Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

28 February 2013 *

(Failure of a Member State to fulfil obligations — Transport — Development of the Community's railways — Directive 91/440/EEC — Article 6(3) and Annex II — Directive 2001/14/EC — Articles 4(2) and 14(2) — Infrastructure manager — Organisational and decision-making independence — Holding company structure — Directive 2001/14 — Articles 7(3) and 8(1) — Setting charges on the basis of direct costs — Levying of charges — Direct costs — Total costs — Directive 2001/14 — Article 6(2) — No incentive to reduce costs — Directive 91/440 — Article 10(7) — Directive 2001/14 — Article 30(4) — Regulatory body — Powers)

In Case C-556/10,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 26 November 2010,

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

applicant,

v

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

defendant,

supported by:

Czech Republic, represented by M. Smolek, J. Očková and T. Müller, acting as Agents,

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

interveners,

THE COURT (First Chamber),

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

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 23 May 2012,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that:

— by failing to adopt the measures necessary to ensure that the entity entrusted with the exercise of essential functions listed in Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25), 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'), is independent of the undertaking which provides rail transport services;

— by failing to adopt incentives to reduce costs;

— by failing to ensure the correct transposition of the provisions on the levying of charges for the use of railway infrastructure laid down in Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2001 L 75, p. 29), as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 2001/14'); and

— by failing to endow the regulatory body provided for in Article 30 of Directive 2001/14 with certain powers with regard to obtaining information and imposing penalties,

the German Federal Republic has failed to fulfil its obligations under Article 6(3) of, and Annex II to, Directive 91/440, Articles 4(2) and 14(2) of Directive 2001/14, Articles 6(2), 7(3) and 8(1) of that directive and Article 30(4) of Directive 2001/14 in conjunction with Article 10(7) of Directive 91/440.

Legal context

European Union law

Directive 91/440

2 The fourth recital in the preamble to Directive 91/440 is worded as follows:

'… 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; … given this situation, it is necessary for these two activities to be separately managed and have separate accounts'.

3 Article 6(1) to (3) of Directive 91/440 provides as follows:

‘1. 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.

2. Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity.

3. Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.

Member States may, however, assign to railway undertakings or any other body the collecting of the charges and the responsibility for managing the railway infrastructure, such as investment, maintenance and funding.’

4 Article 10(7) of Directive 91/440 is worded as follows:

‘Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body established pursuant to Article 30 of Directive 2001/14/EC, or any other body enjoying the same degree of independence shall monitor the competition in the rail services markets, including the rail freight transport market.

That body shall be set up in accordance with the rules in Article 30(1) of the said Directive. Any applicant or interested party may lodge a complaint with this body if it feels that it has been treated unjustly, has been the subject of discrimination or has been injured in any other way. On the basis of the complaint and, where appropriate, on its own initiative, the regulatory body shall decide at the earliest opportunity on appropriate measures to correct undesirable developments in these markets. In order to ensure the necessary possibility of judicial control and the requisite cooperation between national regulatory bodies, Article 30(6) and Article 31 of the said Directive shall apply in this context.’

5 Annex II to Directive 91/440 gives the list of essential functions referred to in Article 6(3) thereof as follows:

‘

— preparation and decision-making related to the licensing of railway undertakings including granting of individual licenses,

— decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths,

— decision making related to infrastructure charging,

— monitoring observance of public service obligations required in the provision of certain services’.

Directive 2001/14

6 Recitals 12, 16, 20, 40 and 46 in the preamble to Directive 2001/14 set out the directive's objectives as follows:

'(12) Within the framework set out by Member States charging and capacity-allocation schemes should encourage railway infrastructure managers to optimise use of their infrastructure.

…

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

…

(20) It is desirable to grant some degree of flexibility to infrastructure managers to enable a more efficient use to be made of the infrastructure network.

…

(40) A railway infrastructure is a natural monopoly. It is therefore necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently.

…

(46) The efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of these Community rules and acts as an appeal body, notwithstanding the possibility of judicial review.'

7 The first subparagraph of Article 1 of Directive 2001/14 provides as follows:

'This Directive concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity.'

8 Article 4(1) and (2) of that directive is worded as follows:

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

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

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

9 Article 6 of Directive 2001/14 states as follows:

‘1. 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.

2. Infrastructure managers shall, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

3. Member States shall ensure that the provision set out in paragraph 2 is implemented, either through a contractual agreement between the competent authority and infrastructure manager covering a period of not less than three years which provides for State funding or through the establishment of appropriate regulatory measures with adequate powers.

…

5. A method for apportioning costs shall be established. Member States may require prior approval. This method should be updated from time to time to the best international practice.’

10 Article 7(3) to (5) of Directive 2001/14 provides as follows:

‘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.

4. The infrastructure charge may include a charge which reflects the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion.

5. The infrastructure charge may be modified to take account of the cost of the environmental effects caused by the operation of the train. Such a modification shall be differentiated according to the magnitude of the effect caused.’

11 Article 8(1) and (2) of Directive 2001/14 is worded as follows:

‘1. 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.

2. For 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.'

12 Article 9(1) of Directive 2001/14 provides as follows:

'Without prejudice to Articles 81, 82, 86 and 87 of the Treaty and notwithstanding Article 7(3) of this Directive, any discount on the charges levied on a railway undertaking by the infrastructure manager, for any service, shall comply with the criteria set out in this Article.'

13 Article 14(1) and (2) of Directive 2001/14 is worded as follows:

'1. Member States may establish a framework for the allocation of infrastructure capacity while respecting the management independence laid down in Article 4 of Directive 91/440/EEC. Specific capacity allocation rules shall be established. The infrastructure manager shall perform the capacity allocation processes. In particular, the infrastructure manager shall ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.

2. Where the infrastructure manager, in its legal form, organisation or decision-making functions is not independent of any railway undertaking, the functions referred to in paragraph 1 and described in this chapter shall be performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking.'

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

'1. … Member States shall establish a regulatory body. … The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.

2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:

…

3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory …

4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.

5. The regulatory body shall be required to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.

Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision.

…'

German law

15 Paragraph 5a(2) of the General Railways Law (Allgemeines Eisenbahngesetz) of 27 December 1993 (BGBI. I, p. 2378, 2396), as amended by the Law of 29 July 2009 (BGBI. I, p. 2542) ('the General Railways Law'), provides as follows:

'In the exercise of their functions, the railway supervisory authorities may take, in respect of those bound by the provisions cited in Paragraph 5(1), the measures necessary in order to deal with infringements that are established and to prevent future infringements of the provisions referred to in Paragraph 5(1).'

16 Paragraph 9a(1) of the General Railways Law is worded as follows:

'(1) Public railway managers must be independent of all rail transport undertakings in their legal form, organisation and decision making where the decisions at issue concern path allocation and charging. In order to attain the objectives set out in the first sentence, it is necessary:

1. within railway companies which are both rail transport undertakings and railway managers, to separate those two activities and assign each of them to one or more separate companies;

2. to ensure that contracts entered into between a railway manager and third parties are in a form that guarantees the railway manager its organisational autonomy;

3. to authorise only staff of the railway manager who do not perform functions within rail transport undertakings or within undertakings associated with the latter to take decisions concerning the working timetable, path allocation and charging;

4. to consider as unauthorised any instructions given by third parties to the railway manager or its staff in respect of decisions concerning the working timetable, path allocation and charging;

5. to draw up, maintain and publish, within undertakings within the meaning of points 2 and 3 of the first sentence of Paragraph 9(1), regulations that prevent parties outside the railway manager from exerting any influence over decisions concerning the working timetable, path allocation and charging; those regulations must, in particular, list the specific obligations imposed on employees to prevent such influence from being exerted; railway managers shall also be required, if requested by the competent supervisory authority, to inform the latter of the name of a representative ensuring compliance with those regulations; that representative shall be required to send to the competent supervisory authority each year a report on issues that have arisen and the measures taken to resolve them;

6. to appoint different persons to positions on the supervisory boards of undertakings within the meaning of points 2 and 3 of the first sentence of Paragraph 9(1); thus, the supervisory authority of the railway manager shall not contain either members of the supervisory authorities of undertakings within the meaning of points 2 and 3 of the first sentence of Paragraph 9(1) or members of the staff of those undertakings; this provision shall also apply to other firms held by the parent company.'

17 Paragraph 14(4) of the General Railways Law states as follows:

'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 statutory 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. In the order adopted under points 6 and 7 of Paragraph 26(1):

1. derogations from determining the amount of the charge according to the first sentence may be authorised if the costs are covered in another way, or

2. the competent supervisory authority may be authorised to exempt, by a general decision, in consultation with the Federal Agency for Electricity, Gas, Telecommunications, Post and Railways (the regulatory body), all railway managers from complying with the requirements laid down in the first sentence.'

18 Paragraph 14c of the General Railways Law is worded as follows:

'(1) In the exercise of its functions, the regulatory body shall take, in respect of public railway infrastructure undertakings, the measures necessary in order to deal with infringements that are established and to prevent future infringements of the provisions of railway legislation concerning access to railway infrastructure.

(2) Entities authorised to have access to the infrastructure, public railway infrastructure undertakings and their staff must allow the regulatory body and its representatives, in the performance of their tasks:

1. to enter business premises and facilities during normal working hours; and

2. to inspect the books, business documents, files and other documents and to store them on appropriate data media.

(3) Entities authorised to have access to infrastructure, public railway infrastructure undertakings and their staff must provide the regulatory body and its representatives with:

1. all information;

2. all evidence;

3. all means and ancillary services needed in order to carry out their tasks.

   This provision shall apply also to talks, in progress or ended, concerning the amount of charges for infrastructure use and other charges. The information supplied must be correct and prepared in good faith. Any person required to supply information may refuse to answer questions where the answer would expose him, or one of the persons described in points 1 to 3 of Paragraph 383(1) of the Code of Civil Procedure, to the risk of criminal prosecution or proceedings for an administrative offence.

(4) Under the present law, the regulatory body may enforce its orders in accordance with the provisions governing the enforcement of administrative measures. The penalty payment may amount to EUR 500 000.'

19 Paragraph 1 of the acquisition and profit transfer agreement concluded on 1 June 1999 between Deutsche Bahn AG ('DB AG') and Deutsche Bahn Netz AG ('DB Netz'), entitled 'Management of [DB Netz]', in the version contained in the amending agreement of 2 May 2005, reads as follows:

'No derogation shall be made from the principle of the legal and organisational independence of [DB Netz] with regard to decisions concerning the working timetable, path allocation and charging. [DB AG] shall not give any instruction jeopardising that principle.'

20 Paragraph 4 of the rules of procedure of the Board of Directors of DB Netz, entitled 'Decision making', as amended with effect from 9 May 2005, reads as follows:

'…

3. Member of the Board of Directors performing functions in rail transport undertakings associated with [DB Netz] or in undertakings associated with such undertakings shall not take part in voting on the adoption of decisions concerning the working timetable, path allocation and charging. Nor shall they take part in the preparation of such decisions.'

The pre-litigation procedure and the procedure before the Court

21 In May 2007, the Commission sent a questionnaire to the German authorities in order to monitor transposition by the Federal Republic of Germany of Directives 2001/12, 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and 2001/14. That Member State replied by letter of 25 September 2007 and by further letter of 14 December 2007.

22 By letter of 26 June 2008, the Commission pointed out discrepancies between the German rail legislation and 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 and invited the Federal Republic of Germany to comply with those directives.

23 By letter of 22 October 2008, the Federal Republic of Germany responded to that letter of formal notice.

24 By letter of 24 February 2009, the Commission sent the Federal Republic of Germany a further letter of formal notice in which it alleged additional infringements, based on a combined reading of Directives 2001/14 and 91/440, concerning the levying of infrastructure charges and the powers of the German regulatory body.

25 By letter of 17 April 2009, the Federal Republic of Germany responded to that further letter of formal notice.

26 By letter of 9 October 2009, the Commission sent the Federal Republic of Germany a reasoned opinion in which it requested that Member State to take the measures necessary to comply with that opinion within two months of its notification.

27 By letter of 3 December 2009, the Federal Republic of Germany responded to the reasoned opinion, denying the failure alleged by the Commission.

28 Not being satisfied with that Member State's reply, the Commission decided to bring the present action.

29 By order of the President of the Court of 19 May 2011, the Czech Republic and the Italian Republic were given leave to intervene in support of the form of order sought by the Federal Republic of Germany.

The action

The complaint concerning the independence of the body entrusted with the exercise of essential functions listed in Annex II to Directive 91/440

Arguments of the parties

30 The Commission submits that the entity to which exercise of essential functions listed in Annex II to Directive 91/440 is entrusted must be independent not merely in legal terms but also in economic terms of the undertaking providing rail transport services.

31 In that regard it maintains that, although Article 6(3) of Directive 91/440 does not expressly require the entity to which the exercise of essential functions is entrusted to be 'independent' of any company which provides rail transport services, the term 'undertaking' used in that provision should, according to the case-law of the Court, none the less be interpreted as covering all entities which, even if they are legally separate, act as an 'economic unit'.

32 In the Commission's view, Article 6(3) of Directive 91/440 should be interpreted as meaning that essential functions performed by the infrastructure manager must be carried out by an entity that is not only separate from any rail undertaking in its legal form but also independent of such an undertaking in its organisation and decision making.

33 The Commission further maintains that, where those essential functions are performed by a company that is dependent on a railway holding company, as is the case with DB Netz, it is necessary to assess to what extent and in what circumstances the dependent company – which is moreover the rail infrastructure manager entrusted with the exercise of those essential functions – can be considered to be 'independent' of the undertaking providing rail transport services, that is, the holding company and the companies dependent on it providing services for the transport of passengers and goods, despite the fact that they belong to the same group.

34 The Federal Republic of Germany has allegedly not established any effective mechanisms to guarantee the organisational and decision-making independence of the rail infrastructure manager DB Netz or ensure that it performs essential functions listed in Annex II to Directive 91/440 independently. The Commission infers from this that that Member State has thus failed to comply with its obligations under Article 6(3) of, and Annex II to, Directive 91/440 and Articles 4(2) and 14(2) of Directive 2001/14.

35 For the purpose of examining whether the Member States are able to prove that their national railway holding companies or their other regulatory bodies guarantee the independence necessary for the performance of those essential functions and that conflicts of interest are avoided, the Commission disclosed in 2006 the criteria on the basis of which it examines the independence required by Directive 2001/14 and the measures envisaged to guarantee such independence. Those criteria are set out in Annex 5 to the working document produced by the Commission's staff accompanying the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 3 May 2006 on the implementation of the first railway package (COM(2006) 189) ('Annex 5').

36 The Commission maintains, first of all, that compliance with the independence requirements should be monitored by an independent authority, such as the rail regulatory authority or a third party. Competitors should have the possibility of lodging a complaint in the event of any breach of the independence requirements. The Commission considers that neither of those two provisions is complied with by the Federal Republic of Germany.

37 According to the Commission, it is apparent from Paragraph 5a of the General Railways Law that the Eisenbahn-Bundesamt (the Federal Railway Authority) is authorised only to implement provisions concerning independence that are already contained in German law, such as those in Paragraph 9a of that law. The Eisenbahn-Bundesamt has no powers with regard to the adoption of structural measures, such as amendment of the organisational structure of the holding company, or decisions concerning the organisational structure of the infrastructure manager in relation to the holding company, or concerning the replacement of directors who do not meet the independence criterion or the changing of organisational processes for the management of essential functions listed in Annex II to Directive 91/440.

38 In the second place, the Commission considers that there should be statutory or, at the very least, contractual provisions concerning independence governing the relationship between the holding company and the entity entrusted with essential functions and between the entity entrusted with essential functions and other rail service-providing undertakings in the group, or other entities which are controlled by the holding company, including the shareholders' meeting of the entity entrusted with essential functions.

39 The Commission contends that Paragraph 9a of the General Railways Law, which contains the provisions relating to independence, and the provisions of the rules of procedure of the railway holding company, such as Paragraph 1(3) of the acquisition and profit transfer agreement, which prohibit DB AG from giving instructions jeopardising the legal and organisational independence of DB Netz with regard to decisions concerning the working timetable, path allocation and charging, are not sufficient in themselves as safeguards to ensure the independence of essential functions listed in Annex II to Directive 91/440, avoid conflicts of interest or free the body entrusted with essential functions from the control of the holding company.

40 In the third place, the Commission considers that members of the board of directors of the holding company and of other undertakings within that company should not be on the board of directors of the entity entrusted with essential functions listed in Annex II to Directive 91/440.

41 In the Commission's view, it would be difficult to argue that the board of directors of the entity entrusted with those essential functions was independent in decision-making terms of the board of directors of the holding company if both boards were made up of the same persons. The Commission observes that there is no statutory provision precluding such a situation.

42 In the fourth place, there is no provision barring members of the board of directors of the entity entrusted with essential functions listed in Annex II to Directive 91/440 and senior staff members dealing with those functions, for a reasonable number of years after leaving the entity concerned, from accepting any senior position with the holding company or other bodies under its control.

43 No such provisions exist under German law and in practice many DB Netz directors have moved from that entity to the holding company or to other subsidiaries.

44 In the fifth place, the Commission contends that the board of directors of the entity entrusted with essential functions listed in Annex II to Directive 91/440 must be appointed under clearly defined conditions and give legal commitments to ensure the full independence of its decision making. It should be appointed and dismissed under the control of an independent authority.

45 In the sixth place, the Commission maintains that the entity entrusted with those essential functions must have its own personnel and be located in premises that are separate or have protected access. The rules of procedure of that entity or the contracts of employment concluded by it should clearly indicate that contact with the holding company and other companies under its control is to be limited to official communications in connection with the exercise of essential functions. Access to information systems should be protected in such a way as to ensure the independence of essential functions.

46 The Federal Republic of Germany contends that Articles 4(2) and 14(2) of Directive 2001/14 do not require full economic independence but simply the independence of the infrastructure manager in its legal form, organisation and decision making, and require this in the context of the adoption of certain clearly defined decisions such as path allocation and infrastructure charging, in accordance with Article 6(3) of Directive 91/440 in conjunction with Annex II to that directive.

47 The Federal Republic of Germany contends that the criteria for the assessment of independence set out in Annex 5 do not correspond with the relevant binding provisions in the present case, laid down in Article 6(3) of, and Annex II to, Directive 91/440 and in Articles 4(2) and 14(2) of Directive 2001/14. Furthermore, the document containing that Annex has not been published in the *Official Journal of the European Union* and does not constitute a binding legal act. It cannot therefore be relied on in the present proceedings.

48 The Italian Government intervenes in the proceedings solely in support of the arguments put forward by the Federal Republic of Germany in response to the questions raised by the Commission's first complaint.

49 The Italian Republic observes that the separation requirement laid down by the European Union legislature with regard to the functions of rail transport and infrastructure management is an accounting requirement.

50 That Member State states, with regard to the holding company model, that the Commission's approach is inconsistent in so far as it leads to a presumption of incompatibility; the Commission alleges that that model is legally recognised but is compatible with Directives 91/440 and 2001/14 only if the holding company does not possess, or does not exercise, any of the powers pertaining to such a holding.

51 The legislation of the European Union was not by any means intended to introduce a requirement to separate ownership structures or systems of organisation having equivalent effects in terms of management autonomy, but rather to respect and guarantee the discretionary power of the Member States and the undertakings concerned to adopt different types of organisation models.

52 The Italian Republic, in the light of both the wording and purpose of that legislation, cannot accept the Commission's contention that the essential functions listed in Annex II to Directive 91/440 should be assigned to entities that are outside the group to which a railway undertaking belongs.

Findings of the Court

53 By its complaint, the Commission claims that the Federal Republic of Germany failed to adopt specific measures to guarantee the independence of the rail infrastructure manager DB Netz, which was entrusted with certain essential functions listed in Annex II to Directive 91/440, in spite of the fact that DB Netz is part of a holding company, DG AG, comprising rail transport undertakings.

54 The Commission is of the view that, in order to guarantee the independence of that entity in its legal form, organisation and decision-making functions within the meaning of Articles 4(2) and 14(2) of Directive 2001/14, the Member State concerned must adopt specific detailed rules, as provided for in Annex 5.

55 It should be recalled that Article 6(1) and (2) of Directive 91/440 requires only that the accounts for business relating to the provision of transport services by railway undertakings be kept separate from the accounts for business relating to the management of the rail infrastructure, since business relating to the provision of transport services by railway undertakings and business relating to the management of rail infrastructure may be kept separate by means of the organisation of distinct divisions within a single undertaking, as is the case with a holding company.

56 However, Article 6(3) of Directive 91/440 provides that, in order to guarantee equitable and non-discriminatory access to rail infrastructure, Member States are to take the measures necessary to ensure that the essential functions listed in Annex II to that directive are entrusted to bodies or firms that do not themselves provide any rail transport services and that this objective must be shown to have been achieved, regardless of the organisational structures established.

57 In any event, Articles 4(2) and 14(2) of Directive 2001/14 provide that the bodies responsible for charging and allocation must be independent in their legal form, organisation and decision-making functions.

58 In the present case, DB Netz, as rail infrastructure manager, forms part of the undertaking DB AG, which, as holding company, also supervises rail undertakings. Therefore, in order to perform charging and allocation functions, DB Netz must be independent of DB AG in its legal form, organisation and decision-making functions.

59 It is not disputed that DB Netz has separate legal personality from DB AG as well as its own bodies and resources, which are different from those of DB AG.

60 As to the remainder, the Commission argues in its application that, for the purpose of determining whether an infrastructure manager, such as DB Netz, which forms part of a company some of whose business units are rail undertakings has independent decision-making powers, it is necessary to apply Annex 5.

61 Annex 5 thus provides that compliance with the independence requirements should be monitored by an independent authority or a third party, that that there should be statutory or at least contractual provisions concerning independence, that the holding of concurrent positions as between the boards of directors of the different companies forming part of the holding company should be prohibited, that a waiting period should be established for board members in the event of their transfer between the body responsible for essential functions listed in Annex II to Directive 91/440 and any other body within the holding company, that members of the board of directors of the railway infrastructure manager should be appointed and dismissed under the control of an independent authority and that the entity entrusted with those essential functions must have its own personnel and be located in separate premises.

62 First, it should be noted that Annex 5 has no binding legal value. It has never been published in the *Official Journal of the European Union* and was made public five years after the entry into force of Directive 2001/14, that is, three years after the expiry of the period prescribed for the transposition of the directive. Accordingly, at the time when Directives 91/440 and 2001/14 were implemented, the criteria set out in that annex did not exist. Moreover, irrespective of that time-lag, that annex and the criteria laid down therein were referred to in neither Directive 91/440 nor Directive 2001/14, nor indeed in any other legislative measure. Therefore, a Member State cannot be criticised for failing to include those criteria in the laws or regulations transposing Directives 91/440 and 2001/14.

63 Second, the Commission's comparison with the provisions relating to the internal market in electricity and the internal market in natural gas cannot be accepted. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) confer on the regulatory authority substantial supervisory powers as regards the independence of the transmission system operator. Under Article 19(2) of both those directives, the regulatory authority has the power to raise objections concerning the appointment and dismissal of persons responsible for the executive management and members of the administrative bodies of the transmission system operator. Article 19(3) of the directives provides that no professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator may be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator. In accordance with Article 19(4) of the directives, the employees of the transmission system operator cannot hold any other position with any other part of the holding company within the energy sector. Article 19(7) of the directives provides that persons who have performed functions within the transmission system operator cannot, for a given period of time after termination of their term of office, hold a position with any other part of the vertically integrated undertaking.

64 Thus, both those directives lay down express provisions on the conditions under which a position may be held within the operating company and on periods of incompatibility, which is not the case with Directive 2001/14, which does not specify criteria concerning the independence which must exist between the infrastructure manager responsible for essential functions listed in Annex II to Directive 91/440 and the railway undertakings; such criteria cannot therefore be inferred from Directives 91/440 or 2001/14 and the Republic of Austria cannot be required to comply with them.

65 Accordingly, the Court finds that the failure to transpose into German law criteria such as those set out in Annex 5 cannot, of itself, lead to the conclusion that DB Netz does not, as infrastructure manager, have independent decision-making powers vis-à-vis DB AG.

66 According to settled case-law, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, inter alia, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41; Case C-335/07 *Commission* v *Finland* [2009] ECR I-9459, paragraph 46: and the judgment of 10 December 2009 in Case C-390/07 *Commission* v *United Kingdom*, paragraph 43).

67 However, the Commission has failed to provide any concrete evidence to show that DB Netz is not independent of DB AG as regards its decision-making arrangements.

68 In that regard it is apparent, in particular from Paragraph 1 of the acquisition and profit transfer agreement concluded on 1 June 1999 between DB AG and DB Netz and Paragraph 4 of the rules of procedure of the Board of Directors of DB Netz, that certain provisions in those private law measures are specifically directed at guaranteeing that, in practice, DB Netz enjoys independent decision-making powers vis-à-vis DB AG.

69 It was therefore for the Commission, in the light not only of the objectives of Directives 91/440 and 2001/14 but also all the factors pertaining to the relationship between DB Netz and DB AG, including factors of a private nature, to prove that, in practice, DB Netz is not independent of DB AG in its decision making.

70 It follows from the foregoing considerations that the Commission's complaint relating to the independence of the body to which the exercise of essential functions listed in Annex II to Directive 91/440 is entrusted must be rejected.

The complaint relating to charging

Arguments of the parties

71 The Commission claims that the Federal Republic of Germany has failed to fulfil its obligations under Articles 7(3) and 8(1) of Directive 2001/14.

72 It argues that Paragraph 14(4) of the General Railways Law, by which the Federal Republic of Germany transposed those provisions, contains lacunae. Indeed, that provision does not always make it possible to determine with certainty whether the direct costs principle provided for in Article 7(3) of Directive 2001/14 is to be applied or the total costs principle set out in Article 8(1) of that directive, or the circumstances in which one or other of those principles is to be applied.

73 Furthermore, that Member State apparently opted for the total costs principle. However, it has failed to fulfil all the conditions necessary for the application of Article 8(1) of Directive 2001/14, in particular the condition requiring the circumstances to be specified in which a test of the capacity of the market to bear the costs must be carried out, which is necessary in order to determine whether all market segments can bear those costs.

74 The Federal Republic of Germany considers that, so far as taking competitiveness into account is concerned, the German legislative provisions fully meet the requirements laid down in the first sentence of Article 8(1) of Directive 2001/14. Directive 2001/14 does not require, so far as testing capacity to bear costs is concerned, that an assessment of competitiveness should be made for each market segment. Paragraph 14(4) of the General Railways Law, which transposed Article 8 of Directive 2001/14, requires, in accordance with the wording and objective of that directive, only those to whom that provision is addressed to guarantee competitiveness, in particular of international rail freight. Thus, the national law complies with the requirements and objectives laid down in Directive 2001/14.

75 Costs may be apportioned in full when determining the amount of the charge. DB Netz therefore has the power to set charges in such a way as to offset the infrastructure costs that are not covered by grants from the State.

76 The Federal Republic of Germany rebuts the Commission's argument that the German rules provide no definition of the market segments referred to in Article 8(1) of Directive 2001/14. It contends that it fully guarantees the effectiveness of that legislative objective by means of the third sentence of Paragraph 14(4) of the General Railways Law. Moreover, it is clear from the provisions concerning independence in price setting that European Union legislation leaves it to the undertakings operating in the market to assess the market's ability to pay. Article 8(1) of Directive 2001/14 does not expressly provide for any broader requirement with regard to procedure and control, inter alia for transport undertakings to provide information.

77 The Czech Republic supports the Federal Republic of Germany's arguments that the provisions cited by the Commission were properly implemented by that Member State, as regards both the complaints alleging incorrect transposition of the provisions of the European Union law at issue and the complaint alleging infringement of the provisions of Article 7(3) in conjunction with Article 8(1) of Directive 2001/14.

78 More specifically, with regard to infringement of Article 7(3) of Directive 2001/14, the Czech Republic considers that it is necessary to clarify the meaning of 'the cost that is directly incurred as a result of operating the train service', in order to determine whether or not the abovementioned provisions have been infringed.

Findings of the Court

79 By the complaint under consideration, the Commission claims in essence that the Federal Republic of Germany failed to adopt legislation which indicates without ambiguity whether it is necessary to apply the direct costs principle laid down in Article 7(3) of Directive 2001/14 or the total costs principle set out in Article 8(1) of the directive and the conditions under which one or the other of those principles is to be applied.

80 Article 7(3) of Directive 2001/14 provides that the charges for the minimum access package and track access to service facilities must be set at the cost that is directly incurred as a result of operating the train service, without prejudice to Article 7(4) or (5) or to Article 8.

81 In accordance with Article 8(1) of Directive 2001/14, if the market can bear it, mark-ups may be levied by the Member State in order to obtain full recovery of the costs incurred by the infrastructure manager.

82 It should be recalled that one of the objectives pursued by the charging system introduced by Directive 2001/14 is to ensure independence of management by the infrastructure manager. In other words, the latter must, as observed by the Advocate General at point 80 of his Opinion, use the charging system as a management tool. Thus, recital 12 in the preamble to that directive that states that charging and capacity-allocation schemes must encourage railway infrastructure managers to optimise use of their infrastructure within the framework set out by Member States. In order to make such optimisation possible, the managers must be granted some degree of flexibility, as mentioned in recital 20.

83 Similarly, the application of other provisions of Directive 2001/14 require that infrastructure managers be allowed some degree of flexibility, in order to encourage them to optimise use of their infrastructure. Indeed, Article 8(2) of the directive provides that the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of certain investment projects. Article 9 of the directive permits the infrastructure manager to introduce a system of discounts on charges levied by operators.

84 It should also be noted that Article 4(1) of Directive 2001/14 establishes a division of powers as between the Member States and the infrastructure manager with regard to charging schemes. The Member States are to establish a charging framework, while the determination and collection of the charge are tasks to be performed by the infrastructure manager. However, as the Advocate General stated at point 78 of his Opinion, the State may recover infrastructure costs in full by means of mark-ups, if the market can bear this and if in so doing it does not 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.

85 It is clear that, in order to comply with the objectives pursued by Directive 2001/14, the infrastructure charge constitutes, as observed by the Advocate General at point 77 of his Opinion, 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.

86 Between those two extremes, Directive 2001/14 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), as well as the discounts provided for in Article 9.

87 Accordingly, as regards the Commission's argument that it is not possible on the basis of Paragraph 14(4) of the General Railways Law to determine whether it is the principle of direct costs, set out in Article 7(3) of Directive 2001/14, or the principle of total costs, provided for in Article 8(1) of the directive, which is applicable, it should be noted, as observed at paragraphs 84 and 85 above, that those two principles are not interchangeable. The system provided for in Article 8(1) of Directive 2001/14 may be used only if the market can bear this, a market study being required in order to verify whether that is the case.

88 In the present case, the national provision in question allows full recovery of the costs incurred and gives the infrastructure manager the option of distinguishing between long-distance passenger services, short-distance passenger services and rail freight services, and also between market segments within those services. However, as the Advocate General observed at point 85 of his Opinion, Directive 2001/14 does not requires Member States to lay down more detailed rules on charging.

89 As regards the Commission's argument that a test of the market's capacity to bear the costs must be carried out in order to determine whether all segments of the market can bear those costs, it should be noted that such a test must be carried out by the infrastructure manager only if it intends to levy mark-ups on costs specifically on the basis of market segments. As pointed out at paragraph 84 above, the Member State is required only to establish a charging framework, while charging itself is a matter for the infrastructure manager. It follows that the Federal Republic of Germany is not required under Directive 2001/14 to lay down in its national legislation the detailed rules in accordance with which the infrastructure manager must determine the capacity of market segments to bear any increase in costs and the circumstances in which it is required to do so.

90 In the light of the foregoing considerations, the Commission's complaint relating to charging must be rejected.

The complaint relating to incentives to reduce costs

Arguments of the parties

91 The Commission submits that Article 6(2) of Directive 2001/14 has not been transposed into German law. According to that institution, none of the measures described by the Federal Republic of Germany provide the infrastructure manager with an incentive to limit the costs of provision of infrastructure or the level of access charges. In addition, the service and funding agreement concluded between the German State, DB AG's infrastructure undertakings and that company itself does not contain any provision envisaging a reduction in infrastructure costs and charges.

92 The Federal Republic of Germany maintains that Article 6(1) of Directive 2001/14 starts from the principle that there should be a balance between income from infrastructure charges and State funding, on the one hand, and infrastructure expenditure on the other. It considers that the level of infrastructure costs, the amount of access charges and the amount of State funding form an economic relationship which excludes unilateral legal requirements. Thus, the provisions of the directive give no grounds for concluding that there is a unilateral obligation to reduce costs or charges. The objective of reducing costs and access charges laid down in Article 6(2) of Directive 2001/14 is subject to the reservation that safety must be maintained and the quality of the infrastructure service improved.

93 That Member State also argues that Directive 2001/14 does not require an actual reduction in costs or access charges. Such a requirement should, on the contrary, be reconciled with the other charging structure requirements. Overall, it is necessary to attain the long term objective of balancing income and infrastructure expenditure.

94 The Federal Republic of Germany also considers that, in accordance with the wording of Article 6(3) of Directive 2001/14, the national legislature may decide which policy instrument it will use for the purpose of transposition, that is, either a contractual agreement between the competent authority and the infrastructure manager or appropriate regulatory measures.

95 That Member State contends that it has fully transposed the incentive scheme required by Article 6(2) of Directive 2001/14. The service and funding agreement (Leistungs- und Finanzierungsvereinbarung) ('the LuFV') meets the conditions required of a contractual agreement within the meaning of Article 6(3) of Directive 2001/14 and thus constitutes an effective system to encourage the reduction of costs and access charges, in accordance with Article 6(2) of that directive.

96 Indeed, the LuFV imposes on infrastructure managers among other things numerous obligations regarding quality assurance and information. The quality requirements imposed are structured in such a way as to ensure gradual improvement in the quality of railway infrastructure. That agreement limits grants from the Federal State for replacement of capital assets to an annual amount of EUR 2.5 billion and requires infrastructure managers to set aside their own financial resources for track maintenance.

97 Furthermore, there are in the railway sector numerous systemic factors that encourage cost reduction, with infrastructure managers having to be run as commercial undertakings required to observe the principles of the private sector, inter alia by means of competition-oriented business management in order to maximise profits, which provides DB Netz with a strong incentive to reduce its costs.

Findings of the Court

98 By the complaint under consideration, the Commission claims in essence that the Federal Republic of Germany failed to introduce measures to provide the infrastructure manager with an incentive to limit the costs of provision of infrastructure or to reduce the level of access charges.

99 The Commission and the Federal Republic of Germany disagree as to whether the infrastructure manger should be the subject of both incentives to lower the costs of provision of infrastructure and – irrespective of such measures – incentives to reduce access charges.

100 Article 6(1) of Directive 2001/14 provides that Member States must lay down conditions to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager at least balance income from charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other. In accordance with Article 6(2) of the directive, infrastructure managers must be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

101 In that regard, Article 6(3) of Directive 2001/14 provides that the obligation set out in Article 6(2) is to be implemented, either through a multi-annual contractual agreement providing for State funding between the infrastructure manager and the competent authority or through the establishment of appropriate regulatory measures with adequate powers. It is therefore open to Member States to implement incentive measures in the context of a multi-annual contract or by means of regulatory provisions.

102 In the present case, the LuFV was concluded between the German State, DB AG and that company's rail infrastructure undertakings and constitutes an incentive scheme for the purpose of the multi-annul contract referred to in Article 6(3) of Directive 2001/14.

103 The conditions governing State funding, such as those laid down in the LuFV, are liable to encourage the infrastructure manager to reduce costs since they limit grants from the Federal State for replacement of capital assets to an annual amount of EUR 2.5 billion, regardless of inflation, which requires the infrastructure manager, obliged to maintain consistent quality standards, to reduce costs. That applies *a fortiori* since the infrastructure manager is required to contribute from its own resources to the replacement of capital assets.

104 Similarly, the LuFV imposes obligations regarding quality assurance and information, which the infrastructure manager must comply with, on pain of penalties.

105 Thus, those measures provide the infrastructure manager with an incentive to reduce costs and, indirectly, lower the level of charges.

106 As regards the Commission's argument that Article 6(2) of Directive 2001/14 requires the Member States to provide incentives to reduce access charges separate from the incentives adopted with a view to lowering costs, recital 40 in the preamble to the directive clearly states that a railway infrastructure is a natural monopoly and that it is therefore necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently. That recital does not refer to charges but simply to costs.

107 It is true that Article 6(2) of Directive 2001/14 provides that incentives must be given in order to reduce costs and access charges. It does not, however, provide that such incentives must be adopted as separate measures.

108 If the Commission's view were accepted, that would amount to recognising that a Member State is under an obligation to provide the infrastructure manger with an incentive to pass on to network users, through a reduction in charges, part of the surpluses obtained as a result of an increase in its efficiency, even though it might not be in a position to recover all the costs of provision of infrastructure. That interpretation would require the Member State, in consideration for passing on that benefit, to fund the infrastructure. It is clear that such an interpretation is at variance with the second subparagraph of Article 6(1) of Directive 2001/14, which provides that a Member State may, within the charging framework of Articles 7 and 8 of the directive, require the infrastructure manager to balance its accounts without State funding.

109 It must therefore be concluded that the requirement to encourage the infrastructure manager, by means of incentives, to reduce infrastructure costs and the level of access charges is, in the present case, satisfied by the measures to reduce the costs of provision of infrastructure, since such measures also have an impact on the reduction of charges, as mentioned at paragraphs 102 to 105 above.

110 Moreover, it should also be noted that incentives to reduce the costs of provision of infrastructure can only have the effect of reducing the level of access charges, irrespective of whether those charges are set on the basis of Article 7(3) of Directive 2001/14 or on that of Article 8(1) of the directive.

111 It follows from the foregoing considerations that the Commission's complaint relating to incentives to reduce costs must be rejected.

The complaint relating to the powers of the regulatory body

Arguments of the parties

112 The Commission submits, first, that the Federal Republic of Germany has failed to fulfil its obligations under Article 30(4) of Directive 2001/14 in conjunction with Article 10(7) of Directive 91/440.

113 According to the Commission, the regulatory body cannot fulfil its obligation under Article 10(7) of Directive 91/440 to monitor competition in the rail services markets regularly and correct undesirable developments in these markets unless it is authorised, independently of any complaint or specific suspicion of infringement of the directives concerned, to question rail undertakings and infrastructure managers, and unless it has the right to compel them to respond to its requests for information by using threats of appropriate penalties. Unless it has information obtained by means of this type of questioning, the regulatory body, which will always have to rely on the information provided by complainants, will not be in a position to institute proceedings on its own initiative.

114 Next, the Commission considers that the transposition of Article 30(4) of Directive 2001/14 is incomplete, since that article does not distinguish between infrastructure managers and transport undertakings.

115 Lastly, unless the regulatory body has the possibility of enforcing a request for information, it can rely only on the information which the railway undertakings see fit to provide to it, which is inconsistent with the objectives of Directive 2001/14.

116 The Federal Republic of Germany maintains that Article 30(4) of Directive 2001/14 does not require the regulatory body to have the power to obtain information in the absence of any specific reason or any suspicion of infringement. That provision should, on the contrary, be interpreted in the light of the scope and legislative objective of that directive, namely the allocation of railway infrastructure capacity and infrastructure charging. From that perspective, the regulatory body acts more as an appeal body, monitoring and guaranteeing non-discriminatory access to railway infrastructure in the context of capacity allocation and charging. That provision offers only a substantive right to obtain information and a corresponding obligation to provide information, the question of penalties for infringement of such rights not being raised in the directive.

117 Similarly, Article 10(7) of Directive 91/440 does not give regulatory bodies powers to obtain information or to impose penalties in the area of competition.

Findings of the Court

118 By the complaint under consideration, the Commission claims in essence that the Federal Republic of Germany has failed to fulfil its obligations under Article 10(7) of Directive 91/440 and Article 30(4) of Directive 2001/14 by not providing that the regulatory body referred to in the latter provision is to be authorised, independently of any complaint or any specific suspicion of infringement of the directives concerned, to question rail undertakings and infrastructure managers and impose penalties on them.

119 Article 30(4) of Directive 2001/14 provides that the regulatory body is to have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.

120 It is clear that Article 30(4) of Directive 2001/14 does not require that the regulatory body should have powers to obtain information in the absence of a specific reason or any suspicion of infringement.

121 It should be noted in that regard that any interpretation of Article 30(4) of Directive 2001/14 must be take account of the scope of that provision and of the objective pursued by that directive.

122 Recital 16 in the preamble to Directive 2001/14 states that charging and capacity allocation schemes should allow for fair competition in the provision of railway services. Moreover, according to recital 46 of the directive, the efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of these European Union rules and acts as an appeal body, notwithstanding the possibility of judicial review.

123 That interpretation is also supported by the subject-matter of Directive 2001/14, as set out in Article 1 thereof. According to that provision, Directive 2001/14 concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity.

124 It follows from the above and from the regulatory framework of Article 30(4) of Directive 2001/14 that the function of the regulatory body provided for in that provision is to monitor and guarantee non-discriminatory access to railway infrastructure in the context of capacity allocation and charging. On that basis, that body's powers to obtain information derive from Article 30(2) of Directive 2001/14, which provides that an applicant has a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved.

125 With regard to whether Article 10(7) of Directive 91/440 in conjunction with Article 30(4) of Directive 2001/14 permits the regulatory body to carry out investigations of its own initiative where no complaint has been lodged and in the absence of any specific reason or any suspicion of infringement, it should be recalled that Article 10(7) of Directive 91/440 provides that the regulatory body established pursuant to Article 30 of Directive 2000/14, or any other body enjoying the same degree of independence, is to monitor the competition in the rail services markets, including the rail freight transport market.

126 It is clear that Article 10(7) of Directive 91/440 makes no reference to any possibility for or indeed any obligation upon a Member State to require that the regulatory body, as part of its task of monitoring competition, should obtain information in the absence of a specific reason or any suspicion of infringement or that it should impose penalties.

127 It is true that the third sentence of the second subparagraph of Article 10(7) of Directive 91/440 provides that on the basis of a complaint and, where appropriate, on its own initiative, the regulatory body is to decide at the earliest opportunity on appropriate measures to correct undesirable developments in the rail services markets. However, it is apparent from the scheme of that provision, which refers to Article 30 of Directive 2001/14, the scope of which was analysed at paragraphs 121 to 125 above, that the position of that sentence within the second subparagraph of Article 10(7) of Directive 91/440 and the regulatory body's powers to decide on its initiative on appropriate measures to correct undesirable developments in that market, must be interpreted as meaning that that body may take action, independently of any complaint, on the basis of information which has come to its attention, in particular in connection with a specific suspicion of infringement, and not as meaning that it is empowered to instigate its own investigations and compel the undertakings concerned to respond to its questions.

128 Consequently, Article 10(7) of Directive 91/440 and Article 30(4) of Directive 2001/14 do not expressly provide that Member States must implement measures enabling the regulatory body to obtain information in the absence of any complaint or suspicion of infringement of those directives and to impose penalties in the event of any infringement. Thus, the Federal Republic of Germany cannot be criticised for failing to provide for such measures in its national legislation.

129 It follows that the Commission's complaint relating to the powers of the regulatory body must be rejected. It is therefore clear from all the foregoing considerations that the Commission's action must be dismissed.

Costs

130 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

131 In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic and the Italian Republic are to bear their own costs.

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

1. **Dismisses the action.**

2. **Orders the European Commission to pay the costs.**

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

[Signatures]