— It has not adopted a system of measures to encourage railway undertakings and infrastructure management to minimise disruption and improve the performance of the railway network.

(1) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, Special edition in Hungarian, Chapter 7, Volume 1, p. 341).

(2) Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29, Special edition in Hungarian, Chapter 7, volume 5, p. 404).

Appeal brought on 1 October 2010 by the Federal Republic of Germany against the order of the General Court (First Chamber) of 14 July 2010 in Case T-571/08 Federal Republic of Germany v European Commission

(Case C-475/10 P)

(2010/C 328/37)

Language of the case: German

Parties

Appellant: Federal Republic of Germany (represented by: T. Henze, J. Möller and N. Graf Vitzthum, acting as Agents)

Other party to the proceedings: European Commission

Form of order sought

— Set aside the order of the General Court of the European Union of 14 July 2010 in Case T-571/08 *Federal Republic of Germany* v *European Commission*;

— order the European Commission to pay the costs.

Pleas in law and main arguments

This appeal has been brought against the order of the General Court on a procedural issue dismissing as inadmissible the appellant's action against the Commission's information injunction of 30 October 2008 in proceedings concerning State aid to Deutsche Post AG ('DPAG').

By the decision at issue, the Commission ordered the appellant to supply information about all of DPAG's costs and revenue in the period 1989 to 2007, even though the privatisation of DPAG — in the context of which the transfers at issue were largely made — had already been concluded in 1994. Instead of resolving the preliminary legal issue as to which periods of time are, in fact, to be taken into account, the Commission proceeded to request information about DPAG's revenue and costs situation in respect of the entire period from privatisation until the present, without giving any consideration to the time and expenditure involved. The Commission thereby placed an unreasonable burden on the appellant and on the undertaking concerned.

The Court of Justice is required to clarify, fundamentally, whether the Commission may in fact require a Member State to supply any information at all in State aid proceedings without being subject to direct judicial review. If the General Court's legal assessment that such decisions are unchallengeable is correct, the Member States and undertakings concerned would always be required to go to considerable — also financial — lengths in order to comply with such injunctions, even though they regard them as unlawful. Moreover, there is a risk of proliferation of business secrets, knowledge of which may in certain circumstances be entirely irrelevant to the State aid proceedings.

The General Court's order under appeal is erroneous in law in a number of respects.

First, the General Court erred in law in its interpretation of the concept of a challengeable act and failed to have regard to the relevant case-law in so far as it considered the act being challenged 'on the basis of its substance'. An assessment of an act on the basis of its material legal effects is relevant only if there is no decision available which is binding on the basis of its legal form alone. Given that the binding nature of the Commission decision at issue, adopted pursuant to Article 10(3) of Regulation No 659/1999, derives from its legal form alone, there is no need to examine further whether the measure was specifically intended by its author to produce legal effects with regard to the appellant.

Second, the General Court erred in law in its assessment of the provisional nature of the information injunction in that, by reference to case-law concerning the admissibility of an action brought against the initiation of an investigation procedure under competition law, it erroneously concluded that the definitive nature of the decision is relevant also to the admissibility of the action against the Commission's information injunction at issue.

Third, the General Court erred in law in its assessment of the legal effects of the information injunction in that it failed to recognise that a measure produces binding legal effects if it is capable of affecting the interests of the person to whom

it is addressed by bringing about a distinct change in his legal position. Such is the case with regard to an information injunction, since failure to comply with it entails sanctions, as can be seen from the fact that Member States are precluded from relying on the proposition that the factual basis of the case is incomplete and the Commission is permitted to take a decision on the basis of the documents in the file. Moreover, it entails a lowering of the standard of proof by reference to which the Commission can assume that the facts asserted by it have been proved. This represents a procedural advantage for the Commission and an associated worsening of the relevant Member State's position in the main investigation procedure. As a result of the information injunction, the appellant was faced with the choice of not complying with its obligations — while being precluded from invoking the proposition that the factual basis of the case is incomplete and the Commission's standard of proof is lowered — or being *de facto* compelled to supply a disproportionate amount of information in order to protect its rights of defence. The latter, in addition to the legal disadvantage suffered, invariably entails an extraordinary amount of time and expense for which no compensation is provided. Beyond the scope of the main proceedings also, the information injunction can produce legal effects with regard to the Member State concerned, in so far as non-compliance could lead to infringement proceedings under Article 258 TFEU and, in extreme cases, to penalty payment proceedings under Article 260 TFEU.

Fourth, the General Court's decision is contrary to the rule of law and the requirement of legal certainty in that it deems the only protection against an excessive information injunction to be non-compliance. Such an approach is unreasonable and infringes the principles referred to above. Legal protection against unlawful information injunctions cannot be dependent on a Member State's non-compliance with such an injunction. The possibility of challenging an information injunction represents the only means of preventing the Member State's duty of loyalty from being exposed to the Commission's unfettered discretion and, in turn, allows the Commission to comply with its duty of sincere cooperation with the Member States.

Finally, the General Court erred in its assessment of responsibilities in State aid cases in so far as it determined that protection against excessive information injunctions is afforded by Member States' refusal to supply information which, in their view, is not required for the purposes of ascertaining the facts. That entails the transfer to the Member States of the duty to ascertain the facts and to determine the subject-matter of the procedure, a transfer which is alien to the division of responsibilities under State aid law. The transfer of responsibilities indicated by the General Court is incompatible with the division of competences provided for in Articles 107 TFEU and 108 TFEU, exposes the Member States to the risk of an error of assessment and absolves the Commission to the extent indicated above from the duty to undertake a careful examination of the facts in administrative proceedings.

Reference for a preliminary ruling from the Unabhängiger Verwaltungssenat des Landes Vorarlberg (Austria) lodged on 1 October 2010 — 'projektart' Errichtungsges mbH, Eva Maria Pepic and Herbert Hilbe v Grundverkehrs-Landeskommission Vorarlberg

(Case C-476/10)

(2010/C 328/38)

Language of the case: German

Referring court

Unabhängiger Verwaltungssenat des Landes Vorarlberg

Parties to the main proceedings

Applicants: 'projektart' Errichtungsges mbH, Eva Pepic and Herbert Hilbe

Defendant: Grundverkehrs-Landeskommission Vorarlberg

Questions referred

1. Is Article 6(4) of Directive 88/361/EEC [1] of 24 June 1988 for the implementation of Article 67 of the Treaty, according to which existing national legislation regulating purchases of secondary residences may be upheld, still applicable to the purchase of secondary residences situated in a Member State of the EU by a national of the Principality of Liechtenstein, which forms part of the EEA?

2. Does national legislation which, on the basis of Article 6(4) of Council Directive 88/361/EEC of 24 June 1988, prohibits a national of the Principality of Liechtenstein from purchasing a secondary residence situated in a Member State of the EU conflict with the provisions of the EEA Agreement concerning the free movement of capital, so that a national authority must disregard such national legislation?

[1] OJ 1988 L 178, p. 5.

Appeal brought on 27 September 2010 by European Commission against the judgment of the General Court (First Chamber) delivered on 7 July 2010 in Case T-111/07: Agrofert Holding a.s. v European Commission

(Case C-477/10 P)

(2010/C 328/39)

Language of the case: English

Parties

Appellant: European Commission (represented by: B. Smulders, P. Costa de Oliveira, V. Bottka, Agents)