

70. In support of this argument, the Portuguese Government refers to Directive 2003/48, mentioned above. As that directive approved such a differentiation for negotiable debt securities issued by a public authority, it was accordingly also deemed legitimate, in the context of the adoption of the RERF, to grant preferential treatment to holders of public debt securities issued by the Portuguese State.

71. Moreover, according to the Portuguese government, the abovementioned OECD reports require the Member States, which are contracting parties to that organization, to adopt measures to promote the voluntary regularisation of the situation of taxpayers who, by investing funds abroad, have concealed income that is taxable in their State of residence.

72. Finally, pointing out that the RERF was aimed at the tax regularisation of assets that have not been declared for tax purposes in Portugal, the Portuguese Government considers that the scheme at issue is legitimate. In fact, the tax in question actually functioned as the ‘cost of regularisation’ of the tax situation. That tax took the form of a compensatory indemnity for the extinction of tax liabilities to the Portuguese State in respect of the assets in question.

73. This indemnity function therefore provided justification, in the case of the public debt securities issued by the Portuguese State, for there being a reduced cost, unlike in the case of the securities of any other Member State, since, in the context of the RERF, it was the tax revenue of that Member State, through extinction of relevant tax liabilities, that was being taken into account.

2. Appraisal

a) The existence of a restriction on the free movement of capital

74. As the Court has already held, measures imposed by a Member State which are likely to dissuade its residents from contracting loans or making investments in other Member States, constitute restrictions on movements of capital, within the meaning of Article 56 EC. (47)

75. As summarised, in the present case, by the Commission, without being challenged by the Portuguese Republic, taxable persons holding public debt securities issued by the Portuguese State could benefit from preferential tax treatment under Article 6(1) of the RERF as opposed to taxable persons holding public debt securities issued by other Member States.

76. While the latter had to pay a tax at the basic rate of 5% of the value of the assets contained in their declaration of regularisation in accordance with the RERF, taxable persons having invested in public debt securities issued by the Portuguese State were liable to tax at the reduced rate of 2.5%.

77. Such preferential treatment was likely to deter the taxable persons concerned from holding public debt securities issued by other Member States, as under the RERF the less favourable rate of 5% applied to the latter.

78. It follows from the foregoing that the contested measure undeniably constitutes a restriction within the meaning of Article 56(1) EC.

79. To the extent to which the failure to fulfil obligations also covers the tax treatment of public debt securities issued by the EFTA States, contracting parties to the EEA Agreement, that interim conclusion also applies in regard to Article 40 of that agreement, the legal scope of which is essentially identical Article 56(1) EC. (48)

b) Justification of the restriction on the free movement of capital

80. It has been consistently held that the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 58 EC or by overriding requirements of the general interest where there is no harmonising Community measure providing for the measures necessary to ensure the protection of those interests. (49)

81. In the absence of such Community harmonisation, it is for each Member State to establish the level at which it intends to ensure protection of those legitimate interests as well as the manner of achieving it, whilst observing the Treaty and in particular the principle of proportionality according to which national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it. (50)

82. In the present case, the Portuguese Government is first of all claiming that Directive 2003/48 could justify a difference in treatment between negotiable debt securities issued by a public authority and such securities issued by private individuals.

83. Without its being necessary to embark on a detailed examination of the provisions of Directive 2003/48, this line of argument does not carry conviction.

84. Even assuming that the directive does differentiate in the way contended for by the Portuguese Government, it would not justify a difference of treatment between securities of the same kind, that is to say, in the present case, public debt securities issued by different Member States. However, that is the accusation made by the Commission which, as I already stated at paragraph 21 above, restricted the subject-matter of the case at the stage of the reasoned opinion to the difference in tax treatment in Portugal between public debt securities issued by the Portuguese Republic and those issued by the other Member States (as well as by EFTA States, that are contracting parties to the EEA Agreement) and not to the difference in tax treatment between public debt securities issued by the Portuguese State and any other assets.

85. Directive 2003/48 cannot therefore serve as a source of inspiration to justify the restrictions to the free movement of capital in question in the present case.

86. It therefore remains to examine whether, as the Portuguese Government goes on to argue, the combating of tax avoidance and evasion justifies such restrictions.

87. It is true that, according to the Court's case-law, the two abovementioned objectives may justify a restriction on the free movement of capital. (51) None the less, the restrictions in question, in the present case those stemming from application of the RERF, must constitute measures that are essential for combating tax avoidance and evasion and tax fraud. (52)

88. The RERF, it seems to me, does not satisfy that condition.

89. In this connection, the Portuguese Government has neither explained nor *a fortiori* demonstrated why it is indispensable for there to be a difference in rates as between public debt securities issued by the Portuguese State and those issued by other Member States in order to achieve *the general-interest objectives that it seeks to pursue.* The other rules of the RERF applicable to taxable persons wishing to regularise their tax situations applied regardless of the place where the capital was invested. In fact, the explanation that the rate difference is justified, in essence, as a compensatory indemnity that is higher on regularised investments in public debt securities issued by other Member States comes down, in my view, to an attempt to justify a measure restricting the free movement of capital by pursuit of an objective that is plainly financial in nature, that is to say offsetting the Member State's lost tax revenue. However, in accordance with the Court's case?law, a ground of a financial nature certainly cannot justify a measure contrary to Article 56(1) EC. (53) If, in accordance with the RERF, the taxable persons concerned were all invited to regularise their situations in respect of taxes unpaid in Portugal, I do not at all see why in the event of tax evasion, only those who invested in public debt securities issued by the Portuguese State ought to enjoy the benefit of preferential treatment.

90. Finally, the OECD reports, referred to above, cannot, in my view, be relied on in the present case. Those reports do not allow Member States of the European Union to limit the freedoms of movement. In addition, it is very doubtful that such reports, which do not contain any legal obligation, can, as a general rule, entail a requirement on Member States to adopt a particular line of conduct.

91. It follows from the foregoing that the RERF constitutes, in my view, a restriction on the free movement of capital provided for in Article 56 EC which cannot be justified by the grounds invoked by the Portuguese Government.

92. An analogous conclusion is called for, I believe, as regards the complaint alleging infringement of Article 40 of the EEA agreement.

93. The situation in question similarly affects public debt securities issued by the EFTA States, which are contracting parties to the EEA Agreement. The Portuguese Republic has not advanced any grounds based on the different legal context applying to restrictions on the movement of capital as between Member States and non-Member States in regard to free movement of capital within the Community, (54) which might, in a proper case, justify the preferential tax treatment under the RERF. Such treatment therefore also infringes Article 40 of the EEA Agreement, and cannot be justified by the objective of combating tax avoidance and evasion.

94. I therefore propose that the Court should allow the Commission's action for failure to fulfil obligations.

## VI – **Costs**

95. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to pay the costs if they have been applied for in the successful party's pleadings.

96. As I am suggesting to the Court that the action be allowed and the Commission has asked for the defendant State to be ordered to pay the costs, I consider that the costs should be borne by the Portuguese Republic.

## VII – **Conclusion**

97. Having regard to the foregoing considerations, I propose that the Court should:

– Declare that, by providing, in the context of tax regularisation under Law No 39-A/2005 of 29 July 2005, for preferential tax treatment in favour only of public debt securities issued by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC and Article 40 of the Agreement on the European Economic Area (EEA); and

– Order the Portuguese Republic to pay the costs.

1 – Original language: French.

2 – *Diário da República* – series I – A, no 145.

3 – Judgment in Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353.

4 – See, in this connection, judgments in Cases 74/82 *Commission* v *Ireland* [1992] ECR 317, paragraph 20; 274/83, *Commission* v *Italy* [1985] ECR 1077, paragraph 21; C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 16; and C-358/01 *Commission* v *Spain* [2003] ECR I-13145, paragraph 29.

5 – See to this effect judgments in Case C-365/97 *Commission* v *Italy* [1999] ECR I?7773, paragraph 25 and Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, paragraph 33.

6 – Opinion in Case C-237/05 *Commission* v *Greece* [2007] ECR I-8203.

7 – Opinion in Case C-456/05 *Commission* v *Italy* [2007] ECR I-10517.

8 – See judgments in Cases C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 23; C?394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 14 and 15; and C?33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 65.

9 – See, inter alia, judgments in Cases C-196/07 *Commission* v *Spain* [2008] ECR I?41,

paragraph 25; C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 17; and C-348/99 *Commission* v *Luxembourg* [2000] ECR I-2917, paragraph 8.

10 – Opinion in Case C-362/90.

11 – See point 11 of that Opinion.

12 – See judgment in Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraphs 15 to 17. That was a case of partial inadmissibility inasmuch as the action for failure to fulfil obligations was aimed at two regional laws relating to fairs, exhibitions, and markets.

13 – See, inter alia, judgment cited above in Case C-333/99 *Commission* v *France*, paragraphs 22 to 26; Cases C-418/00 and C-419/00 *Commission* v *France* [2002] ECR I-3969, paragraphs 28 to 30; and Case C-149/03 *Commission* v *Belgium*, not published in the ECR. Note that in the latter case the Court did not even consider the admissibility of the action for failure to fulfil obligations brought almost two years after the last fishing season.

14 – See paragraph 22 of the judgment in Case C-333/99 *Commission* v *France*, cited above.

15 – See paragraphs 23 to 25 of the judgment.

16 – Thus, in *Commission* v *Germany* (C-456/05), cited above, the Court very correctly examined the plea of inadmissibility constituted by the lack of any current infringement of the Treaty, irrespective of and prior to that of the Commission's lack of interest in bringing the action.

17 – See judgment in Case 26/69 *Commission* v *France* [1970] ECR 565, paragraphs 2 to 13 and point 12 of the Opinion of Advocate General Lenz in *Commission* v *Italy* (C-362/90), cited above.

18 – Judgment in Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039.

19 – Judgment in Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851.

20 – Judgment in Case C-317/92, cited above (paragraph 2).

21 – See judgment cited above in Case C-35/96 *Commission* v *Italy*, paragraphs 21 to 31.

22 – In any case, if the Court should decide to follow that judicial line of reasoning in the present case, the action for failure to fulfil obligations would be admissible, since this line of reasoning does not require the existence of an infringement to be demonstrated at the end of the period laid down in the reasoned opinion.

23 – See, inter alia, judgments in Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraphs 42 to 44; Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I?3609, paragraphs 32 to 37; Case C-125/03 *Commission* v *Germany*, not published in the ECR, paragraphs 12 and 13; Case C-217/06 *Commission* v *Italy* [2007] ECR I-132, paragraph 21; and judgment cited above in Case C-394/02 *Commission* v *Greece*, paragraphs 18 and 19.

24 – See judgment cited above in Case C-237/ 05 *Commission* v *Greece*, paragraphs 29 to 35.

25 – See judgment in Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraphs 15 and 16.

26 – Judgment in Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969 paragraph 73 in which the Court referred to the judgment in Case C-362/90 *Commission* v *Italy*.

27 – OJ 1985 L 175, p. 40.

28 – Judgment cited above in Case C-221/ 04 *Commission* v *Spain*, paragraphs 23 to 26 in which the Court referred to judgments cited above in Cases C-362/90 *Commission* v *Italy* and C-525/03 *Commission* v *Italy*.

29 – OJ 1992 L 206, p. 7.

30 – Judgment cited above (Case C-456/05).

31 – Paragraph 16 of the judgment of 6 December 2007 cited above. The Court refers in this paragraph to three judgments delivered in the matter of public procurement, namely the judgments cited above in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, C-125/03 *Commission* v *Germany* and C?525/03 *Commission* v *Italy*.

32 – Paragraph 18 of the judgment.

33 – Paragraph 20 of the judgment.

34 – See, to this effect, judgment in *Commission* v *France* [2001] ECR I-9989, paragraph 64.

35 – The fact that the operative part of the reasoned opinion criticises the Member State for reserving preferential treatment only to holders of securities issued by the Portuguese State does not seem to me to be decisive. In fact, in infringement proceedings, the Commission does not have the power to compel a Member State to adopt a particular kind of behaviour towards its own nationals in a domestic situation. Thus, it could not call into question the choice of the Portuguese legislature to grant a rate of 2.5% to holders of securities issued by the Portuguese State wishing to regularise their tax situation. Conversely, starting from that premise, it invited the Member State to ensure the equality of treatment provided for by the Treaty provisions. This in no way means that, to attain that objective and to comply with the reasoned opinion, the Member State may not itself review its initial choice to grant the rate of 2.5% to the Portuguese taxpayers concerned, if that seems to it to be the solution that is most appropriate or most realistic.

36 – Case C-362/90.

37 – See judgment cited above in *Commission* v *Italy* (C-362/90), paragraph 12.

38 – Case C-456/05.

39 – Judgment in Case C-1/00 *Commission* v *France* [2001] ECR I?9989, paragraph 65 and case-law cited.

40 – Judgment cited above.

41 – Case C-328/96 *Commission* v *Austria* [1999] ECR I?7479, paragraph 54.

42 – Case C-456/05.

43 – See point 56 of my Opinion in Case C-456/05.

44 – Case C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen* [2000] ECR I?4071, paragraphs 43 and 44.

45 – OECD Reports, *Improving Access to Bank Information for Tax Purposes* 2000, p. 19 and *Improving access to Bank information for tax purposes: Progress report*

, 2007, p. 26.

46 – OJ 2003 L 157, p. 38.

47 – Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19; and Case C-478/98 *Commission* v *Belgium* [2000] ECR I?7587, paragraph 18.

48 – See inter alia Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-0000, paragraph 33 and Case C-540/07 *Commission* v *Italy* [2009] ECR I-0000, paragraph 66.

49 – See, in this connection, Case C-367/98 *Commission* v *Portugal* [2002] ECR I?4731, paragraph 49 and Case C-274/06 *Commission* v *Spain* [2008] ECR I-26, paragraph 35.

50 – See, in this connection, Case C-54/99 *Church of Scientology* [2000] ECR I-1335, paragraph 18; judgments cited above in *Commission* v *Belgium*, paragraph 45; *Commission* v *Portugal*, paragraph 49, and *Commission* v *Spain*, paragraph 36.

51 – See, inter alia, in regard to combating tax avoidance, Case C-478/98 *Commission* v *Belgium*, cited above, paragraph 39; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraphs 49 and 51; and Case C-231/05 *Oy AA* [2007] ECR I?6373, paragraph 60 and, in regard to tax evasion, Cases C-358/93 and C-416/93 *Aldo Borsena* [1995] ECR I-361, paragraphs 21 and 22; Joined Cases C-163/ 94, C?165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 22, as well as *Commission* v *Italy* (C-540/07), cited above paragraph 55.

52 – See judgments cited above in *Aldo Borsena* (paragraph 21) and *Commission* v *Belgium* (C?478/98), paragraph 40.

53 – See, in particular, *Verkooijen*, cited above (paragraph 49). In regard to the non-justification of national measures restricting the free movement of capital to prevent the loss of tax revenue, see, in particular, Case C-318/07 *Persche* [2009] ECR I-359, paragraph 46 and case-law cited.

54 – See in that connection Case C-540/07 *Commission* v *Italy*, cited above, paragraph 69. In particular, contrary to the arguments deployed by the Italian Republic in that case, the Portuguese Republic has never argued that the preferential tax treatment provided for by the RERF was introduced and is necessary because there is no provision for exchanges of information between the tax authorities of Member States and those of the EFTA States, parties to the EEA Agreement.