Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 24 November 2016 [1]

Case C-489/15

CTL Logistics GmbH
v
DB Netz AG

(Request for a preliminary ruling from the Landgericht Berlin (Regional Court, Berlin, Germany))

(Transport — Railway infrastructure usage charges — Review as to the fairness of charges set unilaterally by an infrastructure manager in an agreement with a rail transport undertaking — Directive 2001/14/EC — Uniform application of the law regulating the railway sector — Principle of non-discrimination between railway undertakings)

1. While the Court is often called upon to rule on the suitability of national remedies for the purposes of ensuring adequate protection for the rights and freedoms guaranteed by EU law, the present reference for a preliminary ruling, on the other hand, places before it the question of whether a judicial remedy under national law which is made available to individuals alongside and in addition to the administrative and judicial appeal mechanism established by a Member State in fulfilment of its obligations under the provisions of a directive constitutes to some extent 'excessive protection' incompatible with the requirements and objectives of that directive.

2. By its request for a preliminary ruling, the Landgericht Berlin (Regional Court, Berlin, Germany) asks the Court a number of questions concerning the interpretation of various articles 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. [2]

3. The questions were raised in an action brought on the basis of Paragraph 315 of the Bürgerliches Gesetzbuch (German Civil Code, the 'BGB') by CTL Logistic GmbH ('CTL Logistic'), a private rail transport undertaking, against DB Netz AG ('DB Netz'), a licensed public railway infrastructure undertaking, with a view to obtaining reimbursement of the charges which it paid to the defendant during network timetable periods from 2004 to 2011.

1 Original language: French

2 OJ 2001 L 75, p. 29. That directive was repealed and replaced with effect from 17 June 2015 by Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (OJ 2012 L 343, p. 32), see first paragraph of Article 65, as corrected (OJ 2015 L 67, p. 32).

I – The dispute in the main proceedings and the questions referred for a preliminary ruling

4. It follows from the order for reference that DB Netz makes its railway infrastructure available to its customers in return for payment on the basis of 'infrastructure usage agreements'. The infrastructure usage agreement is a *pro forma* document governing the principles of the contractual relationship between rail transport undertakings and DB Netz. It forms the basis of the individual usage agreements which have to be concluded for the specific use of train paths. Its terms are incorporated into each individual usage agreement.

5. Under such infrastructure usage agreements, use of the DB Netz railway network is made subject to the payment of train path prices calculated on the basis of the price list in force. The train path price lists, also known as the 'train path pricing system' ('TPS'), are fixed by DB Netz in advance for given periods of time, without the involvement of the rail transport undertakings.

6. The parties are in dispute over certain cancellation and modification charges which DB Netz unilaterally included in the TPS and which applied whenever CTL Logistics sought to modify or cancel a previously booked train path. CTL Logistics is seeking reimbursement of the charges it paid between 2004 and 2011, which it considers to have been set at an unfair level. It claims that, pursuant to Paragraph 315 of the BGB, the setting of those charges by DB Netz is ineffective and that it is for the referring court to set a charge *ex aequo et bono*. The amounts paid in excess of that charge have no basis in law and must be recovered.

7. In this regard, the referring court explains that, in German civil law, Paragraph 315(1) of the BGB provides that a party may be granted, by statute or contract, the right to determine unilaterally the performance owed under the contract and that, in case of doubt, the determination of the performance owed must be effected *ex aequo et bono*. Under subparagraph 3 of that Paragraph, observance of the principle of *ex aequo et bono* may be reviewed by the civil courts. Where a court finds that the determination of performance is unfair, it replaces it with an equitable judicial decision.[3] The purpose of Paragraph 315 of the BGB is therefore to prevent any abuse in individual cases of the power to create legal relationships that is conferred by private autonomy.

8. It is apparent from the order for reference that, according to the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), the review provided for in Paragraph 315(3) of the BGB is not excluded, under the German public legislation governing the railway sector, where the determination of the charge for the use of railway infrastructure still falls within the discretion conferred by private autonomy. The purpose of such a review is to ascertain whether, in exercising that discretion, the railway infrastructure manager satisfied the fairness criterion laid down in Paragraph 315(1) of the BGB by also taking due account of the other contractual party's interests in matters above and beyond non-discriminatory access to the network.

9. As the referring court points out, the abovementioned case-law, which recognises Paragraph 315 of the BGB as being independently applicable, assumes that that Paragraph and the legislation governing railways apply concomitantly, to the extent that the railway infrastructure manager has a duty to comply both with the rules for the calculation of usage charges prescribed by the legislation governing railways and with the fairness criterion laid down by Paragraph 315. The charges are therefore subject to two forms of review, that carried by the regulatory body (and, on appeal against that body's decisions, by the administrative courts) under the procedures laid down by the legislation governing railways, and that carried out by the civil courts in accordance with Paragraph 315(3) of the BGB.

3 Paragraph 315 of the BGB ('Determination of performance by one party') provides, in subparagraph 1, that, 'where performance is to be determined by one of the parties to the contract, it shall be assumed, in case of doubt, that the determination is to be effected *ex aequo et bono*' and, in subparagraph 3, that, 'where the determination is to be effected *ex aequo et bono*, the determination effected shall be binding on the other party only if it is equitable. If it is not equitable, the determination shall be effected by judgment …'.

10. The referring court has doubts about whether the concomitant application of those provisions and such a twofold review regime are compatible with the provisions of Directive 2001/14, and asks the Court the following seven questions:

‘(1) Are the provisions of European law, in particular Article 30(1) (first sentence), (2), (3), (5) (first subparagraph), and (6) of Directive 2001/14/EC, to be interpreted as precluding claims for repayment of charges for the use of railway infrastructure agreed or specified in a framework contract between an infrastructure manager and an applicant in so far as such claims are not made in the proceedings envisaged as taking place before the national regulatory body and the corresponding judicial proceedings in which decisions of that regulatory body are reviewed?

(2) Are the provisions of European law, in particular Article 30(1) (first sentence), (2), (3), (5) (first subparagraph), and (6) of Directive 2001/14/EC, to be interpreted as precluding claims for repayment of charges for the use of railway infrastructure agreed or specified in a framework contract between an infrastructure manager and an applicant if the disputed charges have not previously been submitted to the national regulatory body for review?

(3) Is it compatible with the requirements of EU law, which requires an infrastructure manager to comply with general requirements for setting charges, such as covering costs (Article 6(1) of Directive 2001/14/EC) or taking into account market sustainability criteria (Article 8(1) of Directive 2001/14/EC), for there to be a review in the civil courts of the equitable nature of charges for the use of railway infrastructure on the basis of a national civil law provision which permits the courts to review the fairness of performance unilaterally specified by one of the parties and, where appropriate, to specify performance themselves in the exercise of their own discretion?

(4) If question 3 is answered in the affirmative: in exercising its discretion, must the civil court apply the criteria in Directive 2001/14/EC as regards the setting of charges for the use of railway infrastructure, and, if so, which ones?

(5) Is the assessment by the civil courts of the fairness of charges on the basis of the national provision referred to in question 3 compatible with European law in so far as the civil courts set charges which depart from the general charging principles and the amounts of the charges of a railway manager, notwithstanding the fact that that railway manager is obliged by EU law to treat all persons entitled to access equally and in a non-discriminatory manner (Article 4(5) of Directive 2001/14/EC)?

(6) Is the review by the civil courts of the equitable nature of charges imposed by an infrastructure manager compatible with EU law taking into account the fact that EU law assumes that it is the regulatory body that is competent to determine differences of opinion between an infrastructure manager and a person entitled to access as regards charges for the use of railway infrastructure, or the amount or structure of such charges, which the person entitled to access is or would be obliged to pay (third subparagraph of Article 30(5) of Directive 2001/14/EC), and the fact that the potentially large number of disputes before different civil courts means that the regulatory body would not be able to ensure the uniform application of railway regulatory law (Article 30(3) of Directive 2001/14/EC)?

(7) Is it compatible with EU law, in particular Article 4(1) of Directive 2001/14/EC, for national provisions to require that all charges for the use of railway infrastructure imposed by infrastructure managers be calculated solely on the basis of direct costs?’

II – Analysis

A – Preliminary remarks

11. Although essentially national in scope, the issue at the heart of this case attests to the sensitivity that surrounds questions relating to the process of determining national railway infrastructure usage charges — harmonised in part by the EU legislature — and the level of those charges.

12. The order for reference mentions a line of case-law (to which the referring court does not subscribe) endorsed most recently by a judgment of the Bundesgerichtshof (Federal Court of Justice) of 18 October 2011 [4] and shared, it seems, by the majority of German civil — in particular, appeal — courts, which, based on alleged shortcomings in the system for monitoring charges that is provided for in the domestic legislation transposing Directive 2001/14, seeks, by means of an instrument of civil law, to subject to judicial review the fairness of charges for the use of railway infrastructure in a context considered to be characterised by considerable, not to say excessive, discretion on the part of infrastructure managers.

13. The domestic debate generated by this line of case-law seems to have taken on the proportions of a full-blown institutional conflict, as is apparent not least from the disagreement expressed by the Bundesrat (Federal Council, Germany) with the proposal, contained in the draft law amending the legislation governing railways and transposing Directive 2012/34, [5] to make express provision for the non-application of Paragraph 315 of the BGB in the field to which that legislation applies. [6]

14. As the German Government — which has adopted a deliberately neutral position throughout the proceedings before the Court [7] — announced at the hearing, that draft law was finally adopted in August 2016. [8] As well as excluding the review provided for in Paragraph 315 of the BGB, [9] the new law prescribes a stricter framework for the discretion exercised by the infrastructure manager and an enhanced level of scrutiny in relation to his decisions, all of which, according to the German Government, has the effect, in principle, of removing the premise on which the use of that review mechanism was based, and justified.

15. The matter having been resolved for future purposes, the importance of the judgment to be given by the Court is in principle confined to the period prior to the date of entry into force of the new law.

16. In this regard, I note that the Bundesgerichtshof (Federal Court of Justice) made a request for a preliminary ruling on the same subject in June 2016. [10] In that request (made in the course of a dispute between Die Länderbahn GmbH DLB ('Die Länderbahn'), a short-distance railway passenger transport undertaking, and DB Station & Service AG, a subsidiary of DB, concerning the amount of charges which Die Länderbahn paid for the use of stations maintained by DB Station & Service between November 2006 and February 2008), the Bundesgerichtshof (Federal Court of Justice)

4 Judgment of the Federal Court of Justice of 18 October 2011 — KZR 18/10, NVwZ 2012, p. 189.

5 Cited in footnote 2 above.

6 Stellungnahme des Bundesrates vom 18.03.2016 (BR-Drucksache 22/16, Ziff. 29, S. 26-27).

7 The German Government had not submitted any written observations to the Court but was invited by the Court to answer a number of written questions. It took part in the hearing, confining its intervention largely to illustrating the substance of the future new law.

8 Gesetz zur Stärkung des Wettbewerbs im Eisenbahnbereich, vom 29. August 2016, Bundesgesetzblatt Jahrgang 2016 Teil I Nr. 43, ausgegeben zu Bonn am 1. September 2016.

9 See the final sentence of Paragraph 33(2), according to which '[a]n approved charge shall constitute an equitable charge for the purposes of Paragraph 315 of the BGB'.

10 Pending Case C-344/16. In its request for a preliminary ruling, the Bundesgerichtshof (Federal Court of Justice) explains that it has been prompted to make a reference to the Court by the position expressed by the Commission in its observations in the present case and that it had previously considered the review provided for in Paragraph 315 BGB to be clearly not incompatible with Directive 2001/14.

expresses a point of view diametrically opposed to that taken by the Landgericht Berlin (Regional Court, Berlin) in the order for reference in the present case, despite having described the characteristics of the fairness review provided for in Paragraph 315 of the BGB in much the same terms.

17. The present request for a preliminary ruling therefore raises questions of essentially domestic dimensions and limited temporal scope which nonetheless concern a sensitive issue that has given rise to a fairly heated domestic debate involving various institutional powers. In my view, all of these factors militate in favour of a cautious approach on the Court's part.

18. That said, the seven questions referred for a preliminary ruling by the Landgericht Berlin (Regional Court, Berlin), which, contrary to what CTL Logistics maintains, are all admissible, may be divided into two groups.

19. By its *first, second, fifth and sixth questions*, the referring court asks the Court about the procedural and schematic issues raised by the application of Paragraph 315 of the BGB to the field of infrastructure charges for the use of the rail network.

20. The *third, fourth and seventh questions*, on the other hand, are concerned with matters of substantive law and are intended to enable the referring court to assess the compatibility of the review provided for in Paragraph 315 of the BGB with the provisions of the directive that define the criteria for calculating such charges. It is appropriate to begin the present analysis with this second group of questions.

B – The third, fourth and seventh questions referred for a preliminary ruling

21. By its third question, the referring court wishes in essence to ascertain whether the provisions of Directive 2001/14 relating to the levying of charges preclude a review as to the fairness of charges for the use of railway infrastructure such as that carried out by the civil courts under Paragraph 315 of the BGB and, if appropriate, whether they preclude those courts from determining the amount of those charges *ex aequo et bono*. By its fourth question, the referring court essentially asks the Court, supposing that the reply to the third question were to be that Directive 2001/14 does not preclude such a review, what limits, if any, Directive 2001/14 imposes on the discretion which the civil courts enjoy when it comes to determining the amount of infrastructure charges of their own motion under Paragraph 315(3) of the BGB. The seventh question seeks clarification of the scope of Article 4(1) of Directive 2001/14 in relation to an obligation under national law to calculate charges for the use of railway infrastructure exclusively on the basis of 'direct costs'.

22. I shall examine these three questions together (section 1). In addition, although the referring court has not directly asked a question about the compatibility of the fairness review provided for in Paragraph 315 of the BGB with the discretion which Directive 2001/14 gives the infrastructure manager with respect to the determination of infrastructure charges, that question is nonetheless still there in the background and has been addressed in the observations submitted to the Court. I shall therefore consider it briefly (section 2).

1. The fairness review under Paragraph 315 of the BGB and the provisions of Directive 2001/14 relating to the levying of charges

23. Chapter II of Directive 2001/14, which comprises Articles 4 to 12, is concerned with 'infrastructure charges'.

24. The first and second subparagraphs of Article 4(1) of that directive require the Member States to establish a charging framework while respecting the management independence of the infrastructure manager. Subject to that condition, the Member States may also establish specific charging rules. [11]

25. Articles 7 to 12 of Directive 2001/14 establish in detail the charges that may be levied and, where appropriate, how they are to be calculated. Under the heading 'Principles of charging', Article 7(3) provides in particular that '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*'. [12] Paragraphs 4 and 5 of the same Article 7 state that the charges set in accordance with the criterion defined in paragraph 3 of that article may include the costs connected with capacity constraints (paragraph 4) [13] and the environmental effects caused by the operation of the train (paragraph 5).

26. The basic economic criterion underpinning railway network charges in EU law, so far as 'minimum' access is concerned, [14] is therefore charging 'at the cost that is directly incurred', that criterion leaving the Member States some discretion with respect to its transposition and application in national law. [15]

27. Under Article 8(1) of Directive 2001/14, Member States may introduce *an exception* to that criterion by allowing the infrastructure manager to levy *mark-ups* on the directly incurred cost, provided that 'the market can bear this', that is to say provided that the railway undertakings can bear the mark-ups. It is important to emphasise that that provision *simply* gives the Member States an *option* [16] which they may take up in order to allow the infrastructure manager to pursue the objective of recovering *all the costs* incurred [17] and thus achieve the aim of financial equilibrium, laid down in Article 6(1) of Directive 2001/14, [18] with minimum State funding.

11 See in that regard the judgment of 28 February 2013, *Commission* v *Hungary* (C-473/10, EU:C:2013:113, paragraph 78).

12 Italics added.

13 In the form of 'a charge which reflects the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion'.

14 The services specified in Annex II(1) to Directive 2001/14.

15 See judgment of 30 May 2013, *Commission* v *Poland* (C-512/10, EU:C:2013:338, paragraph 75). At point 28 of the Commission's working document accompanying the proposal for a directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, COM(1998) 480 final, the 'directly incurred cost' is identified as 'the additional cost to the community of the use of the infrastructure by an additional transport unit'. The framework for the discretion enjoyed by the Member States is currently set out in Commission Regulation 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service (OJ 2015 L 148, p. 17), Article 1(1) of which defines the modalities for the calculation of the costs directly incurred as a result of operating the train service for the purpose of setting the charges for the minimum access package and access to infrastructure connecting service facilities referred to in Article 31(3) of Directive 2012/34.

16 An option, moreover, which Some Member States have not exercised; see, in particular, the judgment of 30 May 2013, *Commission* v *Poland* (C-512/10, EU:C:2013:338, paragraphs 87 and 88).

17 The first subparagraph of Article 8(1) provides that '[i]n 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 second subparagraph of paragraph (1) states that '[t]he 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'.

18 The first subparagraph of Article 6(1) Directive 2001/14 provides that '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'.

28. It follows from the foregoing that Directive 2001/14, although it lays down the basic principles and objectives of charging — the latter being, essentially, to secure that the manager's financial equilibrium and ensure optimum use of the infrastructure — leaves to the Member States a broad margin of discretion in the choice of structure for their charging schemes,[19] provided that those principles are observed.[20]

29. In the present case, leaving aside the vague reference to the respective interests of the parties to the agreement, it is apparent from the documents before the Court, and it seems to be common ground between the parties, that the fairness review under Paragraph 315 of the BGB presupposes, more specifically, the application of an assessment criterion based essentially on an analysis of the direct costs of the service provided by the infrastructure manager, that is to say the marginal costs generated by using the infrastructure.

30. Such a criterion does not appear to be incompatible with the charging principles laid down by Directive 2001/14, as explained in points 25 to 27 above, in particular the basic principle adopted by that directive to the effect that charges 'shall be set at the cost that is directly incurred as a result of operating the train service'.

31. The fact that the Republic of Germany has very clearly opted for a charging system based on the 'total costs principle', pursuant to the option made available in Article 8(1) of Directive 2001/14,[21] and that the application of Paragraph 315 of the BGB may be prejudicial to the practical effectiveness of such a choice, in so far as it entails a review of charges based principally on an analysis of marginal costs, does not call into question the conclusion that such a methodology is not in itself incompatible with that directive. For, under Article 8(1) of that directive, as I noted above, the Member States simply have the option, not the obligation, to introduce into their charging schemes the right for the infrastructure manager to apply the mark-ups provided for in that provision, notwithstanding that, within the scheme of the directive, that right is viewed as a departure from the basic criterion based on the 'cost directly incurred'.[22]

32. Given the extent of the discretion which the Member States enjoy when it comes to structuring their charging schemes, the mere fact that the review provided for in Paragraph 315 of the BGB may, as DB Netz submits, lead to the application of 'material requirements additional', not to say contrary, to those laid down in the *national legislation* transposing Directive 2001/14 does not automatically, and *for that reason alone*, render that review mechanism incompatible with the requirements of the directive.

19 Which is one reason for the vast differences in the levels of charges levied for minimum access in Europe, whether for freight or passenger transport; see in this regard the study by M. Amaral and N. Danielowitzowa, *La tarification de l'infrastructure ferroviaire en Europe* in *L'Espace ferroviaire unique européen, quelle(s) réalité(s)?*, Bruylant, 2015, p. 241.

20 The second subparagraph of Article 1(1) of Directive 2001/14 provides that 'Member States shall ensure that charging and capacity allocation schemes for railway infrastructure follow the principles set down in this Directive and thus allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity'.

21 Paragraph 14(4) of the Allgemeines Eisenbahngesetz (General Law on Railways) of 27 December 1993, BGBl. I. p. 2378, 2396, as amended by the Law of 29 May 2009, BGBl. I, p. 1100, 'AEG') provides that 'railway managers shall set their charges in accordance with a regulation adopted in accordance with Paragraph 26(1), points 6 and 7, so as to cover all the costs incurred in supplying mandatory services within the meaning of the first sentence of subparagraph 1, and secure a profit margin at the market rate. In that context, they may set and recover mark-ups directly connected with the operation of the railway and may draw a distinction between long-distance rail passenger transport services, short-distance rail passenger transport services and freight transport services, as well as between market segments within each of those types of service, and they shall ensure that services, in particular in the field of international rail freight transport, are competitive. However, in the case referred to in the second sentence above, the charges for any market segment shall not exceed the rail transport costs directly incurred plus a profit margin at the market rate …'. The criteria for determining charges are set out in particular in Paragraphs 4 and 21 of the Eisenbahninfrastruktur-Benutzungsverordnung (regulation on non-discriminatory access to the rail infrastructure and the principles of charging for use of the railway infrastructure, 3 June 2015, BGBl. I, p. 1566, in the version of 3 June 2009, BGBl. I, p. 1235, 'EIBV').

22 It is clear in particular from the third question referred for a preliminary ruling and from the observations of the parties to the main proceedings that what is at issue is the flexibility in the structuring of charges which the infrastructure manager enjoys as a result of Germany's decision to adopt the mark-up system provided for in Article 8(1) of Directive 2001/14, and which those who support the application of Paragraph 315 of the BGB would like to see more clearly circumscribed and those who oppose it would, conversely, like to keep intact as a means of covering some of the total costs.

33. It should also be emphasised that it is clear from the documents before the Court that the review provided for in Paragraph 315 of the BGB is used by the German civil courts as a means of correcting the excessive or disproportionate nature of the charge set by the infrastructure manager in relation to the object of the agreement.

34. Such an objective is also not incompatible with Directive 2001/14, which, on the contrary, itself points up the need for *access* to the network to be *fair* as well as non-discriminatory. [23]

35. The EU legislature's concern to ensure that the charges applied do not reach a level at which fair access to the network is no longer guaranteed — which concern is apparent in particular from the conditions attached to use of the exceptions to the 'principle of costs directly incurred' laid down in Article 7(3) of Directive 2001/14 — also applies to the setting of the charge at issue in the main action, that is to say the charge which the infrastructure manager may levy, pursuant to the first paragraph of Article 12 of Directive 2001/14, for capacity requested but not used.

36. After all, that provision expressly stipulates that such a charge must be '*appropriate*'. [24]

37. It is true that Directive 2001/14 does not define the meaning to be ascribed to 'equitable access' to the network, or indicate under what conditions a charge levied for capacity requested but not used may be considered appropriate. [25]

38. As I explained above, however, that directive lays down a number of criteria which the charging schemes employed by the Member States must satisfy notwithstanding the margin of discretion those States enjoy.

39. The national courts must also be guided by those criteria when reviewing the level of charges applied for the use of railway infrastructure, pursuant to the powers conferred on them in the legal order of which they form part, including — and this brings us to the fourth question referred by the Landgericht Berlin (Regional Court, Berlin) — fairness reviews the outcome of which may be that the court sets the charges at issue *ex aequo et bono*.

40. It is after all settled case-law that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. [26]

41. Consequently, civil courts which are called upon to verify the fairness of charges for the use of railway infrastructure on the basis of Paragraph 315 of the BGB and, if appropriate, to set the level of those charges *ex aequo et bono*, must, on the one hand, when required to apply the national legislation governing railways, interpret that legislation in a manner consistent with Directive 2001/14 and, on the other hand, when departing from that legislation in their assessment of the fairness of the charges, take into account the criteria established by that directive and the objectives which it pursues, and ensure that the practical effectiveness of its provisions is preserved.

23 Thus, in accordance with recital 11 of Directive 2001/14, charging and capacity allocation schemes must not only permit equal and non-discriminatory access for all undertakings but also attempt 'as far as possible to meet the needs of all users and traffic types in a fair and non-discriminatory manner …'. Recital 17 itself stipulates that '[i]t is important to have regard to the business requirements of both applicants and the infrastructure manager'. Recital 36 refers to the objective of establishing 'appropriate and fair levels of infrastructure charges'. See also recitals 46 and 49.

24 Article 12 of Directive 2001/14 reads as follows: '[i]nfrastructure managers may levy an appropriate charge for capacity that is requested but not used. This charge shall provide incentives for efficient use of capacity'.

25 Those conditions were expressly set out in the proposal for a Council directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, cited in footnote 15 above; see Article 13 of Directive 2001/14.

26 See the judgment of 10 April 1984, *Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26).

42. In this regard I note that, in its judgment of 28 February 2013 in *Commission* v *Germany* (C-556/10, EU:C:2013:116), concerning an action for failure to fulfil obligations calling into question in particular Paragraph 14(4) AEG,[27] the Court held that, in order to comply with the objectives pursued by Directive 2001/14, the infrastructure usage charge constitutes a minimum, corresponding to the cost that is directly incurred as a result of operating the railway service as provided for in Article 7(3) of the directive, and a maximum, arising from the total costs incurred by the infrastructure manager, as provided for in Article 8(1) of the directive, and that, between those two extremes, the directive provides that the charge may vary by the inclusion of a charge which reflects the scarcity of capacity, as provided for in Article 7(4) of the directive, the cost of environmental effects referred to in Article 7(5) or specific investment projects, as mentioned in Article 8(2),[28] as well as the discounts provided for in Article 9.

43. It is on the basis of those criteria and with due regard for those factors that the civil court must carry out a fairness review on the basis of Paragraph 315 of the BGB and, if appropriate, determine a fair level for the charge.

44. Furthermore, while it follows from Directive 2001/14 — in particular recital 11, which states that charging schemes must attempt 'as far as possible to meet the needs of all users and traffic types in a fair and non-discriminatory manner', and recital 17, which stipulates that '[i]t is important to have regard to the business requirements of both applicants and the infrastructure manager' — that the taking into consideration and reconciliation of the respective interests of the parties to the railway infrastructure usage agreement is not entirely ruled out, the courts called upon to verify the fairness of the charges imposed by the infrastructure manager must nevertheless take account, in their assessment, of the fact that, for reasons of transparency and with a view to ensuring non-discriminatory treatment, those charges are set in advance and by category of user, and that, as such, they are able only to a very limited extent to reflect the actual situation of a given railway undertaking.

45. Those courts will also have to take account of the fact that one of the objectives pursued by Directive 2001/14, in particular in giving the infrastructure manager a margin of discretion in the determination of charges, is to allow the latter to use the charging scheme as a management tool to optimise the use of the infrastructure.[29]

46. In that context, and with more specific regard to the charges at issue in the dispute in the main proceedings, the court will also have to take into account the fact that the first paragraph of Article 12 of Directive 2001/14, which states that those charges must be appropriate, also defines them as having the purpose of providing incentives for efficient use of capacity.

27 See footnote 21 above.

28 Article 8(2) of Directive 2001/14 provides that, '[f]or specific investment projects, in the future, or that have been completed not more than 15 years before the entry into force of this Directive, the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of such projects if they increase efficiency and/or cost-effectiveness and could not otherwise be or have been undertaken. Such a charging arrangement may also incorporate agreements on the sharing of the risk associated with new investments'.

29 See to that effect the judgments of 28 February 2013, *Commission* v *Spain* (C-483/10, EU:C:2013:114, paragraph 44) and of 3 October 2013, *Commission* v *Italy* (C-369/11, EU:C:2013:636, paragraph 43).

2. The fairness review under Paragraph 315 of the BGB and the discretion available to the infrastructure manager in the determination of charges

47. Article 4(1) of Directive 2001/14 provides that, when establishing a charging framework, the Member States must respect the management independence of the infrastructure manager, whose responsibility it is, first, to determine the infrastructure usage charge and, secondly, to collect that charge. [30] As I have already noted, the objective pursued by that provision is, in particular, to allow the infrastructure manager to use the charging scheme as a management tool to optimise the use of the infrastructure within the framework defined by the Member States, to which end he must be afforded some discretion in setting the amount of charges. [31] On that basis, the Court has on two occasions already declared incompatible with the requirements of Article 4(1) of Directive 2001/14 national provisions transposing that directive which provided for the level of charges to be set by an act of the executive that was binding on the infrastructure manager. [32]

48. In the present case, neither the fairness review under Paragraph 315(1) of the BGB nor, in particular, the setting by the civil court, if appropriate, of a fair charge under Paragraph 315(3) is, to my mind, such as to call into question the infrastructure manager's independence as required by Article 4(1) of Directive 2001/14.

49. After all, it is clear from the documents before the Court, first, that, in the view of the Bundesgerichtshof (Federal Court of Justice), such a review is justified by the broad margin of discretion which the infrastructure manager enjoys under German law when it comes to deciding on the level of charges, secondly, that that review looks at the way in which the infrastructure manager uses that flexibility and, thirdly, that that review culminates in the determination of a replacement charge by the court only if the judicial proceedings establish that the charge imposed by the infrastructure manager is unfair. Such a mechanism for review and determination, far from being equatable to price regulation by the executive, itself often influenced by industrial, social and environmental policy considerations that do not reflect costs, is by its nature more akin to an unlimited judicial review of the infrastructure manager's charging decisions.

3. Interim conclusions

50. On the basis of the foregoing considerations, I consider that the provisions on infrastructure charges contained in Directive 2001/14, in particular Article 6(1) and Article 8(1) thereof, do not preclude a review, such as that carried out by the German civil courts on the basis of Paragraph 315 of the BGB, as to the fairness of railway infrastructure usage charges which are set unilaterally by the infrastructure manager in his contractual relationship with a railway undertaking, nor, if appropriate, the determination *ex aequo et bono*, by the courts, of the amount of those charges. It nevertheless falls to the national courts called upon to carry out such a review and make such a determination to take into account, in their assessment, the charging criteria laid down in Articles 7 to 12 of that directive and the objectives which it pursues and to ensure that the practical effectiveness of its provisions is preserved.

30 See the judgments of 28 February 2013, *Commission* v *Spain* (C-483/10, EU:C:2013:114, paragraph 39) and of 3 October 2013, *Commission* v *Italy* (C-369/11, EU:C:2013:636, paragraphs 41 and 42).

31 See the judgments of 28 February 2013, *Commission* v *Spain* (C-483/10, EU:C:2013:114, paragraph 44) and of 3 October 2013, *Commission* v *Italy* (C-369/11, EU:C:2013:636, paragraph 43).

32 See the judgments of 28 February 2013, *Commission* v *Spain* (C-483/10, EU:C:2013:114) and of 3 October 2013, *Commission* v *Italy* (C-369/11, EU:C:2013:636).

C – The first, second, fifth and sixth questions referred for a preliminary ruling

51. By its first, second, fifth and sixth questions, which should be examined together, the referring court wishes to ascertain whether the provisions of Article 4(5) and Article 30 of Directive 2001/14 preclude a review of the fairness of charges such as that carried out by the German civil courts on the basis of Paragraph 315 of the BGB.

52. More specifically, by its first question, the referring court wishes to ascertain whether an action for reimbursement must necessarily be brought, in accordance with the prescribed procedures, before the regulatory body established in accordance with Article 30 of Directive 2001/14[33] and the courts responsible for reviewing that body's decisions, while, by its second question, it asks whether such an action may be brought by an applicant even though the matter has not previously been referred to the national regulatory body. By its fifth and sixth questions, the referring court asks, in essence, whether the civil court has jurisdiction to settle disputes between the infrastructure manager and the holder of an access licence in relation to infrastructure usage charges when these are in principle a matter for the regulatory body, and what impact the exercise of that jurisdiction may have on the task given to that body of ensuring the uniform application of the legislation governing railways (sixth question) and on the infrastructure manager's obligation to apply the charging scheme in a non-discriminatory manner (fifth question).

53. Those questions touch on the most delicate aspect of this case, that is to say, in essence, the compatibility of a judicial review that operates alongside that established in accordance with Article 30 of Directive 2001/14 with, on the one hand, the powers which that article confers on the regulatory body (section 1) and, on the other hand, the infrastructure manager's obligation to ensure non-discriminatory access to the network for railway undertakings (section 2).

1. The fairness review under Paragraph 315 of the BGB and the powers of the regulatory body established in accordance with Article 30 of Directive 2001/14

54. It should be noted at the outset that Directive 2001/14 does not contain any provision which prohibits railway infrastructure usage charges from being made the subject of a judicial review to verify retrospectively whether they are fair.

55. A review of the level of charges which extends, in principle, to their fairness nevertheless falls within the powers of the body established in accordance with Article 30 of Directive 2001/14, paragraph 2(e) of which stipulates that 'an applicant'[34] may appeal to that body 'if it believes it has been *unfairly treated* (…)',[35] in particular in order to challenge decisions taken by the infrastructure manager with respect to 'the level or structure of infrastructure fees which it is, or may be, required to pay'.

56. It is true that, in accordance with Article 30(3) of Directive 2001/14, the regulatory body's monitoring of the level of charges is confined to ensuring that they comply with Chapter II of that directive,[36] whereas the scope of the fairness review carried out by the civil court on the basis of Paragraph 315 of the BGB is broader than a mere assessment of whether the charges are in

33 Article 30(1) of Directive 2001/14 provides as follows: '[w]ithout 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. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies'.

34 The term 'applicant' is defined in Article 2(b) of Directive 2001/14 as 'a licensed railway undertaking and/or an international grouping of railway undertakings, and, in Member States which provide for such a possibility, other persons and/or legal entities with public service or commercial interest in procuring infrastructure capacity (…) for the operation of railway service on their respective territories'.

35 Italics added.

36 Article 30(3) of Directive 2001/14 provides that 'the regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory'.

conformity with the provisions of the German legislation governing railways. As I submitted above, however, the civil courts are bound, when conducting such a review, to observe the relevant provisions of Chapter II of Directive 2001/14.[37] It follows that that review operates alongside the monitoring system prescribed by the directive but is in danger of overlapping with it.

57. However, for the reasons which I shall explain below, I am of the opinion that neither the establishment of a regulatory body acting as an appeal authority, notwithstanding that it is independent and has the technical expertise necessary to perform the task assigned to it, nor the conferment on it of a general power to review the charges adopted by the infrastructure manager, including, in principle and on the terms indicated, the assessment of their fairness, can have the effect of depriving railway undertakings of a judicial remedy, made available to them by a provision of national law as interpreted and applied by the courts of the Member State concerned, allowing them to ask the civil court to verify the fairness of the contractual charges unilaterally set by the infrastructure manager with a view to obtaining reimbursement of those charges to the extent that they exceed the level deemed fair by that court.

58. In the first place, it is reasonable to ask whether the body established in accordance with Article 30 of Directive 2001/14 is empowered to examine a complaint concerning the level of charges which have already been paid and may no longer apply. After all, even assuming, as the Commission suggests, that use of the term 'applicant' in Article 30(2) does not necessarily mean that a complaint may be lodged only until such time as an agreement has been concluded with the infrastructure manager, the fact remains that Article 30(2)(e) of that directive, which states that the complaint may concern the level or structure of fees which the party concerned '*is*, or *may be*, required to pay',[38] seems to rule out the making of references to that body to challenge charges that no longer apply or agreements that have already been executed.

59. It is clear from the exchange of argument and evidence before the Court, however, that an action under Paragraph 315 of the BGB is used mainly to obtain reimbursement of charges which have already been paid.[39] This is confirmed both by the facts of the dispute in the main proceedings, which concerns a request for the reimbursement of cancellation charges paid by CTL Logistic between 2004 and 2011, and by those of the dispute that gave rise to the reference to the Court by the Bundesgerichtshof (Federal Court of Justice) (the subject of pending Case C-344/16, referred to above), which concerns a request for the reimbursement of railway station usage charges paid by Die Länderbahn between 2006 and 2008.

60. In the second place, while the centralised monitoring of railway infrastructure usage charges by the regulatory body established in accordance with Article 30 of Directive 2001/14 is undeniably of fundamental importance in the general scheme of that directive, as DB Netz and the Commission have amply illustrated in their observations before the Court, it is my view that the uniformity requirements associated with the creation of such a monitoring system do not in themselves

37 See points 40 to 46 above.

38 Italics added.

39 I note that, in its answers to the written questions put by the Court, the German Government stated that the power of the German regulatory body, and therefore of the administrative courts reviewing the legality of that body's decisions, is confined to restoring legality for future purposes and that cases concerning situations in the past are dealt with by the civil courts. Paragraph 14f(1) AEG provides that the regulatory body may of its own motion review the conditions for use of the rail network, the conditions for use of service facilities and the provisions concerning the amount or structure of usage and other charges applied by railway infrastructure management undertakings. It may, for future purposes, either require railway infrastructure management undertakings to amend those conditions or charging rules as it directs, or cancel them if they are in breach of the provisions of the railway legislation governing access to the railway infrastructure. Subparagraph 2 of that paragraph provides that, in the absence of an agreement on access to the rail network or relating to a framework agreement, decisions adopted by the railway infrastructure undertaking may be reviewed by the regulatory body on application or of its own motion. Applications to that effect may be made by access licence holders whose right of access to the railway infrastructure may be adversely affected. The review may in particular cover the amount and structure of usage and other charges.

constitute grounds on which the Court should be minded to close the door to a judicial remedy under national law which railway undertakings are able to use in order, in accordance with the principles established by that directive, to safeguard rights which they enjoy under it, in particular the right of access to the railway infrastructure on equitable terms.

61. For, on the one hand, I would observe that those requirements do not make it impossible for a review of the level of charges which is external to that provided for by that directive to be carried out, both administratively and judicially, on the basis of the provisions of competition law,[40] and that there may therefore be exceptions to the centralised monitoring system sought by Directive 2001/14.[41] On the other hand, I would recall that recital 46 of Directive 2001/14, while stating that the establishment of a regulatory body to act as an appeal body serves to meet the requirement for 'efficient management' and 'fair and non-discriminatory use of rail infrastructure', is at pains to point out that that state of affairs does not preclude the possibility of judicial review ('notwithstanding the possibility of judicial review').

62. To my mind, nothing to the contrary can be inferred from the judgment of 11 July 2013, *Commission* v *Czech Republic* (C-545/10, EU:C:2013:509) or from the Opinion delivered by Advocate General Jääskinen in *Commission* v *Czech Republic* (C-512/10, C-545/10, C-625/10, C-627/10 and C-412/11, EU:C:2012:791),[42] to which the Commission and BD Netz refer, in different connections, in their written observations before the Court. The review at issue in that case was, after all, an *additional administrative review* by the Ministry of Transport of the decisions taken by the body established by the Member State concerned in accordance with Article 30 of Directive 2001/14, not a judicial review of the charges set by the infrastructure manager in his contractual relationship with a railway undertaking.

63. In the third place, it seems to me that the risks to the consistency and uniformity of the charging review system, as advanced by DB Netz and the Commission in their observations before the Court, should not be overestimated.

64. First, the risk that the making of simultaneous references to the regulatory body and the civil court may, as the Commission puts it, give rise to the 'juxtaposition of two uncoordinated decision-making pillars' seems small. After all, it is clear from the German Government's answers to the Court's written questions that the civil courts cannot review the supervisory body's final decisions and that there is in Germany a common chamber of the supreme courts which has as its purpose to exclude divergent decisions by the administrative and civil courts. As regards the fact, mentioned by DB Netz, that, in an action under Paragraph 315 of the BGB, the civil court may, in common with the regulatory body and the administrative court, be called upon to interpret the provisions of the German legislation governing railways, I would simply observe that, in principle, it falls within the procedural autonomy of the Member States to decide which courts have jurisdiction to interpret their domestic law, including acts adopted to transpose EU law.

40 Unlike Directive 2001/14, Directive 2012/34 now explicitly recognises, in Article 56(2), that the powers of the regulatory body are without prejudice to the powers of the national competition authorities.

41 I would further observe that Directive 2012/34 also gives the national parliaments of some Member States the right to review the level of charges determined by the infrastructure manager in order to ensure that charges 'comply with this Directive, the established charging framework and charging rules'; see the fifth subparagraph of Article 29(1).

42 In point 107 of his Opinion (C-545/10, EU:C:2012:791), Advocate General Jääskinen had in particular pointed up the uniqueness of the body provided for in Article 30 of Directive 2001/14. The Court, for its part, simply stated that 'Article 30 of Directive 2001/14 must be interpreted as meaning that the administrative decisions adopted by the regulatory body can only be subject to judicial review'; see paragraph 104 of the judgment of 11 July 2013, *Commission* v *Czech Republic* (C-545/10, EU:C:2013:509).

65. Secondly, the possibility that the infrastructure manager and a railway undertaking may hold negotiations with a view to reaching an amicable settlement of the matter which fall squarely outside the regulatory body's scrutiny, contrary to the provisions of the second and third sentences of Article 30(3) of Directive 2001/14,[43] is also easily avoidable in my opinion. After all, even assuming that actions under Paragraph 315 of the BGB with respect to the fairness of railway network usage charges lend themselves to an amicable settlement, taking into account also the prohibition laid down in Article 30(3) of the aforementioned directive, any conflict with that provision can be avoided simply by inviting that body to be present at the negotiations between the parties or by duly informing it that they are taking place, which the court hearing such an action should be at liberty to do.

66. Finally, with regard to the argument that the civil courts have no specialist knowledge in the field of railway legislation, I would simply point out that, unlike other directives in the field of network economies, Directive 2001/14 does not expressly provide that the court responsible for hearing appeals against the decisions of the regulatory authority should have specific technical expertise.[44] Any lack of such expertise cannot therefore, in itself, be a justification for a finding that the fairness review under Paragraph 315 of the BGB is incompatible with Directive 2001/14 and, in particular, with the system for the centralised monitoring of infrastructure usage charges which that directive introduces.

67. In the fourth and final place, it is not possible, in my view, to base an argument alleging such incompatibility on Article 30(6) of Directive 2001/14, which provides that decisions taken by the regulatory body are to be subject to judicial review.

68. That provision, after all, simply requires the Member States to put in place a mechanism providing for a right of judicial appeal against the regulatory body's decisions and is not intended to harmonise national rules and practices concerning the judicial procedures applicable in the field of railway infrastructure charges. Accordingly, that provision does not support the inference of any indication as to the nature and extent of the judicial review which the national court must carry out in respect of those decisions,[45] that review being entrusted to the administrative courts under German law. Nor does that provision alone support the inference that any judicial review of infrastructure charges that is conducted outside that appeal mechanism is impermissible from the point of view of Directive 2001/14.

69. In that regard, I would observe that it is clear from the German Government's answers to the Court's written questions that the civil courts are recognised by case-law as being able to conduct fairness reviews under Paragraph 315 of the BGB in other regulated sectors too, such as energy, inasmuch as the undertaking subject to regulation has some discretion in relation to charging.

2. The fairness review under Paragraph 315 of the BGB and the infrastructure manager's obligation to guarantee non-discriminatory access to the network for railway undertakings

70. Article 4(5) of Directive 2001/14 requires infrastructure managers to ensure that the application of the charging scheme 'results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market …'.

43 This provision provides that '[n]egotiation 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'.

44 See in particular Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

45 See, by analogy, the judgment of 13 October 2016, *Polkomtel* (C-231/15, EU:C:2016:769, paragraph 22) and my Opinion in *Koninklijke KPN and Others* (C-28/15, EU:C:2016:310, point 48).

71. The referring court, DB Netz and the Commission have doubts about whether compliance with such an obligation and, more generally, the maintenance of non-discriminatory conditions for use of the network are compatible with the review as to the fairness of charges provided for in Paragraph 315 of the BGB.

72. Non-discriminatory access to and use of railway infrastructure is undoubtedly one of the main objectives of Directive 2001/14[46] and one which that directive pursues, on the one hand, by imposing on the infrastructure manager specific obligations in relation to the provision of information to undertakings and the preparation and application of charging and invoicing rules, and, on the other hand, by conferring on the regulatory body established in accordance with Article 30 the task of monitoring compliance with those obligations, either of its own motion or at the request of an undertaking which considers itself to have been the subject of discriminatory treatment.

73. Consequently, if it were to prove to be the case that the review of railway infrastructure usage charges by the civil court under Paragraph 315 of the BGB may impede the attainment of such an objective, it would have to be concluded that that review is incompatible with Directive 2001/14.

74. In my opinion, however, that is not the case.

75. Like the judgments given by the civil courts on the basis of Paragraph 315 of the BGB, the regulatory body's decisions on complaints raised by applicants are in principle adopted by reference to a particular case[47] and, in accordance with the second subparagraph of Article 30(5) of Directive 2001/14, have *inter partes* effects ('shall be binding on all parties covered by that decision').

76. It is true that, where necessary, in particular in order to prevent a disparity in the level of charges giving rise to discrimination, those decisions may contain orders requiring the infrastructure manager to amend the conditions for use of the network as they apply to all users, not only the undertaking that lodged the complaint, whereas no such order may be made by the civil courts adjudicating on an action under Paragraph 315 of the BGB.

77. However, contrary to the argument put forward by DB Netz and the Commission, I can see no major objections to the notion of such an order being made, where appropriate, by the regulatory body as part of its supervisory functions following a civil court decision which ultimately has to be transposed to other users, in particular where the network manager, who has an obligation to ensure the non-discriminatory treatment of undertakings with access to the infrastructure and was a party to the proceedings before that court, does not do so on his own initiative.

78. I would observe, moreover, that, if a decision taken on the basis of Paragraph 315 of the BGB were to give rise to discrimination against undertakings in the same situation as the undertaking which brought the action before the civil court, those undertakings would have standing, under Article 30(2) of Directive 2001/14, to lodge a complaint with the regulatory body with a view to having the same charging treatment applied to them.

79. Those various mechanisms — initiative by the infrastructure manager, intervention by the regulatory body of its own motion, reference to that body by an undertaking which considers itself to have been discriminated against — should allow the level of charges to be adjusted, within an acceptable period of time, for all the users concerned, where this proves necessary following the civil court's decision.

46 See, for example, recitals 5 and 11 of Directive 2001/14.

47 I note in this regard that, in its answers to the Court's written questions, the German Government stated that, pursuant to the case-law of the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the regulatory body and, therefore, the administrative courts are prohibited from ruling on the individual application of conditions of use in bilateral relations between the applicant and the railway network manager and that that body's decisions are always applicable to all users.

80. Furthermore, given that an action under Paragraph 315 of the BGB is, as noted above, used largely to seek the reimbursement of charges already paid, which may no longer apply, it is reasonable to assume that such a need for adjustment is unlikely to arise on a regular basis. Where the civil court's decision relates only to the past, the remedy provided by Paragraph 315 of the BGB is, in principle, still open to undertakings which have been required to pay the same charges, now declared unfair, for the purposes of obtaining reimbursement of the amounts paid in excess.

3. Interim conclusions

81. In the light of the foregoing considerations, I consider that Article 4(5) and Article 30 of Directive 2001/14 do not preclude a review, such as that carried out by the German civil courts on the basis of Paragraph 351 of the BGB, as to the fairness of railway infrastructure usage charges set unilaterally by the infrastructure manager in his contractual relationship with a railway undertaking, nor, where appropriate, the determination *ex aequo et bono*, by those courts, of the amount of those charges.

III – Conclusion

82. On the basis of all the foregoing considerations, I suggest that the Court's answer to the questions referred for a preliminary ruling by the Landgericht Berlin (Regional Court, Berlin, Germany), taken together, should be that the provisions of Directive 2001/14, and in particular Article 4(5), Article 6(1) and Article 8(1), relating to infrastructure charges, and Article 30, concerning the powers of the regulatory body, do not preclude a review, such as that carried out by the German civil courts on the basis of Paragraph 315 of the BGB, as to the fairness of railway infrastructure usage charges set unilaterally by the infrastructure manager in his contractual relationship with a railway undertaking, nor, where appropriate, the determination *ex aequo et bono*, by those courts, of the amount of those charges. It nevertheless falls to the national courts called upon to carry out such a review and make such a determination to take into account, in their assessment, the charging criteria laid down in Articles 7 to 12 of that directive and the objectives which it pursues, and to ensure that the practical effectiveness of those provisions is preserved.