Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 October 2013 *

(Failure of a Member State to fulfil obligations — Transport — Directive 2001/14/EC — Articles 4(1) and 30(3) — Allocation of railway infrastructure capacity — Levying of charges — Infrastructure fees — Independence of infrastructure managers)

In Case C-369/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 12 July 2011,

European Commission, represented by E. Montaguti and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

supported by:

Czech Republic, represented by M. Smolek, acting as Agent,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and J.-J. Kasel, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 11 April 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by having failed to adopt all the laws, regulations and administrative provisions necessary to comply with Article 6(3) of and Annexe II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25, corrigendum OJ 1991 L 271, p. 70), as amended by Council Directive 2006/103/EC of 20 November 2006 (OJ 2006 L 363, p. 344) ('Directive 91/440'), and Articles 4(1) and (2), 14(2) and 30(1) and (3) of 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 (OJ 2001 L 75, p. 29), as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 2001/14'), the Italian Republic has failed to fulfil its obligations under those provisions.

Legal context

European Union law

2 Article 4 of Directive 91/440, which forms part of Section II of the directive, entitled 'Management independence', is worded as follows:

'1. Member States shall take the measures necessary to ensure that as regards management, administration and internal control over administrative, economic and accounting matters railway undertakings have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State.

2. While respecting the framework and specific charging and allocation rules established by the Member States, the infrastructure manager shall have responsibilities for its own management, administration and internal control.'

3 Recitals 11 and 16 in the preamble to Directive 2001/14 read as follows:

'(11) The charging and capacity-allocation schemes should permit equal and non-discriminatory access for all undertakings and should attempt, as far as possible, to meet the needs of all users and traffic types in a fair and non-discriminatory manner.

…

(16) Charging and capacity allocation schemes should allow for fair competition in the provision of railway services.

4 Article 4 of Directive 2001/14, entitled 'Establishing, determining and collecting charges', provides in paragraphs (1) and (2) as follows:

'1. Member States shall establish a charging framework while respecting the management independence laid down in Article 4 of Directive 91/440/EEC.

Subject to the said condition of management independence, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager.

2. Where the infrastructure manager, in its legal form, organisation or decision-making functions, is not independent of any railway undertaking, the functions, described in this chapter, other than collecting the charges shall be performed by a charging body that is independent in its legal form, organisation and decision-making from any railway undertaking.'

5 Article 30 of Directive 2001/14, entitled 'Regulatory body', reads as follows:

'1. Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.

…

3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiations between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.'

Italian law

6 Directive 91/440 and Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and Directive 2001/14 (together 'the first railway package') were implemented in Italian law by Decree-Law No 188 of 8 July 2003 implementing Directives 2001/12/EC, 2001/13/EC and 2001/14/EC on railways (Ordinary Supplement to GURI No 170 of 24 July 2003) ('Decree-Law No 188/2003').

7 In Italy, the 'essential functions' referred to in Annex II to Directive 91/440 are allocated amongst Rete Ferroviaria Italiana SpA ('RFI'), which is the designated 'infrastructure manager' on the basis of a concession from the Ministry of Infrastructures and Transport ('the Ministry') and the Ministry itself. RFI, whilst having independent legal personality, is part of the group Ferrovie dello Stato Italiane ('the FS group'), which also includes the principal railway undertaking operating on the Italian market: Trenitalia SpA ('Trenitalia').

8 According to Article 11(1) of Decree-Law No 188/2003:

'The railway infrastructure manager shall be an autonomous and independent person from the undertakings operating in the transport sector in its legal form, organisation or decision-making functions.'

9 For the performance of the essential functions, RFI is responsible for the calculation of the charges for network access for each operator and for the collection of those charges, on the basis of the charges set by the Minister for Infrastructures and Transport ('the Minister') pursuant to Article 17 of Decree-Law No 188/2003, of which paragraphs 1 and 2 provide as follows:

'1. In order to ensure fair and non-discriminatory access to the railway infrastructure by international associations of railway undertakings and railway undertakings, the charge owing for access to the national railway infrastructure shall be established by decree of [the Minister], on the basis of a

reasoned report from the railway infrastructure manager, acting on advice from the inter-ministerial committee for economic planning and in agreement with the standing committee on relations between the State, the regions and the independent provinces of Trente and Bolzano for those services coming within their jurisdiction. The decree shall be published in the *Gazzetta ufficiale della Repubblica italiana* and the *Official Journal of the European Communities*.

2. On the basis of paragraph 1, the railway infrastructure manager shall effect the calculation of the charge owing by international associations of railway undertakings and railway undertakings for the use of the infrastructure and the collection thereof.'

10 Article 17(1) of that decree-law describes the role of the Minister as follows:

'The framework applicable to infrastructure access and the principles and the procedure for allocation of capacity referred to in Article 27 and the calculation of the charge for the use of the railway infrastructure and the corresponding amounts for the supply of services referred to in Article 20 shall be defined by decree of [the Minister], published in the *Gazzetta ufficiale della Repubblica italiana*. The same decree shall define the rules applicable to the services referred to in Article 20.'

11 Article 37 of the same decree-law is supposed to implement Article 30 of Directive 2001/14 and define the functions of the 'Regulatory body', That article was amended by Decree-Law No 98 of 6 July 2011 ('Decree-Law No 98/2011') with a view to introducing a new procedure for appointing directors of the Ufficio per la Regolazione dei Servizi Ferroviari ('the URSF'), which is the regulatory body.

12 Article 21(4) of Decree-Law No 98/2011 reformulated paragraph 1a of Article 37 of Decree-Law No 188/2003 as follows:

'For the purposes of paragraph 1, the department of [the Ministry] responsible for the regulatory body functions shall have organisational and accounting autonomy within the limits of the economic and financial resources allocated to it. That department shall table a report on its activities each year to Parliament.'

13 Decree-Law No 98/2011 also introduced in Article 37 a paragraph 1b, which reads as follows:

'The head of the department referred to in paragraph 1a shall be chosen from among persons whose independence and moral character are beyond doubt and whose professional qualities and expertise in the railway sector are recognised; the person shall be appointed by decree of the President of the Council of Ministers, acting on a proposal from [the Minister], pursuant to Article 19(4), (5a) and (6) of Decree-Law No 165 of 30 March 2001, as amended. That proposal shall be submitted beforehand for the opinion of the competent parliamentary commissions, who shall give their opinion within 20 days of the request being submitted. Those commissions may hold a hearing with the person concerned. The head of the department referred to in paragraph 1a shall be appointed for a period of three years, renewable only once. The function of head of the department referred to in paragraph 1a is not compatible with elected political office; similarly, nobody may be appointed to this role if that person's interests, of any kind whatsoever, are contrary to the functions of the department. The head of the department referred to in paragraph 1a may not pursue, directly or indirectly, any professional or consulting activity; the person may not be a director or employee of public or private bodies or perform other public roles or hold any direct or indirect interests in undertakings operating in the sector, failing which the person shall be barred from office. The current head of the department shall remain in the post until the expiry of his or her mandate.'

Pre-litigation procedure and procedure before the Court

14 On 10 May and 21 November 2007, the Commission sent questionnaires to the Italian authorities in order to gather information on the national legal framework in the railway sector. The Italian Republic replied on 13 August 2007 and 18 January 2008 respectively.

15 On the basis of the information gathered, the Commission initiated infringement proceedings against the Italian Republic on the ground of the incompatibility of the Italian legislation governing rail transport and the directives making up the first railway package. On 26 June 2008, the Commission sent the Italian Republic a letter of formal notice in which it reproduced the aspects of the Italian legislation which, in its view, did not comply with the first railway package and gave the Italian Republic two months in which to submits its observations.

16 The Italian Republic responded to that letter of formal notice by letter of 13 August 2008, in which it undertook to study the market situation and legal framework in order to assess the issue of the infrastructure managers' independence in decision-making and to propose adjustments.

17 The Commission's departments requested clarification, to which the Italian Republic replied by letters of 22 December 2008 and 21 January and 23 March 2009.

18 On 1 October 2009, the Italian authorities notified the text of Decree-Law No 135 of 25 September 2009 containing urgent provisions for the implementation of Community obligations and enforcement of judgments of the Court of Justice of the European Communities (GURI No 223 of 25 September 2009, p. 2), pointing out in particular Article 2 thereof, as well as the text of an amendment to Article 15 of the Statutes of RFI making provision for incompatibility of the holding the post of director of RFI and that of director of the parent company, namely the FS group, or other undertakings controlled by the FS group operating in the railway transport sector.

19 By letter of 8 October 2009, the Commission sent the Italian Republic a reasoned opinion in which it stated that the Italian legislation governing the railway transport sector did not comply with Directives 91/440 and 2001/14, and giving the Italian Republic two months in which to take the measures necessary to comply with that opinion.

20 The Italian Republic replied to that reasoned opinion by letters of 23 December 2009 and 26 April 2010. Furthermore, on 2 December 2009 the Italian Republic gave the Commission notice of the text of Law No 166 of 20 November 2009 converting into law, including amendments, Decree-Law No 135 of 25 September 2009.

21 After pointing out a substantive error in the Italian version of the reasoned opinion and wishing to clarify its position in the light of the information provided to it by the Italian Republic, on 24 November 2010 the Commission adopted an additional reasoned opinion which was notified to the Italian Republic on the same date, by which it called on the Italian Republic to comply with that opinion within two months of notification thereof.

22 The Italian Republic replied to the reasoned opinion by letter of 10 January 2011.

23 As the Commission found the response provided by the Italian authorities to be unsatisfactory, it decided to bring the present proceedings.

24 By order of the President of the Court of 21 November 2011, the Czech Republic was granted leave to intervene in support of the forms of order sought by the Italian Republic.

25 The hearing before the Court was held on 11 April 2013, during which the Commission informed the Court that it was withdrawing its first plea in law, alleging infringement of Article 6(3) of and Annex II to Directive 91/440.

The action

Consideration of the plea concerning the levying of charges for access to the infrastructure

Arguments of the parties

26 The Commission submits, first of all, that the Italian rules do not comply with the requirement of managerial independence of the infrastructure manager, as provided for in Article 4(1) of Directive 2001/14.

27 In the Commission's submission, that article provides that the determination of charges or, in other words, charging decisions, must fall within the powers conferred on the infrastructure manager. This managerial independence allows the manager to procure sufficient income to perform his or her duties without State intervention. If, on the other hand, the State reserves for itself the power to set charges, it deprives the manager of an essential management tool.

28 The Commission takes the view that such a reading of Article 4(1) of Directive 2001/14 is corroborated by a systematic interpretation of it. Article 30(3) of that directive makes decisions regarding the levying of charges taken by the manager subject to regulation by the body established for that purpose; that regulation can have meaning only if that manager has decision-making power to determine the charges.

29 Yet, in Italy, under Article 17(1) of Decree-Law No 188/2003, it is the Minister who determines the charges for network access. The infrastructure manager may draw up a proposal in the form of a 'reasoned report', but it is the Minister who decides, by decree, to set the level of the charges. It is then for the manager, under Article 17(2), to calculate the charges actually owing by each railway undertaking for the use of individual licences and to collect those charges.

30 In the Commission's submission, whilst it is the Minister in whom powers are vested, the regulatory body is not in a position to verify the charges or the methods for calculating those charges on the basis of the various cost categories, since it has no power over the Minister.

31 The Commission adds that other provisions of Directive 2001/14 necessarily presuppose that the infrastructure manager's role is not limited to a simple calculation and collection of the charges owing in a specific case, but extend to the determination of the level of applicable charges.

32 The Commission argues that the fact that the Minister sets the level of charges in order to ensure budgetary balance for the infrastructure manager is contrary to the mechanisms introduced by Directive 2001/14. It is true that the State may have an interest in monitoring the infrastructure manager's income, because Article 6(1) of that directive requires it to ensure that that manager's accounts at least balance income from charges for infrastructure use, surpluses from other commercial activities and State funding, on the one hand, and infrastructure expenditure, on the other. That directive also allows the State to influence the manager's accounts, not through setting the level of the charges, but rather through the detailed rules laid down in Article 6(2), namely incentives to reduce the costs of provision of infrastructure and the level of access charges. The reduction in infrastructure costs allows the State to achieve savings, at least partly, on the funds earmarked for infrastructure.

33 The Commission observes that the wording of Article 17(1) of Decree-Law No 188/2003 states very clearly who has the decision-making role and who is charged with tabling proposals. Moreover, the assessments made by the Minister in the course of the decision-making process exceeds the framework of the content of the manager's reasoned report. The Minister in fact checks that the proposal complies not only with the criteria referred to in Article 17(3) of that decree-law, but also with the manager's accounting balance requirements.

34 The Italian Republic observes that the regulatory body may perform its regulatory functions – in respect of the application of the level of charges which are or appear to be anti-competitive or discriminatory as against undertakings – on its own initiative or at the request of the railway undertakings, either during the phase of negotiations of the charge with the infrastructure manager, or after the charge has been fixed, in particular in respect of individual licences.

35 Under Article 37(6a) of Decree-Law No 188/2003, the regulatory body may, 'if violations of the rules governing access and use of the railway infrastructure and related services are established', impose an administrative fine up to a fixed ceiling of 1% of the turnover derived from market income, up to a maximum of EUR 1 000 000.

36 In the Italian Republic's submission, since the ministerial approval does not shield the infrastructure manager from sanctions, it is obvious that, where the regulatory body raises an objection, the manager will have to amend his or her charge proposal or, if they have already been set, table a new proposal. Otherwise, the regulatory body may open a procedure which may lead to a fine being imposed.

37 The Italian Republic adds that the regulatory system does comply with Directive 2001/14. Moreover, given that, according to the wording of that directive, it is not for the regulatory body to amend charges directly, it is difficult to envisage how otherwise the regulatory body's functions might be devised, other than through granting it powers to intervene in negotiations between applicants and the manager, or through granting a power to impose sanctions where the manager violates the legal criteria for setting charges.

38 As regards the fundamental question raised in the context of the plea concerning the levying of charges, the Italian Republic submits that, under a correct application of Article 17(1) of Decree-Law No 188/2003, no substantive regulatory function of the level of charges, which are determined on the basis of the infrastructure manager's reasoned report, is conferred on the Minister. The Minister's powers of control are thus confined only to ensuring lawfulness, including compliance with the 'specific rules', which it is for the Member States to lay down under Article 4(1) of Directive 2001/14.

Findings of the Court

39 By its plea concerning the levying of charges for access to the infrastructure, the Commission alleges that the Italian Republic has infringed Articles 4(1) and 30(3) of Directive 2001/14 in that the detailed rules laid down in the Italian legislation for setting the amounts of charges do not, in its view, satisfy the requirement of 'managerial independence' of the infrastructure manager, since the Minister sets the charges for network access by decree.

40 The Commission and the Italian Republic disagree on the question of as from which moment it is possible to consider that the infrastructure manager manages the fixing of the amount of charges in an independent manner.

41 Article 4(1) of Directive 2001/14 provides that the Member States are to establish a framework for levying charges and may also establish specific charging rules, while respecting the management independence of the infrastructure manager. Under that provision, it is for the infrastructure manager to determine the charge for the use of the infrastructure and also to collect it (see, inter alia, Case C-483/10 *Commission* v *Spain* [2013] ECR, paragraph 39).

42 Article 4 further provides for an allocation of powers between the Member States and the infrastructure manager as regards the charging systems. Under that arrangement it is for the Member States to draw up a framework for levying charges, whilst the determination of the charge and collection fall to the infrastructure manager (*Commission* v *Spain*, paragraph 41).

43 It is useful in that regard to recall the objectives of Directive 2001/14. First of all, one of the objectives pursued by the charging system established by Directive 2001/14 is to ensure the management independence of the infrastructure manager. In other words, the infrastructure manager must use the charging scheme as a management tool. Thus, recital 12 in the preamble to that directive states that charging and capacity-allocation schemes should encourage railway infrastructure managers to optimise use of their infrastructure within the framework established by the Member States. Those managers could not achieve such optimal use by means of the charging system if their role was confined to calculating the amount of the charge in each individual case, applying a formula established in advance by ministerial order. Infrastructure managers must therefore be given a degree of flexibility in setting the amount of charges (see *Commission* v *Spain*, paragraph 44).

44 The Italian Republic argues in that regard that the Minister merely verifies the lawfulness of the infrastructure manager's proposal and therefore has no influence over the manager's independence. As observed by the Commission, however, this practice is not based on any rule which makes it unchallengeable and it cannot, therefore, be regarded as satisfying the objectives of Directive 2001/14.

45 Moreover, under Article 4(1) of Directive 2001/14, '[t]he determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager'. It is, moreover, clear from the wording of Decree-Law No 188/2003, inter alia Article 17 thereof, that the determination of the charge must be set in collaboration with the Minister, whose decision may be imposed on the manager.

46 It is true, as pointed out by the Italian Republic, that the Minister merely ensures compliance with legal requirements. However, under the system put in place by Directive 2001/14, the check of lawfulness should be carried out by the regulatory body, in this case the URSF, and not the Minister. Consequently, since the infrastructure manager is bound by the Minister's decision fixing the charges for access to the infrastructure, the conclusion must be that the Italian legislation does not ensure that manager's independence. Therefore, the legislation does not satisfy the requirements of Article 4(1) of Directive 2001/14 on this point.

47 Lastly, as regards Article 30(3) of Directive 2001/14, although it is true that the fact that the Minister may check the charge proposal drawn up by the infrastructure manager does not prevent the URSF from accomplishing its mission by carrying out the checks associated with that mission, such a system does not by itself ensure the manager's independence as intended by the European Union legislature.

48 It follows from the foregoing considerations that the Commission's plea regarding the levying of charges for access to the infrastructure must be held to be well founded.

Consideration of the plea relating to the independence of the regulatory body

Arguments of the parties

49 The Commission considers that the necessary full independence of the body for regulating all railway undertakings has not been ensured by the Italian legislation, since the staff of the regulatory body consists of officials of the Ministry and the latter continues to exercise a decisive influence over the FS group, which includes the main Italian railway undertaking, Trenitalia, and thus also over the latter.

50 The Commission observes that the URSF, that is, the regulatory body, is part of the Ministry. Moreover, the principal railway operator on the Italian market, namely Trenitalia, in addition to belonging to the same corporate group as the infrastructure manager, is a State-owned company over which the Ministry, despite exercising only the powers of a shareholder, nevertheless has a decisive influence.

51 The Commission argues in essence that the staff of the regulatory body consists of officials of the Ministry who continue to exercise a decisive influence over the FS group and over Trenitalia, and that it is fully integrated into the hierarchy of the Ministry. Furthermore, because of the very support role of the Ministry of Economic Affairs in the exercise of its functions as shareholder in the FS group, the Ministry retains an interest in seeing that group undergo positive growth.

52 In the Commission's submission, this situation gives rise to a conflict of interests for the staff of the Ministry who operate within the structure of the regulatory body and who, for that reason, are under a duty to guarantee non-discriminatory treatment for the competitors of the public railway undertaking. In carrying out their regulatory activities, they will tend to bear in mind the commercial interests of the undertaking.

53 The Commission explains that it does not intend to argue that Directive 2001/14 does not make any allowance for the regulatory body to be part of a ministry. It does submit, however, that that possibility must not interfere with the requirement of independence, inter alia in decision-making, of railway undertakings which are the addressees of measures adopted by the regulatory body. The possibility expressly provided for by Article 30(1) of that directive for the regulatory body to be part of a ministry cannot, in the Commission's submission, be read in isolation from the rest of the provision and, in particular, from the requirement of independence for which it provides. Consequently, such a possibility must not be allowed where the integration of the regulatory body in a ministry is such that the independence of that body is compromised.

54 In the alternative, as regards the other guarantees of the URSF's independence provided by the Italian Republic, the Commission states, first of all, that its argument concerns not the powers conferred on the Council of Ministers, but the relationships within a ministry, namely the Ministry of Infrastructures and Transport. As regards, moreover, the powers of the directors of the URSF, the Commission maintains that they are subordinate to the Minister, which retains a margin of decision-making power as regards the appointment, resource allocation and potential dismissal of those directors.

55 In that regard the Commission observes that, after its application was lodged, Article 37 of Decree-Law No 188/2003 was amended with effect from 6 July 2011. Apart from considerations relating to the relevance of that amendment, which is out of time in relation to the present proceedings, the Commission takes the view that its actual scope in terms of potentially eliminating the infringement remains to be clarified.

56 The Commission goes on to state that it is not convinced by the reply to the reasoned opinion, from which it is not apparent that the Ministry had no discretion, inter alia as regards the termination of the contracts concluded with the directors of the URSF. The reply of 23 December 2009 to the reasoned opinion of 8 October 2009 states merely that the URSF is not part of the structure of the Ministry's departments and therefore falls outside the remit of the head of the department which includes the railway transport directorate. The additional reply of 26 April 2010 to the same reasoned opinion does not make any further reference to the matter. Such statements do not rebut the Commission's submission that the staff of the URSF consists of officials of the Ministry coming within the remit of the minister responsible for shareholder support in the FS group.

57 Lastly, the Commission points out that Article 30(1) of Directive 2001/14 requires that the regulatory body act completely independently in respect of not only the railway undertakings but also the bodies levying infrastructure charges. Thus, in the Commission's submission, the charge for access to the infrastructure is determined by the Minister, to whom the URSF is completely subordinate. It is the reason why the URSF is not in any way independent in its decision-making, organisation, legal structure or funding decisions, since a single entity, namely the Ministry, is concomitantly responsible for the levying of charges as well as the regulation thereof in its capacity as regulator.

58 The Italian Republic observes that Directive 2001/14 does not prohibit the regulatory body from being part of a ministry, provided that the latter does not take part in the exercise of shareholder rights within the FS group. The Italian Republic adds that Decree-Law No 98/2011 created a situation in which decision-making is independent from the Ministry and that it guarantees the URSF a situation in which it can legally manage the resources made available to it by law.

59 As regards the question of the URSF's independence from the Ministry, the Italian Republic states that Decree-Law No 98/2011, which has been in force since 6 July 2011, has allowed the Commission's doubts to be dispelled, by removing the URSF from the influence of the Ministry, inter alia by giving its director a position outside the Ministry's hierarchy. The Italian Republic adds that nor was the scheme in place on the date the application was lodged contrary to Article 30(1) of Directive 2001/14.

60 Moreover, in its rejoinder, the Italian Republic also refers to Law No 27 of 24 March 2012 converting into law, with amendments, Decree-Law No 1 of 24 January 2012 laying down urgent provisions for competition, infrastructure development and competitiveness (Ordinary Supplement to GURI No 71 of 24 March 2012), which provides, in Article 36, for the establishment of the Autorità di regolazione dei trasporti (transport regulatory authority), which replaces the URSF and completes the functions performed by it. The Italian Republic states that that new authority was established not because the URSF was not considered sufficiently independent, but rather due to a choice made by the Italian legislature, in the context of a broader intervention intended to ensure the liberalisation of markets, to entrust one party with responsibility for regulating all modes of transport, not just railway transport.

Findings of the Court

61 By its plea relating to the independence of the regulatory body, the Commission complains that the Italian legislation does not comply with Article 30(1) of Directive 2001/14 in that the URSF, because it consists of officials of the Ministry, cannot be considered independent, especially since the Ministry continues to have influence over the FS group, which owns the principal Italian railway company, namely Trenitalia.

62 It must be recognised in that regard that, by its successive legislative interventions, the Italian authorities have had a direct influence over the constitution of the regulatory body, by redefining at each legislative stage its organisational and accounting independence. This is true of Decree-Law No 98/2011 and even more so of Law No 27 of 24 March 2012 establishing a new transport regulatory authority.

63 It must be borne in mind, however, that, according to the Court's 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 and the Court cannot take account of any subsequent changes (see, inter alia, Case C-111/00 *Commission* v *Austria* [2001] ECR I-7555, paragraph 13, and Case C-383/09 *Commission* v *France* [2011] ECR I-4869, paragraph 22).

64 As regards the argument relating to the compatibility of the Italian legislation in force on the date on which the application was lodged with Article 30(1) of Directive 2001/14, it should be borne in mind that, under that provision, the regulatory body may be the ministry responsible for transport. It follows that the Commission may not rely solely on the fact that the URSF is part of the Ministry in order to conclude that it is not independent.

65 It is true, as rightly pointed out by the Commission, that the Ministry officials find themselves in a delicate position because they work in the regulatory body whilst falling hierarchically under the Ministry. The Commission is also right in pointing out that the purpose of Article 30(1) of Directive 2001/14 is to ensure the independence of the regulatory body and that that objective must prevail over the fact that the regulatory body may belong to a Ministry.

66 It should be noted that, in the version thereof which preceded the version resulting from Decree-Law No 98/2011, Article 37 of Decree-Law No 188/2003 provided that 'the department of [the Ministry] responsible for the functions of regulatory body shall have the human, material and financial resources necessary for the accomplishment of its mission within the resource framework laid down in that Ministry's provisional budget'. In the Commission's submission, however, such wording cannot be considered liable to ensure that the regulatory body can act fully independently, as its financial resources are dependent on the Ministry's budget.

67 The arguments put forward by the Commission in support of its third plea are all general in nature and are, in essence, focused on the fact that the URSF is an entity belonging to the Ministry, whereas such a link is not prohibited by Directive 2001/14. Nor does the Commission put forward any other substantiated argument in support of its plea.

68 Yet according to settled case-law, in proceedings under Article 258 TFEU for failure to fulfil obligations it is for the Commission to prove the alleged failure. It is therefore the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41; Case C-335/07 *Commission* v *Finland* [2009] ECR I-9459, paragraph 46; and Case C-556/10 *Commission* v *Germany* [2013] ECR, paragraph 66).

69 Therefore, the Commission's plea alleging infringement of Article 30(1) of Directive 2001/14 cannot be upheld.

70 Consequently, it must be held that, by failing to ensure the independence of the infrastructure manager with regard to the setting of charges for access to the infrastructure and the allocation of railway infrastructure capacity, the Italian Republic has failed to fulfil its obligations under Articles 4(1) and 30(3) of Directive 2001/14. The action is dismissed as to the remainder.

Costs

71 Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, they are to be ordered to bear their own costs. Under Article 141(1) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance.

72 In this case, the Commission discontinued the first plea relied on in support of its action, alleging a lack of independence of the body performing the essential functions as referred to in Article 6(3) of and Annex II to Directive 91/440.

73 However, since the Commission and the Italian Republic have each succeeded on some and failed on other heads, they must be ordered to bear their own costs.

74 Pursuant to Article 140(1) of those Rules, which provides that Member States which have intervened in the proceedings are to bear their own costs, the Czech Republic is to be ordered to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by failing to ensure the independence of the infrastructure manager with regard to the setting of charges for access to the infrastructure and the allocation of railway infrastructure capacity, the Italian Republic has failed to fulfil its obligations under Articles 4(1) and 30(3) of 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, as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission, the Italian Republic and the Czech Republic to bear their own costs.**

[Signatures]