Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 June 2017*

(Failure of a Member State to fulfil obligations — Development of the Community's railways — Directive 91/440/EEC — Article 6(1) — Deutsche Bahn group — Profit transfer agreement — Prohibition of the transfer of public aid earmarked for the management of railway infrastructure to rail transport services — Accounting obligations — Directive 91/440/EEC — Article 9(4) — Regulation (EC) No 1370/2007 — Article 6(1) — Point 5 of the annex — Accounting obligations — Presentation contract by contract of public aid paid for activities relating to the provision of passenger transport services in respect of public service remits)

In Case C-482/14,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 30 October 2014,

European Commission, represented by W. Mölls and T. Maxian Rusche and by J. Hottiaux, acting as Agents,

applicant,

v

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents, and by R. Van der Hout, advocaat,

defendant,

supported by:

Italian Republic, represented by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

Republic of Latvia, represented by I. Kucina and by J. Treijs-Gigulis and I. Kalniņš, acting as Agents,

interveners,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General : M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 3 March 2016,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2016

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that:

— by allowing public funds paid for the management of railway infrastructure to be transferred to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32) [formerly Article 6(1) of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25), as amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 (OJ 2001 L 75, p. 1) ('Directive 91/440')];

— by failing to take all measures necessary to ensure that the detailed rules on account-keeping make it possible to monitor the prohibition of transferring public funds for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(4) of Directive 2012/34 (formerly Article 6(1) of Directive 91/440)

— by failing to take all measures necessary to ensure that infrastructure charges can be used only to fund the infrastructure manager's business, the Federal Republic of Germany has failed to fulfil its obligations under Article 31(1) of Directive 2012/34 [formerly Article 7(1) 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 and safety certification (OJ 2001 L 75, p. 29)];

— by failing to take all measures necessary to ensure that public funds paid for the provision of public passenger transport services are shown separately in the relevant accounts, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) of Directive 2012/34 (formerly Article 9(4) of Directive 91/440) and the provisions of Article 6(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) in conjunction with point 5 of the annex to Regulation No 1370/2007.

Legal context

EU law

Directive 91/440

2 The fourth recital of Directive 91/440 states that:

'Whereas the future development and efficient operation of the railway system may be made easier if a distinction is made between the provision of transport services and the operation of infrastructure; whereas given this situation, it is necessary for these two activities to be separately managed and have separate accounts'.

3 Article 2(2) of Directive 91/440 provides:

'Railway undertakings whose activity is limited to the provision of solely urban, suburban or regional services shall be excluded from the scope of this Directive.'

4 Article 3 of Directive 91/440 defines 'regional services' as 'transport services operated to meet the transport needs of a region'.

5 Under Section II, entitled 'Management independence', Article 4 of that directive provides 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.'

6 Under Section II, Article 5 of Directive 91/440 provides as follows:

'1. Member States shall take the measures necessary to enable railway undertakings to adjust their activities to the market and to manage those activities under the responsibility of their management bodies, in the interests of providing efficient and appropriate services at the lowest possible cost for the quality of service required.'

Railway undertakings shall be managed according to the principles which apply to commercial companies; this shall also apply to their public services obligations imposed by the State and to public services contracts which they conclude with the competent authorities of the Member State

2. Railway undertakings shall determine their business plans, including their investment and financing programmes. Such plans shall be designed to achieve the undertakings' financial equilibrium and the other technical, commercial and financial management objectives; they must also provide for the means enabling these objectives to be obtained.

…'

7 Article 6(1) of Directive 91/440, in the original version, was worded as follows:

‘Member States shall take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate. Aid paid to one of these two areas of activity may not be transferred to the other.

The accounts for the two areas of activity shall be kept in a way which reflects this prohibition.’

8 Article 6(1) of Directive 91/440 provides:

‘Member States shall take the measures necessary to ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of transport services by railway undertakings and, on the other, for business relating to the management of railway infrastructure. Public funds paid to one of these two areas of activity may not be transferred to the other.

The accounts for the two areas of activity shall be kept in a way that reflects this prohibition.’

9 Article 9(4) of Directive 91/440, added to that directive by Directive 2001/12, is worded as follows:

‘In the case of railway undertakings profit and loss accounts and either balance sheets or annual statement of assets and liabilities shall be kept and published for business relating to the provision of rail freight-transport services. Funds paid for activities relating to the provision of passenger-transport services as public-service remits must be shown separately in the accounts and may not be transferred to activities relating to the provision of other transport services or any other business.’

10 The time limit for transposing Directive 91/414 was fixed, by Article 15 thereof, at 1 January 1993.

11 Pursuant to Article 65 of Directive 2012/34, Directive 91/440 was repealed with effect from 15 December 2012. By a corrigendum published on 12 March 2015 (OJ 2015 L 67, p. 32, ‘Corrigendum of 12 March 2015’) the date on which the repeal of Directive 91/440 took effect was fixed at 17 June 2015.

Directive 2001/12

12 Recital 9 of Directive 2001/12 states:

‘To promote the efficient operation of passenger and freight transport services and to ensure transparency in their finances, including all financial compensation or aid paid by the State, it is necessary to separate the accounts of passenger and of freight transport services.’

Directive 2001/14

13 Article 6(1) of Directive 2001/14 provides:

‘Member States shall lay down conditions, including where appropriate advance payments, to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other.

Without prejudice to the possible long-term aim of user cover of infrastructure costs for all modes of transport on the basis of fair, non-discriminatory competition between the various modes, where rail transport is able to compete with other modes of transport, within the charging framework of Articles 7 and 8, a Member State may require the infrastructure manager to balance his accounts without State funding.'

14 Article 7(1) and (3) of that directive provides:

'1. Charges for the use of railway infrastructure shall be paid to the infrastructure manager and used to fund his business.

…

3. Without prejudice to paragraphs 4 or 5 or to Article 8, the charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service.'

15 Article 8(1) of Directive 2001/14 is worded as follows:

'In order to obtain full recovery of the costs incurred by the infrastructure manager a Member State may, if the market can bear this, levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimum competitiveness in particular of international rail freight. The charging system shall respect the productivity increases achieved by railway undertakings.

The level of charges must not, however, exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.'

16 The time limit for transposing Directive 2001/14 was fixed, by Article 38 thereof, at 15 March 2003.

17 Pursuant to Article 65 of Directive 2012/34, Directive 2001/14 was repealed with effect from 15 December 2012. By the Corrigendum of 12 March 2015, the date on which the repeal of Directive 91/440 took effect was fixed at 17 June 2015.

Regulation No 1370/2007

18 Article 6(1) of Regulation No 1370/2007 is worded as follows:

'All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex.'

19 Points 2 and 5 of the annex to that regulation, entitled 'Rules applicable to compensation in the cases referred to in Article 6(1)', provide:

'2. The compensation may not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator. The effects shall be assessed by comparing the

situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect, the competent authority shall be guided by the following scheme:

costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority/authorities, contained in a public service contract and/or in a general rule,

minus any positive financial effects generated within the network operated under the public service obligation(s) in question,

minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,

plus a reasonable profit,

equals net financial effect.

…

5. In order to increase transparency and avoid cross-subsidies, where a public service operator not only operates compensated services subject to public transport service obligations, but also engages in other activities, the accounts of the said public services must be separated so as to meet at least the following conditions:

— the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with the accounting and tax rules in force,

— all variable costs, an appropriate contribution to the fixed costs and a reasonable profit connected with any other activity of the public service operator may under no circumstances be charged to the public service in question,

— the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.'

Directive 2012/34

20 Recital 1 of Directive 2012/34 states:

'[Directive 91/440], Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [OJ 1995 L 143, p. 70] and Directive [2001/14] have been substantially amended. Since further amendments are necessary, those Directives should be recast and merged into a single act in the interest of clarity.'

21 Article 6(1) and (4) of Directive 2012/34 replaced Article 6(1) of Directive 91/440, whereas Article 6(3) of Directive 2012/34 replaced Article 9(4) of Directive 91/440.

22 The first subparagraph of Article 64(1) of Directive 2012/34 provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive including as regards compliance by undertakings, operators, applicants, authorities and other entities concerned by 16 June 2015. They shall forthwith communicate to the Commission the text of those provisions'.

23 According to Article 65 of that directive 'Directives [91/440] … and [2001/14], as amended by the Directives listed in Annex IX, Part A, are repealed with effect from 15 December 2012, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex IX. By the Corrigendum of 12 March 2015, the date on which the repeal of those directives took effect was fixed at 17 June 2015.

German law

24 Paragraph 9 of the Allgemeines Eisenbahngesetz (General Railway Act) of 27 December 1993 (BGBl. 1993, I, pp. 2378, 2396; 1994, I, p. 2439) ('AEG') provides:

'(1) Public railway companies

1. which are both railway transport undertakings and railway infrastructure undertakings, or

2. (a) which are solely railway transport undertakings and are linked, through a parent company, to a railway infrastructure undertaking which is a public railway company, or
   (b) which are solely railway infrastructure undertakings and are linked, through a parent company, to a railway transport undertaking which is a public railway company, or

3. which, as a railway transport undertaking or railway infrastructure undertaking, is the parent company or subsidiary of another railway transport undertaking or railway infrastructure undertaking which is a public railway company

shall be obliged, even if they are not operated in the form of capital companies, to draw up, have audited and publish annual accounts and a management report in accordance with the provisions applicable to large capital companies set out in the second section of the third book of the Commercial Code. …

(1a) Public railway undertakings within the meaning of point 1 of the first subparagraph of paragraph 1 must separate the two sectors in their accounts; this includes maintaining separate accounts for the 'provision of transport service' sector and for the 'management of railway infrastructure' sector. For each sector within the meaning of the first subparagraph and for a sector external to them, they must include in the annex to their annual accounts a balance sheet and an additional profit and loss account, kept in accordance with the principles of commercial law. ...

(1b) Public funds paid to one of the two sectors of activity referred to in the first subparagraph of paragraph 1a shall not be transferred to the other. The accounts for the two sectors of activity shall be kept in a way that reflects this prohibition. This also applies to undertakings within the meaning of points (2) and (3) in the first subparagraph of paragraph 1.

…

(1d) For public railway undertakings providing railway services in both for passenger and freight transport, paragraph 1a shall apply *mutatis mutandis*, with the proviso that the necessity to draw up separate accounts or include in the annex to the annual accounts a balance sheet and an additional profit and loss account applies only in respect of the railway freight sector and that that balance sheet

may also be replaced by a statement of assets. Public funds paid for activities relating to the provision of passenger transport services as public-service remits must be shown separately in the relevant accounts and may not be transferred to activities relating to the provision of other transport services or any other business.

…'

25 Paragraph 14(4) of the AEG is worded in the following terms:

'Railway managers must set their charges in accordance with an order adopted under points 6 and 7 of Paragraph 26(1) in such a way as to offset the costs they incur in order to provide all the minimum services within the meaning of the first sentence of Paragraph 26(1), plus a rate of return which the market can bear. In doing so they may levy mark-ups on the cost that is directly incurred as a result of operating the rail service, and may distinguish between long-distance passenger services, short-distance passenger services and rail freight services, and also between market segments within those services, while guaranteeing competitiveness, in particular of international rail freight. The level of charges shall not, however, under the second sentence of Paragraph 26(1), exceed, in respect of any particular market segment, the cost that is directly incurred as a result of operating the rail service, plus a rate of return which the market can bear.'

26 The subsidies for replacement investments in the existing network are governed by the Leistungs- und Finanzierungsvereinbarung (Service and Funding Agreement) of 9 January 2009, amended on 4 November 2010 and 6 September 2013, concluded between the Federal Republic of Germany, the railway infrastructure undertakings of Deutsche Bahn AG and Deutsche Bahn AG itself. This agreement was replaced with effect from 1 January 2015 by the Leistungs- und Finanzierungsvereinbarung II (Service and Funding Agreement II; 'LuFV II'), which put in place, inter alia, a closed financing circuit for infrastructure profits that are fully paid to the federal State before being reinvested as is in the infrastructure.

Factual background

27 The Deutsche Bahn group (the 'DB group') operates in the field of national and international freight and passenger transport, logistics and ancillary services in rail transport, directed by the holding company Deutsche Bahn AG ('DB AG').

28 In accordance with Article 9a of the AEG, the management of the railway infrastructure elements referred to in Article 3(3) of Directive 2012/34 and in Annex I thereto, is carried out by DB Netz AG. DB Station & Service AG and DB Energy GmbH manage other infrastructure elements within the meaning of that directive.

29 The management of the group's transport activities is carried out through specific subsidiaries of DB Mobility Logistics AG, which is a wholly owned subsidiary of DB AG, which includes DB Regio AG.

30 DB AG has entered into agreements with its subsidiaries to control and transfer profits ('profit transfer agreements'). These agreements provide for the transfer of all the profits of the subsidiaries concerned to DB AG without any limitation as to the use of such profits by DB AG. They simultaneously oblige DB AG to cover the losses of its subsidiaries.

Pre-litigation procedure

31 By letter of formal notice of 22 November 2012, the Commission informed the Federal Republic of Germany of a possible infringement of Directive 91/440, Directive 2001/14, and Regulation No 1370/2007 in so far as the DB AG's accounting system failed to observe the prohibitions of transfers to other areas, in particular to rail passenger transport services, of, first of all, public funds earmarked for infrastructure, next, compensation for regional passenger transport services, operated under public service remits, and, lastly, charges for use of the rail network.

32 By letter of 20 March 2013, that Member State replied to the Commission's letter of formal notice and rejected the Commission's claims.

33 On 21 June 2013, the Commission then sent a reasoned opinion, restating the view previously set out in the letter of formal notice referring not only to Regulation No 1370/2007, but also to Directive 2012/34, which came into force on 15 December 2012, replacing Directives 91/440 and 2001/14 in respect of the relevant points. It requested the Federal Republic of Germany to comply with the reasoned opinion within two months of notification thereof.

34 By letter of 21 August 2013, the Federal Republic of Germany answered that reasoned opinion, repeating and expanding on the arguments which it had previously put forward.

35 Considering that the situation was unsatisfactory, the Commission decided to bring the present proceedings.

The action

Admissibility

The lack of clarity of the application as a whole and of each of the complaints

36 The Federal Republic of Germany submits that the four complaints relied upon by the Commission, both in their entirety and individually, suffer from a lack of precision linked to imprecise and non-uniform terminology preventing that Member State from understanding the practices and omissions in which it is accused of engaging and the purport of those complaints. In its view, the Commission did not specify whether the alleged infringements consist of an inadequate transposition of EU law, insufficient implementation of the law or unlawful conduct as the owner of DB AG.

37 For each of those four complaints, it submits that the Commission did not specify what specific conduct infringed the provisions in question and that, by merely referring to the contracts concluded within the DB group, it did not identify the national rule whose content or application was contrary to the wording or purpose of those provisions.

38 The Commission contests those arguments.

39 It that regard, it must be recalled that, in accordance with Article 120(c) of the Rules of Procedure of the Court of Justice and the case-law relating to that provision, an application initiating proceedings in respect of direct actions must state the subject matter of the proceedings and set out a summary of the pleas in law on which the application is based; that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself (judgment of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 32 and the case-law cited).

40 The Court has also held that, when an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court may ascertain exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (judgment of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 33 and the case-law cited)

41 In the present case, and as the Advocate General pointed out, in point 36 of his Opinion, the Commission precisely sets out, in its application initiating proceedings, both the EU law provisions allegedly infringed by the Federal Republic of Germany and the facts complained of, namely, in respect of the first three complaints, the existence of profit transfer agreements concluded between DB AG and its various subsidiaries giving DB AG profits transferred for any purpose, without restriction and irrespective of their origin and, in respect of the fourth complaint, the want of a separate reference in the accounts of DB Regio to the public funds paid for its activities relating to the provision of transport services under its public service mandate.

42 It must also be held that neither the wording of the Commission's application as a whole nor that of each of the complaints raised by the Commission leaves any room for the doubts raised by the Federal Republic of Germany as to whether an insufficient transposition of EU law or an insufficient implementation of the law or unlawful conduct as the owner of DB AG is at issue.

43 In addition to the fact that the Commission expressly stated in its reasoned opinion that the Federal Republic of Germany appeared to have formally transposed the contested provisions, it is clear from the detailed description of the profit transfer agreements between DB AG and its various subsidiaries and the presentation of the composition and transfer of the profits of DB Netz, DB Station & Services and DB Energie, that only the DB group's internal financial relations arising from these agreements are at issue and not an incorrect transposition of the relevant provisions of Union law.

44 In the light of the foregoing, it must be concluded that the Federal Republic of Germany was in a position to grasp the purport of the infringements of Union law complained of.

The legal basis of the action

– Arguments of the parties

45 The Federal Republic of Germany takes the view that the present action is also inadmissible in so far as the application refers to Directive 2012/34, the period for the transposition of which expires on 16 June 2015, that is to say, after the date to be taken into consideration when assessing the existence of the infringement alleged by the Commission. According to that Member State, only the provisions of Directives 91/440 and 2001/14 were relevant.

46 In its reply, which was filed after the Council's publication of the Corrigendum of 12 March 2015 which fixed the date for the repeal of Directives 91/440 and 2001/14, on 17 June 2015 instead of 15 December 2012, the Commission requests the Court to ground, as necessary, the findings which the Commission seeks in respect of Directive 2012/34 in points 1 to 4 of the application on Directives 91/440 and 2001/14, mentioned in the alternative in its written pleadings.

– Findings of the Court

47 On the dates on which the reasoned opinion was issued and this action was brought, Directive 91/440 and Directive 2001/14 had disappeared from the Union legal order following their repeal by Article 65 of Directive 2012/34, with effect from 15 December 2012.

48 Consequently, as the Advocate General pointed out in point 42 of his Opinion, only Directive 2012/34 could be invoked by the Commission and the Commission could ground its action for failure to fulfil obligations only on that directive.

49 Furthermore, and as is clear from paragraph 1 above, it must be pointed out that the Commission has, in particular in the application, taken care to refer to, for each of the complaints relied upon, not only the article at issue from Directive 2012/34 but also the corresponding provision in Directives 91/440 and 2001/14, thereby excluding any uncertainty as to the identification of the EU law in the light of which the merits of that action fall to be assessed or with regard to the scope of the alleged failure to fulfil obligations (see, by analogy, judgment of 22 October 2014, *Commission* v *Netherlands*, C-252/13, EU:C:2014:2312, paragraphs 35 to 37).

50 Moreover, it is settled case-law that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of an EU measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new EU measure (judgment of 19 December 2013, *Commission* v *Poland*, C-281/11, EU:C:2013:855, paragraph 37 and the case-law cited). As the Commission points out in its reply, its action relates exclusively to the provisions of Directive 2012/34 already laid down in Directives 91/440 and 2001/14.

51 Consequently, the present action must be declared admissible in its entirety.

Substance

52 As a preliminary matter and in view of the publication of the Corrigendum of 12 March 2015 according to which the date for the repeal of Directives 91/440 and 2001/14 is now set at 17 June 2015, it should be noted that, on the date taken into account in the assessment of the merits of the present action (judgment of 8 April 2014, *Commission* v *Hungary*, C-288/12, EU:C:2014:237, paragraph 29), namely, 21 August 2013, the end of the period laid down in the reasoned opinion, Directives 91/440 and 2001/14 were applicable *ratione temporis*.

53 Accordingly, it is necessary to assess the merits of the present action in respect of its first and second complaints, on the basis of Article 6(1) of Directive 91/440, in respect of its third complaint, on the basis of Article 7(1) of Directive 2001/14 and, in respect of the fourth complaint, on the basis of Article 9(4) of Directive 91/440 read in conjunction with the combined provisions of Article 6(1) of Regulation No 1370/2007 and point 5 of the annex to that regulation.

54 Furthermore, it was pointed out in paragraph 43 above that the Commission does not complain that the Federal Republic of Germany incorrectly transposed the contested directives. There is therefore no need to reply to the arguments put forward in that regard by that Member State when it challenges the first to third complaints.

The second complaint, alleging infringement of Article 6(1) of Directive 91/440 in so far that the account-keeping of DB AG's subsidiaries in charge of the management of the railway infrastructure does not permit observance of the prohibition of transferring public funds earmarked for railway infrastructure to the provision of rail transport services

– Arguments of the parties

55 By its second complaint, the merits of which must be assessed first, the Commission criticises the Federal Republic of Germany for the way in which the accounts of the subsidiaries of the DB group responsible for railway infrastructure are kept, which, in contravention of Article 6(1) of Directive 91/440, does not permit observance of the prohibition of transferring public funds earmarked for the management of railway infrastructure to the provision of rail transport services.

56 The public funds used to acquire assets belonging to the infrastructure managers not being shown either in their profit and loss accounts or in their balance sheets, this does not make it possible, according to the Commission, to know what parts of those managers' profits, transferable to DB AG pursuant to the profit transfer agreements at issue, come from public funds or to apportion the profits between the railway infrastructure management activities and other activities of these managers. In so doing, DB AG, to which the undifferentiated profits of its subsidiaries managing railway infrastructure are transferable, could use them at will.

57 In that regard, the Federal Republic of Germany submits, in essence, that the Commission misinterprets the contested provision since it wrongly treats 'balance sheet' and 'accounting' in the same way and that the transparency requirement therein does not require public funds to appear in the company's external accounts, namely, the balance sheet, the income statement or the activity report. It requires only separate accounting for the transport and infrastructure companies, a requirement satisfied in this case, DB Netz, DB Station & Service and DB Energie being legally autonomous and not providing transport services. The purpose of that provision is not to control the use of funds in accordance with their allocation, but only to ensure fair and non-discriminatory access to infrastructure.

58 According to the Federal Republic of Germany, that provision contains no requirement more extensive and specific than that of bookkeeping and accounting making it possible to check that the prohibition of transferring profits has been complied with. This limited obligation is supported by the Commission's intention, within the framework of the fourth railway package presented by the Commission, to increase the separation of the financial circuits of infrastructure managers and transport undertakings.

59 Moreover, it adds that, every year, DB group's companies keep and publish separate profit and loss accounts and balance sheets for, on the one hand, business relating to the provision of transport services by railway undertakings and, on the other hand, business relating to the management of railway infrastructure.

60 Finally, the Federal Republic of Germany adds that the fact that public funds are not included in the balance sheet does not mean that they were not recorded from an internal accounting point of view.

– Findings of the Court

61 With regard to Article 6(1) of Directive 91/440 read in the light of, in particular, the fourth recital of that directive, it must be noted that the purpose of that directive is, as stated in the title of the section to which it belongs, to ensure the separation between the management of the railway infrastructure

and transport operations, so that these activities can be managed separately, but also so that the public funds paid to the one of these two activities cannot be transferred from one to the other through cross-subsidisation.

62 To that end, Article 6(1) of Directive 91/440 requires the keeping of separate profit and loss accounts and balance sheets, on the one hand, for business relating to the provision of transport services by railway undertakings and, on the other, for business relating to the management of railway infrastructure. With regard more particularly to the accounting treatment of public funds, it specifies that it should reflect the prohibition of the transfer of those funds.

63 This article also requires the accounts relating to the two activities of the management of railway infrastructure and of rail transport services to be published.

64 It follows from this that, as regards public funds in particular, the Union legislature's intention was to oblige railway undertakings providing railway transport services and managing railway infrastructure not only to enter such funds into the accounts, to ensure that they can be monitored in the accounts, but also to publish those accounts in order, inter alia, to ensure that the information relating to the funds is publicly available, which should make it possible to verify objectively that there is no cross-subsidisation between rail infrastructure management and railway transport activities.

65 Article 6(1) of Directive 91/440 aims not only to put in place a precise accounting treatment which makes it possible, in particular, to identify the public funds received by the railway undertakings and also to ensure the external transparency of the use of those funds.

66 As the Advocate General pointed out in points 65, 68 and 71 of his Opinion, the Union legislature intended, by the use of the word 'reflect' in that provision, to facilitate monitoring of the prohibition of the transfer of public aid from one activity to another, which would be difficult to achieve without the railway undertakings' accounts being transparent, which makes it possible to detect cross-subsidisation, a constant objective of the successive pieces of EU railway transport legislation, be it in Council Regulation (EEC) No 2830/77 of 12 December 1977 on the measures necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings (OJ 1977 L 334, p. 13), or in Directive 91/440 or Directive 2001/12.

67 In that regard, it should be pointed out that Article 9(4) of Directive 91/440 provides for similar accounting and publication obligations in respect of railway undertakings providing passenger and freight services to those referred to in Article 6(1) of Directive 91/440, referring explicitly, as is apparent from recital 9 of Directive 2001/12, to the requirement of transparency of their finances, including all financial compensation or aid paid by the State.

68 Accordingly, contrary to what the Federal Republic of Germany submits, Article 6(1) of Directive 91/440 cannot be interpreted as limiting the obligations of railway undertakings to the mere entry in their accounts of the public funds which they receive, even if such entries were such as to make it possible, in the internal accounting system of those companies, to monitor the prohibition of the transfer of such funds.

69 In the present case, as that Member State acknowledges, the public funds received by the DB AG's subsidiaries, which the Commission does not claim were not actually entered in their accounts, do not appear in the accounts of the DB AG's subsidiaries. That omission, as the Commission claims, makes it impossible to determine to what extent the profits transferred from the infrastructure managers to DB AG contains such funds and to satisfy the requirement of transparency referred to in paragraph 66 above.

70 Consequently, by failing to take all measures necessary to ensure that the detailed rules on account-keeping make it possible to monitor the prohibition of transferring public funds for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440

71 Accordingly, the second complaint must be upheld.

The first complaint, alleging infringement of Article 6(1) of Directive 91/440 on the grounds that the profit transfer agreements enable funds intended for railway infrastructure to be used to finance rail services

– *Arguments of the parties*

72 By its first complaint, the Commission criticises the Federal Republic of Germany for accepting a system of profit transfer agreements which enable, in breach of Article 6(1) of Directive 91/440, the transfer of funds earmarked for railway infrastructure to rail transport activities.

73 According to the Commission, profits realised by DB AG's subsidiaries operating in infrastructure markets and transferred to DB AG under the profit transfer agreement were used for activities relating to the provision of transport services, and thus irrespective of the origin of the profits, even if they came from public funds paid for infrastructure management purposes.

74 In that regard, the Commission refers to the covering of losses of companies in the DB group which offer transport services, such as DB Schenker Rail in the course of 2009 and 2010. It also refers to the financing of acquisitions by the DB group of other transport undertakings and the improvement of the DB group's solvency as a whole. In this respect, the Commission states that DB Netz, DB Station & Service and DB Energy were beneficiaries during the period 2007 to 2011 only thanks to the revenues generated by railway infrastructure and/or to public funds and that the profits transferred therefore contain elements of aid for the purposes of Article 6(1) of Directive 91/440.

75 The Federal Republic of Germany maintains, first, that this complaint is the result of a misinterpretation of Article 6(1) of Directive 91/440 and, second, that it has properly transposed that provision in Paragraph 9(1)(b) of the AEG.

76 It submits that Article 6(1) of Directive 91/440 does not preclude the subsidiaries making profits or transferring them subsequently to their parent companies, since it prohibits only the transfer of public funds earmarked for railway infrastructure and not the revenues which the undertakings responsible for managing the railway infrastructure derive from the commercial operation of the railway infrastructure.

77 In its reply, the Commission disputes the interpretation of Article 6(1) of Directive 91/440 adopted by the Federal Republic of Germany. In its view, it is clear from the proposal in Directive 2001/12 that this provision was intended to ensure fair and non-discriminatory treatment for all railway undertakings, an aim which could only be achieved by considering the financing of the infrastructure as a whole, with, on the one hand, all of its costs and, on the other, all of the revenue, namely, public funds and the charges for use of the rail network.

78 The Commission also disputes the argument that the terms 'public funds' in Article 6(1) of Directive 91/440 refers only to public funds granted through a public budget and in accordance with a clear legal basis. The objective of that provision is to prevent cross-subsidies and both its wording and the preparatory documents confirm that the funds concerned are public funds within the meaning of the rules on State aid, which use the same terminology.

79 In its rejoinder, the Federal Republic of Germany criticises the Commission for failing to adduce proof of its allegations and defends the checks on the spending of public funds carried out *ex ante* and *ex post* by the Bundesnetzagentur (Federal Network Agency, Germany) and the Bundesrechnungshof (Federal Court of Auditors, Germany).

80 The Italian Government argues, for its part, that Article 6(1) of Directive 91/440 merely lays down accounting rules in order to avoid the risk of cross-subsidisation. It also takes the view that there is nothing to preclude the network manager from managing the profits independently. In that regard, it points out that the Court has recognised the lawfulness of undertakings structured in the form of a holding company and that the Commission's approach restricts the managerial independence of groups of railway undertakings, contrary to Articles 4 and 5 of Directive 91/440.

– *Findings of the Court*

81 Pursuant to Article 6(1) of Directive 91/440, transfers of public funds paid for the business of the management of railway infrastructure to the provision of railway transport business and vice versa are prohibited.

82 Failure to abide by such a prohibition therefore presupposes, first, a transfer of 'public funds' and, second, that the transfer has benefited an activity other than that for which the aid had been allocated.

83 In the present complaint, the Commission has not, in any event, established to the requisite legal standard that the profit transfer agreements, even if they could have given rise to a transfer of public funds, which the Federal Republic of Germany contests, led to alleged transfers of sums for use in identifiable rail transport activities.

84 According to settled case-law, in proceedings for failure to fulfil obligations under Article 258 TFEU, it is for the Commission to prove the existence of the alleged infringement and to place before the Court the information necessary for it to determine whether the infringement is made out, without the Commission being entitled to rely on any presumption (see, to that effect, judgments of 22 November 2012, *Commission* v *Germany*, C-600/10, not published, EU:C:2012:737, paragraph 13, and of 10 November 2016, *Commission* v *Greece*, C-504/14, EU:C:2016:847, paragraph 111 and case-law cited).

85 In the present case, it must be held that the evidence provided by the Commission with regard to the contested facts, namely, the use of profits transferred under profit transfer agreements in order to finance rail transport services with funds reserved for railway infrastructure, are either not well documented or completely undocumented and essentially circumstantial.

86 As regards, first, the evidence provided in support of the allegation of transfers of profits intended to offset the deficits of the transport operator DB Schenker Rail for the years 2009 and 2010, the Commission merely states, referring to its reasoned opinion, that DB group infrastructure management companies generated profits and that, at the same time, DB AG offset the losses suffered by DB group companies engaged in rail transport operations, without however establishing that the sums used for these operations originated from the sums received from one or more companies in the DB group in charge of infrastructure management.

87 Next, with regard to the information provided in support of the alleged transfer of profits which enabled DB AG to finance the acquisition of undertakings in the field of transport, the Commission does not identify, in its written pleadings, the undertakings concerned, merely referring to that end to its reasoned opinion, which provides no evidence other than the names of those undertakings and, at all events, no evidence relating to the amounts of the acquisitions or how they were financed.

88 As regards evidence provided in support of the claim of the transfers of profits which have made it possible to improve the profitability and the solvency of the DB group, the Commission merely refers to brief statements contained in reports from rating agencies which are of little evidential value in this regard.

89 Finally, with regard to the alleged transfer of profits from DB Netz, DB Station & Service or DB Energie, the Commission merely asserts that the profits of those companies, which it considers, without any concrete evidence in that regard, to have been made solely on the basis of revenues generated by the use of infrastructure and public funds, have been transferred to DB AG under the profit transfer agreements but adduces no evidence proving that those profits were subsequently allocated to the financing of rail transport activities.

90 Consequently, and without it being necessary to assess whether the transfers of profits alleged by the Commission must be classified as transfers of 'funds' within the meaning of Article 6(1) of Directive 91/440, it must be held that the Court does not have sufficient evidence to find that the profit transfer agreements at issue have made it possible to finance rail transport services with funds reserved for the railway infrastructure and, consequently, that the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440.

91 The Commission's first complaint must therefore be rejected.

The third complaint, alleging infringement of Article 7(1) of Directive 2001/14 in so far as, by virtue of the profit transfer agreements within the DB group, infrastructure charges are used for purposes other than financing the activities of the infrastructure manager

– Arguments of the parties

92 By its third complaint, the Commission criticises the Federal Republic of Germany for the fact that, by virtue of profit transfer agreements within the DB group, infrastructure charges are used for purposes other than the financing of the activities of the infrastructure manager, in breach of Article 7(1) of Directive 2001/14.

93 In that regard, the Commission submits that the transfers of the profits of the infrastructure managers to DB AG, provided for in the profit transfer agreements, mean that the fees paid for the use of the infrastructure are not used by the infrastructure manager for its activities so defined. This would at least be the case when no profit would have been generated without a charge, as would be the case with DB Netz, DB Station & Service and DB Energie. In such a case the Commission is of the view that it is clear that charges are being withheld from the infrastructure manager and may be used for purposes other than its activities.

94 The Federal Republic of Germany, supported by the Italian Republic, takes the view that, from a systematic point of view, Article 6(1), the first subparagraph of Article 7(1) and Article 8(1) of Directive 2001/14 allow infrastructure managers to obtain a certain rate of return which is an integral part of the charges payable. Moreover, no provision governs the use of profits obtained by infrastructure managers, which enjoy complete freedom to transfer those profits to the parent company

95 Accordingly, Directive 2001/14 does not preclude the transfer of profits from charges from the use of railway infrastructure calculated on the basis of an adequate rate of return on the undertaking's own funds. The first subparagraph of Paragraph 14(4) of the AEG provides, in addition, that the charges must be fixed so that they cover the railway infrastructure manager's costs and a rate of return may be added if the market could bear this. Contrary to the view put forward by the Commission, income generated in this way does not create any infrastructure funding deficit.

96 Lastly, that interpretation is corroborated by a recent proposal for amendment, drawn up by the Commission in the context of the Fourth Railway Package, which does not require income received in return for use of the infrastructure necessarily to be used for the operation or maintenance of railway lines.

97 In the reply, the Commission states that Article 6 of Directive 2001/14 is explained by the method of calculating the infrastructure charges, which is usually based on the direct costs, and by the chronic deficit which infrastructure managers face if the public authorities do not assume, at least in part, liability for infrastructure costs. Viewed in that way, Article 6 of Directive 2001/14 requires Member States to take financial responsibility vis-à-vis infrastructure managers by balancing their budgets.

98 The Commission refers in the reply to an opinion of the Bundesrat (Federal Council, Germany) which, the Commission contends, supports its position and makes clear the negative consequences of profit transfer agreements and refers to the entry into force of the LuFV II on 1 January 2015 intended to satisfy that concern of the Bundesrat by providing that the profits of infrastructure managers should be transferred directly to the Federal State for investment in infrastructure.

99 The German Government admits in the rejoinder that the funds which DB Netz AG transfers to DB AG come, in whole or in part, from income received for use of 'train paths', but argues that those funds cease to be categorised as infrastructure charges at the latest when they are correctly paid to DB Netz AG in return for the grant of the right to use the paths and when they have been allocated to the financing of activities concerned.

– *Findings of the Court*

100 Under Article 7(1) of Directive 2001/14, charges for the use of railway infrastructure are paid to the infrastructure manager and used to fund his business.

101 In its third complaint, the Commission considers, in essence, that it is contrary to that provision for the managers of the railway infrastructure of the DB group to generate systematically profits which subsequently and pursuant to the profit transfer agreements at issue are transferable to DB AG, with the result that the amounts generated from infrastructure charges can be used by DB AG for purposes other than financing the activities of the railway infrastructure managers.

102 In those circumstances, failure by the Federal Republic of Germany to fulfil its obligations under Article 7(1) of Directive 2001/14 presupposes that the Commission should establish, first, that those profits derive, at least in part, from infrastructure charges within the meaning of that provision so as to be treated like those charges and, second, that those profits were actually used for purposes other than financing the activities of infrastructure managers concerned.

103 It must be held that, in any event, the Commission has not established to the requisite legal standard that profits of all or some of the railway infrastructure managers of the DB group originating from infrastructure charges in fact have been allocated for purposes other than the financing of the infrastructure managers' activities.

104 In that regard, it has already been pointed out in paragraph 84 above that it is for the Commission to establish the existence of the alleged failure to fulfil obligations.

105 In addition to the fact that the Commission identifies only by implicit reference the infrastructure managers whose profits were diverted from their purposes by the profit transfer agreements, it is clear from the Commission's written pleadings, mentioned in paragraph 93 above, that that institution in essence bases its reasoning on the fact that the transfer of profits of the infrastructure managers of the DB group to DB AG necessarily entails an allocation for purposes other than those imposed by

Article 6(1) of Directive 2001/14. However, the Commission itself states that the automatic allocation referred to is established in certain situations only, namely, where no profit has been generated without a charge.

106 In that regard, it should also be pointed out, moreover, that the transfer of profits from a railway infrastructure manager to a third party entity probably does not necessarily entail the use of the resources concerned for purposes other than the financing of the activities of that manager's infrastructure, as can be seen in the mechanism resulting from the LuFV II, which creates a closed financing circuit for the profits resulting from the infrastructure management which are transferred in their entirety to the federal state before being reinvested as such in that infrastructure.

107 It was therefore for the Commission to identify more precisely the factual evidence supporting the third complaint.

108 Moreover, and more particularly in respect of the profits realised for 2009 and transferred by DB Netz to DB AG, it must be pointed out that the Federal Republic of Germany disputed, in substance, the alleged fact that the profits transferred to DB AG originated in infrastructure charges, arguing that, according to DB Netz's activity report, those profits derived in essence from the release of reserves for property sales. However, the Commission in no way questioned that explanation, contending only that the Federal Republic of Germany did not contest the other situations referred to.

109 Therefore, even if it is not necessary to assess whether profits generated by railway infrastructure managers and transferred to third-party entities may be treated as infrastructure charges for the purposes of applying Article 7(1) of Directive 2001/14, which the Federal Republic of Germany contests, it must be held that the Commission has not proved to the requisite legal standard that the profits mentioned of all or some of the railway infrastructure managers of the DB Group originated from infrastructure charges or were allocated to uses other than the financing of railway infrastructure entrusted to these managers.

110 Therefore, the third complaint must be rejected.

The fourth complaint, alleging infringement of Article 9(4) of Directive 91/440 and Article 6(1) of Regulation No 1370/2007, in conjunction with point 5 of the annex thereto, inasmuch as public funds paid for the provision of passenger transport services operated as public service remits are not shown separately in DB Regio's accounts

– Arguments of the parties

111 By its fourth complaint, the Commission criticises the Federal Republic of Germany for the fact that the public funds paid to DB Regio AG for the provision of passenger transport services operated under public service remits are not shown separately, contract by contract, in that company's accounts, contrary to Article 9(4) of Directive 91/440 and Article 6(1) of Regulation No 1370/2007, read in conjunction with the last indent of point 5 of the annex thereto.

112 The Commission submits that compensation payments for public service obligations and income from ticket sales are shown only as a total or aggregate sum for all services provided, and it is therefore impossible to check whether those compensation payments, granted in each case, are excessive for the purpose of detecting possible cross-subsidies.

113 As regards Article 9(4) of Directive 91/440, the Federal Republic of Germany maintains that DB Regio AG, in its capacity as an operator of regional transport services, did not fall within the scope of that provision, in accordance with Article 2(2) of that directive. That conclusion stems from Article 3 of Directive 91/440, which defines 'regional services' as 'transport services operated to meet the transport needs of a region'.

114 As regards the infringement of Article 6(1) of Regulation No 1370/2007, the Federal Republic of Germany interprets point 5 of the annex (to which that article refers) as requiring contracts to be referred to separately in the accounts only when an operator carries on activities compensated for under the rules on public service obligations at the same time as other activities. The Federal Republic of Germany contends that that is not the case of DB Regio AG, which merely operates transport services under public service remits.

115 In that regard, the Commission acknowledges that point 5 of that annex does not explicitly mention a contract by contract breakdown in the accounts. It is, however, of the opinion that such an obligation can be inferred from the regulation as a whole and from its objective, and, more particularly, from a joint reading of points 2 and 5 of the annex to Regulation 1370/2007.

116 In the rejoinder, in relation to the alleged infringement of Article 6(1) of Regulation No 1370/2007, the Federal Republic of Germany states that the aim of point 5 of the annex is not to prevent cross-subsidies between different types of public service contract but between contracts that give rise to the payment of compensation and those that do not.

117 In support of the Federal Republic of Germany, the Italian Government agrees that none of the provisions at issue requires the separate publication of accounts for every contract for the provision of transport services as public service remits.

– *Findings of the Court*

118 According to Article 9(4) of Directive 91/440, the funds paid for activities relating to the provision of passenger transport services as public service remits must be shown separately in the accounts corresponding to profit and loss accounts and balance sheets and may not be transferred to activities relating to the provision of other transport services or any other business.

119 In order to increase transparency and avoid cross-subsidies, when a public service operator not only operates compensated services subject to public transport service obligations, but also engages in other activities, Article 6(1) of Regulation No 1370/2007, read in conjunction with the first and last indents of point 5 of the annex to that regulation, imposes certain minimum accounting conditions on such an operator. In particular, the latter must ensure that the operating accounts corresponding to each of its activities are separate and that the costs of the public service are balanced by the operating revenue and the payments from the public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.

120 On the basis of those two provisions, the Commission alleges that the Federal Republic of Germany has failed to fulfil its obligations in so far as DB Regio's accounts show only in aggregate the contributions paid to the activities relating to provision of passenger transport service in respect of its public service remits and not, as required by those provisions, contract by contract, thus preventing the detection of any cross-subsidisation.

121 The Federal Republic of Germany challenges the merits of the fourth complaint on the grounds that, first, Directive 91/440 is not applicable to DB Regio and, second, that that complaint is based on a misinterpretation of the provisions concerned.

122 It is therefore necessary, in the first place, to assess whether Directive 91/440 is in fact applicable to DB Regio, having regard to Article 2(2) of that directive, which excludes from its scope railway undertakings whose activity is limited to the provision of urban, suburban or regional services.

123 In that regard, and as the Advocate General pointed out, in paragraph 138 of his Opinion, the Commission refers in its written submissions to the 2013 annual report, published by DB Regio, which clearly shows that the company brings together not only all the regional transport services of the DB group but also the transport services between Germany and the neighbouring countries.

124 It is clear, therefore, from that document, published by DB Regio itself, and in particular from the reference to the international part of its business, that that company does not restrict its activity to urban, suburban or regional services referred to in Article 2(2) of Directive 91/440.

125 Accordingly, that provision cannot be relied upon by the Federal Republic of Germany in order to exclude the applicability of Directive 91/440 to the DB Regio's accounting situation.

126 In the second place, it must be determined whether the Commission may validly criticise that Member State, whether under Article 9(4) of Directive 91/440 or Article 6(1) of Regulation No 1370/2007 in conjunction with point 5 of the annex to that regulation, for the fact that, in its accounts, DB Regio does not break down, contract by contract, public funds paid into the activities related to the provision of passenger transport services in connection with its public service remits.

127 In that regard, it is not apparent from the wording of those two provisions that operators of passenger rail transport services operating both compensated activities subject to public service obligations and other activities would be required to identify, in their annual accounts, individually, contract by contract, the public funds received in respect of their public service activity.

128 On the contrary, these two provisions impose on such operators only an obligation to keep separate accounts of their various areas of activity.

129 Thus, Article 9(4) of Directive 91/440 requires, in respect of the accounting for contributions paid for activities relating to the provision of passenger transport services under public service remits, the separation of, on the one hand, their passenger transport activities guaranteed under these public service obligations from, on the other hand, their other activities, including other transport services. Article 6(1) of Regulation No 1370/2007 read in conjunction with point 5 of the annex to that regulation requires, for its part, an accounting separation between the public transport activities between contracts that give rise to the payment of compensation for public service obligations and those that do not.

130 It is the same requirement for the separation of accounts for the areas of activity which governs Article 6 of Directive 91/440 as regards the accounting for the provision of rail transport services and the railway infrastructure management.

131 Consequently, as the Advocate General pointed out in points 146 and 153 of his Opinion, the Commission's interpretation that undertakings are required in their annual accounts to identify separately, contract by contract, public funds received in respect of their public service activities cannot be inferred either from Article 9(4) of Directive 91/440 or from Article 6(1) of Regulation No 1370/2007 read in conjunction with point 5 of the annex to that regulation.

132 In that regard, that conclusion cannot be altered by the fact that the last indent of point 5 of the annex to Regulation No 1370/2007 states that the accounting of public service operators must not permit the transfer of revenue from a public service to another sector of the public service operator's activity and the fact that an obligation as envisaged by the Commission is such as to ensure greater transparency in the activity of the undertakings concerned, thus making it possible to detect any cross-subsidisation.

133 Neither a plea based on the effectiveness of Article 9(4) of Directive 91/440 nor the very general scope of the last indent of point 5 of the annex to Regulation No 1370/2007 and the lack of any practical means of implementing that provision can give rise, in and of itself alone, to a specific obligation on the part of the Member States such as that referred to by the Commission.

134 Thus, the Federal Republic of Germany cannot be criticised for having allowed the accounts of DB Regio to show only in aggregate the contributions paid for activities relating to the provision of passenger transport services in respect of its public service remits.

135 Consequently, the fourth complaint, alleging infringement of Article 9(4) of Directive 91/440 and the Article 6(1) of Regulation No 1370/2007 read in conjunction with point 5 of the annex to that regulation must be rejected as unfounded.

136 In the light of the foregoing considerations, it must be held that by failing to take all measures necessary to ensure that the detailed rules on account-keeping make it possible to monitor the prohibition of transferring public funds earmarked for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440.

Costs

137 Under Article 138(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. Since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

138 Under Article 140(1) of those Rules of Proccedure, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, the Italian Republic and the Republic of Latvia are to bear their own costs.

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

1. **Holds that, by failing to take all measures necessary to ensure that the detailed rules on account-keeping make it possible to monitor the prohibition of transferring public funds earmarked for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, as amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001;**

2. **Dismisses the remainder of the action;**

3. **Orders the European Commission, the Federal Republic of Germany, the Italian Republic and the Republic of Latvia to bear their own costs.**

[Signatures]