JUDGMENT OF THE COURT (Second Chamber)

7 April 2011 (*)

(Failure of a Member State to fulfil obligations – Admissibility of the action – Free movement of capital – Article 56 EC – Article 40 of the EEA Agreement – Public debt securities – Preferential tax treatment – Justification – Combating of tax evasion – Combating of tax avoidance)

In Case C-20/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 January 2009,

**European Commission,** represented by R. Lyal and A. Caeiros, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Portuguese Republic,** represented by L. Inez Fernandes, C. Guerra Santos and J. Menezes Leitão, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 May 2010,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2010

gives the following

## Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by providing under the tax regularisation scheme established by Law No 39-A/2005 of 29 July 2005 (*Diàrio da República* I, Series A, No 145, of 29 July 2005), for preferential tax treatment of public debt securities issued only 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) of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

### Legal context

*The EEA Agreement*

2 Article 40 of the EEA Agreement provides:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.’

3 The said Annex XII, headed ‘Free movement of capital’, refers to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Amsterdam Treaty] (OJ 1988 L 178, p. 5).

*National law*

4 The exceptional tax regularisation scheme for assets not in Portuguese territory on 31 December 2004 (‘regime excepcional de regularização tributária de elementos patrimoniais que não se encontrem no território português em 31 de Dezembro de 2004’; ‘the RERF’) was established by Law No 39-A/2005.

5 Article 1 of the RERF provides:

‘The [RERF] shall apply to assets not on Portuguese territory consisting of deposits, certificates of deposit, securities and other financial instruments, including life assurance policies linked to investment funds and capitalisation operations of the “life” branch.’

6 According to Article 2(1) of the RERF, the persons capable of benefiting therefrom are physical persons holding the assets referred to in Article 1.

7 Article 2(2) of the RERF provides:

‘For the purposes of this scheme, taxpayers must:

(a) submit the declaration of tax regularisation provided for in Article 5;

(b) make payment of the amount corresponding to the application of a rate of 5% on the value of the assets appearing in the declaration referred to in paragraph 1.’

8 Article 5 of the RERF provides:

‘1. The declaration of tax regularisation referred to in Article 2(2)(a) shall follow the model approved by the Ministry of Finance and be accompanied by documents evidencing the ownership and the lodging or registration of the assets referred to therein.

2. The declaration of tax regularisation must be lodged not later than 16 December 2005 with the Banco de Portugal or another bank established in Portugal.

3. The payment referred to in Article 2(2)(b) shall be made with the bodies mentioned in paragraph 2 [of this article], simultaneously with the lodging of the declaration referred to in Article 2(2)(a) or within the following 10 working days, counting from the date of receipt of the said declaration.

4. The bank concerned shall give to the declarant, upon payment, a registered document proving

the lodging of the declaration and the payment of the corresponding amount.

5. Within the limits of this law, the declaration of tax regularisation may not be used as evidence in any tax or criminal proceeding whatsoever, the banks concerned being required to keep the information provided confidential.

6. Where the lodging of the declaration and the payment are not made directly with the Banco de Portugal, the bank concerned shall send that declaration and a copy of the evidencing document to the Banco de Portugal within 10 working days following the date on which the declaration was lodged.

7. In the cases referred to in paragraph 6, the bank concerned shall transfer the amounts received to the Banco de Portugal within 10 working days following the payment concerned.'

9 Article 6 of the RERF provides:

'1. If all or any of the assets covered by the declaration of tax regularisation are Portuguese State securities, the rate referred to in Article 2(2)(b) shall be reduced by half in relation to the part corresponding to those securities.

2. The rate reduction referred to in the previous paragraph shall also apply to other assets if their value is reinvested in Portuguese State securities not later than the date of submission of the declaration of tax regularisation.

3. In the case of partial reinvestment, the rate reduction shall concern only the part of the value reinvested.

4. The Portuguese State securities benefiting from the scheme laid down by this article must remain the property of the declarant for at least three years from the date of submission of the declaration of tax regularisation, irrespective of the date of their acquisition.

5. Non-compliance with the minimum holding period laid down in the previous paragraph shall result in the payment of the difference resulting from the application of the rate referred to in Article 2(2)(b), plus the corresponding compensatory interest increased by 5 percentage points.'

**Pre-litigation procedure**

10 Following a complaint, the Commission sent the Portuguese Republic a letter of formal notice on 19 December 2005, claiming that that Member State had failed to fulfil its obligations under Article 56 EC and Article 40 of the EEA Agreement inasmuch as, under the RERF, 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 ('the scheme in question').

11 By letter of 27 February 2006, the Portuguese Republic raised a preliminary question concerning the expiry of the RERF. It argued that, since the RERF, and hence the scheme in question, had expired and not been renewed, the letter of formal notice should be regarded as devoid of purpose, the legislation constituting the alleged failure to fulfil obligations being no longer in existence. Regarding the substance, the Portuguese Republic argued that no incompatibility with EU law could be established and that, in any event, the scheme in question was justified on public policy grounds recognised by EU law, particularly the aim of combating tax evasion and avoidance.

12 Being dissatisfied with that answer, by letter of 11 May 2007 the Commission sent the Portuguese Republic a reasoned opinion in which it disputed the relevance of the preliminary question concerning the expiry of the RERF and accused that Member State of granting preferential tax treatment to public debt securities issues solely by the latter. The Commission called upon the Portuguese Republic to take the measures necessary to comply with the reasoned opinion within two months of the date of receipt.

13 The Portuguese Republic having replied to the reasoned opinion by maintaining its previous position, the Commission decided to bring this action.

## The action

*Admissibility*

14 The Portuguese Republic considers that the Commission's action is inadmissible for two reasons. First, it argues that there is an inconsistency between the letter of formal notice and the reasoned opinion, mentioned, respectively, in paragraphs 10 and 12 of this judgment. Secondly, it argues that, since the RERF, and thus the scheme in question, have expired, the action is devoid of purpose.

The plea of inadmissibility alleging inconsistency between the letter of formal notice and the reasoned opinion

– Arguments of the parties

15 According to the Portuguese Republic, it was only in the reasoned opinion sent on 11 May 2007, after the expiry of the scheme in question in 2005, that the Commission explained that the alleged failure consisted in preferential treatment of Portuguese State securities not by comparison with other assets, as stated in the letter of formal notice sent on 19 December 2005, but only as compared to public debt securities issued by other Member States and States party to the EEA Agreement. Thus, the subject-matter of the failure as described in that reasoned opinion did not coincide with that described in the letter of formal notice.

16 The Commission argues that there is no inconsistency between the letter of formal notice and the reasoned opinion as regards the subject-matter of the alleged failure. It was following arguments raised by the Portuguese Republic in its reply to that letter of formal notice that the Commission gave further particulars of its objection in that reasoned opinion, without in any way modifying the objections formulated in that letter of formal notice. The content of the objection at the centre of this action was, necessarily, already included in the latter.

– Findings of the Court

17 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, in particular, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23; Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 46; Case C-337/05 *Commission* v *Italy* [2008] ECR I-2173, paragraph 19).

18 The proper conduct of that procedure constitutes an essential guarantee required by the FEU Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (*Commission* v *Germany*, paragraph 46; Case C-442/06 *Commission* v *Italy* [2008] ECR I-2413, paragraph 22).

19 It follows from that function that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, secondly, to enable the Member State to comply before proceedings are brought before the Court (*Commission* v *Germany*, paragraph 47; Case C-442/06 *Commission* v *Italy*, paragraph 22).

20 It should also be recalled that, although the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (see, for example, Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 20; Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 21; Case C-358/01 *Commission* v *Spain* [2003] ECR I-13145, paragraph 29).

21 In this case, the letter of formal notice enabled the Portuguese Republic to be informed of the nature of the objections addressed to it, giving it the possibility of submitting its defence. It is true that, in the letter of formal notice, the Commission compared the preferential treatment of Portuguese public debt securities compared with all other assets covered by the RERF, whereas, in the reasoned opinion, it made a comparison only between those securities and public debt securities issued by other Member States and States party to the EEA Agreement. However, as the Advocate General has pointed out in point 21 of his Opinion, the fact remains that those assets constitute a more general category than that of public debt securities issued by States, which necessarily includes those securities.

22 Thus, in the reasoned opinion, the Commission did no more than give further particulars of the objections set out in the letter of formal notice. By so doing, it circumscribed the subject-matter of the dispute to the different treatment of public debt securities of the Portuguese State as compared with public debt securities issued by other Member States and other States party to the EEA Agreement, without extending that subject-matter (see, in that respect, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 25, and, by analogy, Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, paragraph 33).

23 Therefore, the plea of inadmissibility based on inconsistency between the letter of formal notice and the reasoned opinion, raised by the Portuguese Republic, must be dismissed.

The plea of inadmissibility claiming that the action has become devoid of purpose

– Arguments of the parties

24 The Portuguese Republic argues that the action is inadmissible for lack of subject-matter. The RERF was applied only for a very limited period, such limitation being essential having regard to its purpose, namely to encourage taxpayers to regularise their tax situation spontaneously.

25 The Member State argues that an action for failure to fulfil obligations under Article 226 EC is inadmissible where the infringement of obligations arising from EU law no longer exists at the expiry of the period specified in the reasoned opinion. That was precisely the case here, the possibility of applying the scheme in question having disappeared at the end of 2005. The benefit of the scheme was subject to the condition of paying the amount due for the tax regularisation, which, by virtue of Article 5(2) and (3) of the RERF, had to be done within 10 working days following the lodging of the declaration of tax regularisation, which had to take place no later than 16 December

2005.

26 In this case, no lasting situation presented itself. The full payment of a greater or lesser sum was an instantaneous fact. The tax disadvantage suffered by persons unable to obtain the benefit of a more favourable tax treatment ceased at the time of executing payment of the amount arising from the application of the rate fixed by the RERF. That was the moment legally relevant for the purposes of verifying whether the alleged failure had already exhausted all its effects before the expiry of the time-limit set in the reasoned opinion.

27 In support of its argument, the Portuguese Republic relies in particular on paragraph 73 of the judgment in Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, according to which an action concerning a failure which, at the expiry of the time-limit set in the reasoned opinion, no longer exists, is inadmissible for lack of subject-matter.

28 The Commission argues, on the contrary, that this action is admissible.

29 It considers that the Portuguese Republic did not voluntarily put an end to the alleged failure in order to re-establish legality. The RERF was no longer in force because, from the beginning and by reason of its nature, that scheme was temporary. The procedure for failure to fulfil obligations may be pursued in order to determine whether a Member State has failed to fulfil its obligations, even if the situation in question no longer exists, if there is still an interest in pursuing that procedure. According to the Commission, that interest may continue to exist in particular where the effects of a temporary measure are of a durable nature. Persons who were unable to obtain the benefit of more favourable tax treatment remain financially disadvantaged by comparison with those who had that possibility. An effect is durable by reason of being maintained, even if it is not repeated.

30 At the hearing, the Commission added that the durable nature of the effects of the scheme in question is demonstrated by a further element, namely the obligation, imposed on holders of public debt securities issued by the Portuguese State wishing to benefit from the more favourable regularisation rate granted to them by the RERF, to keep those securities for a period of at least three years from the lodging of their declaration of tax regularisation, in accordance with Article 6(4) of the RERF.

– Findings of the Court

31 At the outset, it should be recalled that, in accordance with settled case-law, 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 (see, for example, Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraph 14; Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 15).

32 In this case, the time-limit imposed on the Portuguese Republic in the reasoned opinion for compliance therewith expired during July 2007.

33 It therefore needs to be verified whether, at that date, the scheme in question continued to produce effects (see, to that effect, Case C-525/03 *Commission* v *Italy*, paragraph 16; Case C-221/04 *Commission* v *Spain*, paragraph 25; Case C-456/05 *Commission* v *Germany*, paragraph 16).

34 In that respect, it is apparent from the RERF that the benefit thereof was subject to the condition of paying the amount owed for tax regularisation, which had to be done within 10 working days following the lodging of the declaration of tax regularisation. According to Article 5(2) of the RERF, that lodging had to take place not later than 16 December 2005.

35 It should further be noted that, in accordance with Article 6(4) and (5) of the RERF, public debt securities issued by the Portuguese State, held by taxpayers wishing to benefit from the preferential tax treatment, had to remain the property of those taxpayers for a period of at least three years from the date of submission of the declaration of tax regularisation, whatever the date of their acquisition, failing which those taxpayers were required to pay the difference between the amount corresponding to application of the general regularisation rate and that which they had paid on the basis of the preferential rate, plus the corresponding compensatory interest increased by 5 percentage points.

36 As the Advocate General has pointed out in point 49 of his Opinion, the benefit of preferential treatment could be acquired fully only on expiry of the period of three years from submission 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.

37 It should be added that Article 6(5) of the RERF gave the Portuguese Republic the possibility of applying, beyond the application period of the RERF, the general rate of 5%, plus compensatory interest, to taxpayers who had sold the public debt securities issued by that State, the possession of which had justified application of the special rate of 2.5% during the three-year period referred to in Article 6(4) of the RERF. Thus, the Portuguese Republic had, until 16 December 2008, the possibility of applying different treatment to taxpayers selling public debt securities issued by the Portuguese State, compared with those who kept those securities. The Court therefore finds that that facility was still applicable at the time of the expiry of the time-limit set for compliance with the reasoned opinion.

38 It follows that the scheme in question continued to produce effects at the expiry of the time-limit laid down in the reasoned opinion.

39 At the hearing, the Portuguese Republic maintained, in essence, that the Commission is not blaming it for imposing an obligation to keep Portuguese public debt securities giving rise to application of the preferential regularisation rate for three years, but is merely asking it to extend the preferential treatment to holders of securities issued by other Member States or other States party to the EEA Agreement. According to the Portuguese Republic, the obligation in question constitutes not an advantage but a burden for the taxpayers concerned.

40 However, that line of argument by the Portuguese Republic does not seem relevant for determining whether or not the scheme in question had exhausted all its effects at the expiry of the time-limit laid down in the reasoned opinion.

41 Moreover, it should be recalled that the Commission’s function is to ensure, of its own motion and in the general interest, that the Member States give effect to EU law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing them to an end (see Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 23; Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 15). In this case, the Commission rightly confines itself to asking the Court to declare the existence of the alleged failure and request the Portuguese Republic to bring it to an end, without requiring it, contrary to what that Member State argues, to adopt a particular conduct in order to re-establish the equality of treatment allegedly infringed.

42 Having regard to all the above evidence, and without it being necessary for the Court to rule on the Commission’s argument that the financial disadvantage suffered by persons not having been able to benefit from the preferential tax treatment compared with those who had that possibility constitutes, as such, a lasting effect of the scheme in question, the Court finds that that scheme continued to

produce effects at the relevant date for assessing the admissibility of the action, so that the plea of inadmissibility on the basis that the action is devoid of subject-matter must be dismissed.

*Substance*

Arguments of the parties

43 The Commission accuses the Portuguese Republic of infringing Article 56 EC and Article 40 of the EEA Agreement by granting, under the RERF, preferential tax treatment as regards public debt securities issued by the Portuguese State.

44 The Commission notes that, pursuant to Articles 2 and 6 of the RERF, the rate of 5% applicable to the value of assets appearing in the declaration of tax regularisation was reduced to 2.5% for either assets consisting of Portuguese State securities or other assets if their value had been reinvested in such securities before the date of submission of that declaration.

45 While not challenging the fact that public debt securities issued by States may benefit from preferential treatment, the Commission considers that a lower rate of taxation applying only to regularised assets which are securities of the Portuguese State constitutes a restriction on the free movement of capital prohibited by Article 56 EC, in so far as taxpayers who might benefit from the RERF are deterred from keeping their regularised assets in forms other than Portuguese State securities. A national tax provision capable of deterring taxpayers from making investments in other Member States constitutes a restriction on the free movement of capital within the meaning of Article 56 EC, with reference to the judgment in Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 70. The Commission argues that such a restriction cannot be justified on the basis of Article 58(1) EC.

46 In support of its argument, the Commission refers to the judgment in Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraphs 43 and 44. There is, it submits, no objective justification for applying two different regularisation rates, since all the taxpayers concerned are in an identical position, characterised by the wish to regularise their tax position.

47 In its reply, the Commission adds that Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38) does not allow the preferential treatment granted to be justified as regards securities issued by the Portuguese State.

48 The Portuguese Republic considers that the scheme in question is justified having regard to the public policy interest which it pursues, namely the fight against tax avoidance and evasion. In that context, it invokes Article 58(1)(b) EC, while arguing that the scheme in question also satisfies the requirements of Article 58(3), and refers also to overriding reasons in the public interest, referring in that respect to Case C-315/02 *Lenz* [2004] ECR I-7063, paragraph 27.

49 The Portuguese Republic recalls that the RERF was established with a view to the tax regularisation of assets which had been concealed from taxation in Portugal. In that context, the payment of the amount corresponding to the application of a rate of 2.5% or 5% genuinely constituted the ‘cost of regularising’ the tax position of the persons concerned. That payment took the form of a compensatory indemnity allowing the extinction of tax obligations towards the Portuguese State in respect of the assets covered by a declaration.

50 That compensatory function justified a reduced regularisation cost being provided for solely in the case of securities of the Portuguese State, since, in the context of the RERF, it was the tax receipts of that Member State which were taken into consideration, by reason of the extinction of the tax

obligations relating to the assets concerned. The Portuguese State thus disposed, in an indirect manner, with tax receipts which were due to it.

51 Moreover, the prospect of a reduction in the rate was likely to promote more general adherence to the RERF, thereby contributing more effectively to the fight against tax evasion and avoidance.

52 Therefore, the scheme in question was compatible with EU law and proportionate to the aim pursued, in that it was limited to a clearly delimited category of securities and did not in any way give rise to a segmentation of markets.

53 The Portuguese Republic also relies on Directive 2003/48. Since that directive had allowed that type of differentiation for negotiable debt securities issued by a public administration, it was likewise considered legitimate, when establishing the RERF, to grant preferential treatment to securities issued by the Portuguese State.

Findings of the Court

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

54 It should be recalled that measures imposed by a Member State which are likely to deter its residents from contracting loans or making investments in other Member States constitute restrictions on the free movement of capital, within the meaning of Article 56 EC (see, to that effect, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 26; Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19).

55 In this case, it is undisputed that taxpayers holding public debt securities issued by the Portuguese State were able to benefit from preferential tax treatment, provided for by Article 6(1) of the RERF, in comparison with taxpayers holding public debt securities issued by other Member States. Whereas the latter had to pay an amount corresponding to the application of a rate of 5% on the value of the assets appearing in their declaration of tax regularisation, taxpayers investing in public debt securities issued by the Portuguese State were subject only to a reduced rate of 2.5% in respect of the part corresponding to the latter. In addition, pursuant to Article 6(2) of the RERF, that reduced rate was also applicable to any other declared asset if its value was reinvested in securities of the Portuguese State at the time of submission of the declaration of tax regularisation.

56 The scheme in question thus provided for different treatment according to whether taxpayers held public debt securities issued by the Portuguese State or public debt securities issued by other Member States, which was unfavourable to the second category of taxpayers. Such a difference in treatment is thus likely to deter taxpayers from investing in public debt securities issued by other Member States, or from holding such securities.

57 The scheme in question thus constitutes a restriction on the free movement of capital, prohibited in principle by Article 56(1) EC.

– Justification of the restriction on the free movement of capital

58 It needs to be examined whether the restriction on the free movement of capital thus determined may be objectively justified by legitimate interests recognised by EU law.

59 As the Court of Justice has repeatedly held, the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 58 EC or by overriding reasons in the public interest within the meaning of the case-law of the Court (see, to that

effect, Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 49; judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 35).

60 It is undisputed that the objectives of combating tax evasion and tax avoidance, invoked by the Republic of Portugal, may justify a restriction on the free movement of capital (see to that effect, concerning the fight against tax avoidance, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 39; and, concerning the fight against tax evasion, Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 55).

61 It is, however, also necessary that the restriction on the free movement of capital be appropriate for attaining those objectives and not go beyond what is necessary to attaining them (see to that effect, for example, Case C-540/07 *Commission* v *Italy*, paragraph 57).

62 In that respect, this Court finds that, even if the tax regularisation implemented by the RERF were able, in a general way, to contribute to attaining the objectives of combating tax evasion and avoidance, it appears that the scheme in question, by providing for different treatment for public debt securities issued by the Portuguese State compared with those issued by other Member States, does not comply with those requirements.

63 It should be recalled that that scheme provided, in the context of that tax regularisation, for the application of different regularisation rates according to whether the declared assets were public debt securities issued by the Portuguese State or public debt securities issued by other Member States, whereas the other rules of the RERF applicable to taxpayers wishing to regularise their tax position applied whatever the State of origin of the assets.

64 As for the argument of the Portuguese Republic that that difference in the regularisation rate was justified by the fact that payment of the amount corresponding to the application of such a rate constituted a compensatory indemnity capable, in essence, of being greater for regularised investments concerning securities issued by other Member States, that argument amounts in reality, as the Advocate General has pointed out in point 89 of his Opinion, to an attempt to justify a measure restricting the free movement of capital by pursuit of an objective that is economic in nature, namely offsetting the Member State's lost tax revenue.

65 In that respect, it is sufficient to note that, in accordance with consistent case-law, an objective of a purely economic nature cannot justify a restriction on a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39; *Verkooijen*, paragraph 48; Case C-171/08 *Commission* v *Portugal* [2010] ECR I-0000, paragraph 71).

66 Regarding the argument of the Portuguese Republic that Directive 2003/48 permits a difference in treatment between negotiable debt securities issued by a public administration and such securities issued by private persons to be justified, it is sufficient to note that, even if that directive authorises the establishment of such a difference in treatment, that does not permit justification of a difference in treatment between securities of the same nature, in this case public debt securities issued by the Portuguese State and those issued by other Member States.

67 It follows that the restriction on the free movement of capital arising from the scheme in question cannot be justified by the grounds relied upon by the Portuguese Republic.

68 In so far as the provisions of Article 40 of the EEA Agreement have the same legal scope as the essentially identical provisions of Article 56 EC (see Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 33; Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 67), all the above considerations are, in circumstances such as those of the present action,

transposable *mutatis mutandis* to Article 40 of the EEA Agreement.

69 Therefore, the Commission's action should be regarded as well founded.

70 It must therefore be held that, by providing, under the RERF, established under Law No 39-A/2005, for preferential tax treatment of public debt securities issued only by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC and Article 40 of the EEA Agreement.

**Costs**

71 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for a costs order against the Portuguese Republic and the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby rules:

1. **By providing under the exceptional tax regularisation scheme for assets not in Portuguese territory on 31 December 2004 ('regime excepcional de regularização tributária de elementos patrimoniais que não se encontrem no território português em 31 de Dezembro de 2004') established by Law No 39-A/2005 of 29 July 2005, for preferential tax treatment of public debt securities issued only 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 of 2 May 1992.**

2. **The Portuguese Republic is ordered to pay the costs.**

[Signatures]

---

* Language of the case: Portuguese.