Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 6 September 2012 [1]

Case C-556/10

European Commission
v

Federal Republic of Germany

(Action for failure to fulfil obligations — Directive 91/440/EEC — Development of the Community's railways — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 6(3) of, and Annex II to, Directive 91/440 — Articles 4(2) and 14(2) of Directive 2001/14 — Infrastructure manager — Independence in the exercise of essential functions — Holding company structure — Articles 7(3) and 8(1) of Directive 2001/14 — Setting charges on the basis of direct costs — Levying of charges — Direct costs — Total costs — Article 6(2) of Directive 2001/12/EC — Absence of an incentive to reduce costs — Article 30(4) of Directive 2001/14 and Article 10(7) of Directive 91/440 — Regulatory body — Powers)

I – **Introduction**

1. By the present action, the European Commission seeks a declaration from the Court that the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) of, and Annex II to, Directive 91/440/EEC,[2] as amended by Directive 2001/12/EC[3] ('Directive 91/440'), Articles 4(2) and 14(2) of Directive 2001/14/EC[4], as amended by Directive 2004/49/EC[5] ('Directive 2001/14'), and Articles 6(2), Council Directive of 29 July 1991 on the development of the Community's railways 7(3), 8(1) of Directive 2001/14 and Article 30(4) of Directive 2001/14 in conjunction with Article 10(7) of Directive 91/440. The Federal Republic of Germany contends that the Commission's action should be dismissed.

1 — Original language: French.

2 — Council Directive of 29 July 2991 on the development of the Community's railways (OJ 1991 L 237, p. 25).

3 — Directive of the European Parliament and of the Council of 26 February 2001 (OJ 2001 L 75, p. 1).

4 — Directive of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29).

5 — Directive of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 144, p. 44). It should be noted that the title of Directive 2001/14 was amended by Article 30 of Directive 2004/49/EC. It is now entitled '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'.

2. This action is one in a series of infringement proceedings,[6] brought by the Commission in 2010 and 2011, concerning the application by Member States of Directives 91/440 and 2001/14, in particular with regard to equitable and non-discriminatory access for railway undertakings to infrastructure, that is to say, the rail network. Those actions break new ground since they provide the Court with its first opportunity to rule on the liberalisation of railways within the European Union and, inter alia, to interpret what is known as 'the first railway package'.

3. With regard to the first complaint concerning the independence required in the exercise of essential functions, the legal issues relating to European Union law in this case seem to me to be the same *mutatis mutandis* as those relating in Case C-555/10 *Commission* v *Austria*, since both Member States have adopted the holding company model, in which the essential functions of the infrastructure manager have been delegated to a separate company within a group of companies which also includes rail undertakings. For this reason the legal arguments put forward in my Opinion in that case, delivered this day, apply also in the present case, despite certain differences in the national rules, inter alia with regard to groups of companies.

4. However, the Commission's other complaints are new compared to the other actions for failure to fulfil obligations mentioned above.

II – **Legal framework**

A – *European Union law*

5. The fourth recital in the preamble to Directive 91/440 reads:

'… 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.'

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

'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.

6 — Cases C-473/10 *Commission* v *Hungary*; C-483/10 *Commission* v *Spain*; C-512/10 *Commission* v *Poland*; C-528/10 *Commission* v *Greece*; C-545/10 *Commission* v *Czech Republic*; C-555/10 *Commission* v *Austria*; C-557/10 *Commission* v *Portugal*; C-625/10 *Commission* v *France*; C-627/10 *Commission* v *Slovenia*; C-369/11 *Commission* v *Italy*; and C-412/11 *Commission* v *Luxembourg*.

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.'

7. Article 10(7) of Directive 91/440 provides:

'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.'

8. Annex II to Directive 91/440 gives the list of essential functions referred to in Article 6(3):

'– 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.'

9. Recitals 7, 11, 16, 20, 21, 25, 32 to 40, 42 and 44 in the preamble to Directive 2001/14 set out the directive's objectives as follows:

'(7) Encouraging optimal use of the railway infrastructure will lead to a reduction in the cost of transport to society.

…

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

…

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

…

(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.

(21) Capacity allocation and charging schemes may need to take account of the fact that different components of the rail infrastructure network may have been designed with different principal users in mind.

…

(25) The charging and capacity allocation schemes must take account of the effects of increasing saturation of infrastructure capacity and ultimately the scarcity of capacity.

…

(32) It is important to minimise the distortions of competition which may arise, either between railway infrastructures or between transport modes, from significant differences in charging principles.

(33) It is desirable to define those components of the infrastructure service which are essential to enable an operator to provide a service and which should be provided in return for minimum access charges.

(34) Investment in railway infrastructure is desirable and infrastructure charging schemes should provide incentives for infrastructure managers to make appropriate investments where they are economically attractive.

(35) Any charging scheme will send economic signals to users. It is important that those signals to railway undertakings should be consistent and lead them to make rational decisions.

(36) To enable the establishment of appropriate and fair levels of infrastructure charges, infrastructure managers need to record and establish the valuation of their assets and develop a clear understanding of cost factors in the operation of the infrastructure.

(37) It is desirable to ensure that account is taken of external costs when making transport decisions.

(38) It is important to ensure that charges for international traffic are such as to permit rail to meet the needs of the market; consequently infrastructure charging should be set at the cost that is directly incurred as a result of operating the train service.

(39) The overall level of cost recovery through infrastructure charges affects the necessary level of government contribution; Member States may require different levels of overall cost recovery through charges including mark-ups or a rate of return which the market can bear while balancing cost recovery with intermodal competitiveness of rail freight. However, it is desirable for any infrastructure charging scheme to enable traffic to use the rail network which can at least pay for the additional cost which it imposes.

(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.

…

(42) Discounts which are allowed to railway undertakings must relate to actual administrative cost savings experienced; discounts may also be used to promote the efficient use of infrastructure.

…

(44) The allocation of capacity is associated with a cost to the infrastructure manager, payment for which should be required.'

10. Article 4(2) of Directive 2001/14 provides:

'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.'

11. Article 6 of Directive 2001/14 provides that:

'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.'

12. Article 7(3) of Directive 2001/14 provides:

'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.'

13. Article 8(1) of Directive 2001/14/EC provides as follows:

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

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

14. Under Article 14(1) and (2) of Directive 2001/14:

‘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.’

15. Article 30 of Directive 2001/14 provides:

‘Regulatory body

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.

…’

B – *National law*

16. Paragraph 5a(2) of the General Railways Law of 27 December 1993 (Allgemeines Eisenbahngesetz),[7] as amended by the Law of 29 July 2009,[8] provides:

'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).'

17. Paragraph 9a(1) of the General Railways Law provides:

'(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 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 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.'

7 — BGBl. I, p. 2378, 2396.

8 — BGBl. I, p. 2542.

18. Paragraph 14(4) of the General Railways Law provides:

'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.'

19. Paragraph 14c of the General Railways Law provides:

'(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 the 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.'

20. 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 AG'), in the version contained in the amending agreement of 2 May 2005, reads:

'Article 1 Management of DB Netz AG

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

21. Paragraph 4 of the rules of procedure of the Board of Directors of DB Netz AG, as amended with effect from 9 May 2005, reads:

'Article 4 Decision making

3. Member of the Board of Directors performing functions in rail transport undertakings associated with DB Netz AG 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.'

III – **The pre-litigation procedure and the procedure before the Court**

22. In May 2007, the Commission sent a questionnaire to the German authorities in order to monitor transposition by the Federal Republic of Germany of the directives of the first railway package. That Member State replied to it by letter of 25 September 2007 and by a further letter of 14 December 2007.

23. By letter of 26 June 2008, the Commission pointed out discrepancies between the German rail legislation and Directives 91/440, 95/18/EC[9] and 2001/14 and invited the Federal Republic of Germany to comply with those directives. By letter of 22 October 2008 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 more infringements of the directive, 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. By letter of 17 April 2009 the Federal Republic of Germany responded to that further letter of formal notice.

25. 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 the reasoned opinion within two months of its notification. By letter of 3 December 2009, the Federal Republic of Germany responded to the reasoned opinion and denied the failure alleged by the Commission.

26. Not being satisfied with the Federal Republic of Germany's reply, the Commission decided to bring the present action, which was received at the Court on 26 November 2010.

9 — Council Directive of 19 June 1995 on the licensing of railway undertakings (OJ 1995 L 143 p. 70).

27. 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.

28. The Commission, the Federal Republic of Germany and the Italian Republic were represented at the hearing which took place on 23 May 2012.

IV – **Pleas and arguments of the parties**

A – *First complaint: independence in the exercise of essential functions*

1. Arguments of the parties

29. 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 from the undertaking providing rail transport services.

30. In that regard it maintains that, although Article 6(3) of Directive 91/440 does not expressly require that the entity to which the exercise of essential functions is entrusted must 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'. [10]

31. The Commission further maintains that, where 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 entrusted with the exercise of 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.

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

33. In the first place, the Commission maintains 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 to complain about any breach of the independence requirement. The Commission considers that neither of those two provisions is complied with in Germany.

34. According to the Commission, it is apparent from Paragraph 5a of the General Railways Law that the Eisenbahn-Bundesamt, the Federal Railway Authority ('the EBA') is only authorised to implement provisions concerning independence that are already contained in German law, like those in Paragraph 9a of the General Railways Law. The EBA has no powers with regard to the adoption of

10 — The Commission refers to Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11, and Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 50.

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.

35. In the second place, the Commission considers that there should be statutory or at least contractual provisions concerning independence in the relationship between the holding company and the entity entrusted with essential functions that should be the case 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.

36. 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 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 safeguards which are not sufficient in themselves to ensure the independence of essential functions, avoid conflicts of interest and free the body entrusted with essential functions from the control of the holding company.

37. In the third place, the Commission considers that members of the board of directors of the holding company and of other undertakings within the holding should not be on the board of directors of the entity entrusted with essential functions.

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

39. In the fourth place, there is no provision barring members of the board of directors of the entity entrusted with essential functions and senior staff members dealing with essential 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.

40. No such provisions exist in Germany and in practice many directors from DB Netz have been transferred to the holding company or to other subsidiaries.

41. In the fifth place, the Commission contends that the board of directors of the entity entrusted with essential functions must be appointed under clearly defined conditions and with legal commitments to ensure the full independence of its decision making. It should be appointed and dismissed under the control of an independent authority.

42. In the sixth place, the Commission maintains that the entity entrusted with essential functions must have its own personnel and be located in premises that are separate or have protected access. The rules of procedure or the contracts of employment should clearly indicate that contacts with the holding company and other companies under its control are 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.

43. The German Government 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.

44. The German Government contends that the criteria for the assessment of independence contained in Annex 5 to Commission staff working document SEC(2006) 530[11] 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, that document was not published in the *Official Journal of the European Union* and does not constitute a binding legal act. It cannot therefore be used in the present proceedings.

45. In the first place, with regard to monitoring by an independent authority, the German Government considers that, under the General Railways Law, the EBA has, inter alia, the possibility of taking the measures necessary in order to deal with infringements that are established and to prevent future infringements of that law and its implementing provisions. The EBA can also order amendments in respect of the legal relationship between the infrastructure manager and the holding company, inter alia as regards matters connected with the organisation of the group, where it is established that those amendments serve to ensure the independence of the functions listed in the General Railways Law.

46. The German Government also contends that the EBA is required to examine complaints in the context of the normal exercise of its discretion. On the other hand, the right for a competitor to bring an action against a measure taken by the EBA on the ground of alleged infringement of the provisions concerning legal separation is, in principle, alien to the German system of administrative protection of individual rights, in the context of which only the infringement of individual public law rights can be claimed; the citizen does not, however, have the possibility of bringing proceedings in order to obtain an objective application of the law.

47. The General Railways Law however confers on the competitor effective means of protecting its individual rights. Competitors may thus require intervention by the Bundesnetzagentur (Federal Network Agency) where they consider their right to non-discriminatory access to infrastructure is infringed by decisions of a railway infrastructure undertaking. The interests of competitors, and indirectly those of competition, are therefore taken into account.

48. In the second place, the German Government maintains that the provisions of Paragraph 9a of the General Railways Law fully meet the requirements laid down by European law as regards independence between the holding company and the entity entrusted with the exercise of essential functions. It argues that separation exists at the accounting and operational level and, lastly, at the level of company law, which ultimately ensures the necessary independence.

49. In the third place, the German Government contends that the Commission does not cite any provision of the directive as the basis for its contention that members of the board of directors of the holding company and other undertakings within the holding company must not be members of the board of directors of the entity entrusted with essential functions.

50. It considers that the acquisition and profit transfer agreement and the rules of procedure of the Board of Directors of DB Netz AG fully ensure the legal, decision-making and organisational independence of DB Netz AG with regard to decisions concerning path allocation and infrastructure charging. Moreover, concurrent terms of office do not preclude independence, since, under German company law, each member of the board of directors is required, even in the event of concurrent terms of office, to protect the interests of his particular company.

11 — Commission report to the European Parliament, the European and Social Committee, the Committee of the Regions on the implementation of the first railway package (COM(2006) 189 final).

51. In the fourth place, as regards the absence of transitional periods relied on by the Commission, the German Government points out that neither Article 6(3) of Directive 91/440 nor Articles 4(2) and 14(2) of Directive 2001/14 provide any legal ground for such periods, nor is there any justification for them in the provisions of the European railways legislation. The comparison with the provisions applying in the electricity and gas sectors is not relevant since, inter alia, those provisions were only adopted recently and were not adopted in the railways sector.

52. In the fifth place, the German Government takes the view that it does not follow from the directives of the first railway package that the appointment and dismissal of members of boards of directors should take place under the control of an independent authority, which is what the Commission attempts to impose through the application by analogy of provisions from other fields in which, unlike the railway sector, express provisions exist with regard to appointments.

53. In the sixth place, the German Government argues that the organisation of DB Netz AG's information systems fully satisfies the requirement of legal and organisational independence as regards key decisions in respect of access to train paths and infrastructure charging. Access to the relevant data is dependent on DB Netz AG granting rights of access.

54. The Italian Government intervenes in the proceedings solely in support of the arguments put forward by the German Government in relation to the questions raised by the first complaint in the action.

55. The Italian Government 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.

56. It states that, with regard to the holding company model, 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 in law but is compatible with the directive only if the holding company does not possess, or does not exercise, any of the prerogatives pertaining to such a holding.

57. The legislation 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.

58. The Italian Government, in the light of both the wording and the purpose of the legislation, does not agree with the Commission's contention that essential functions should be assigned to entities that are outside the group to which a railway undertaking belongs.

2. Examination of the first complaint

59. As I stated in my Opinion in Case C-555/10 *Commission* v *Austria*, it is not possible to infer from the requirement of independence of the body entrusted with essential functions, laid down in Article 6(3), and in Articles 4(2) and 14(2) of Directive 2001/14, that there is an obligation on Member States which have adopted the holding company model – whose compatibility with the requirements is not in itself called in question by the Commission – to adopt measures in the form of laws, regulations or agreements, corresponding to the interpretation contained in Annex 5 to Commission staff working document SEC(2006) 530, mentioned above.

60. A Commission staff working document can neither replace nor supplement a directive and its provisions. Such a document can undoubtedly express the Commission's opinion or, more accurately, that of the 'Commission staff', but its normative value, if such exists, is not even comparable to that of Commission 'notices', provided for in the TFEU and published in the *Official Journal of the European Union* in all languages. The obligations incumbent on Member States should be clear from the wording of the directive, interpreted in accordance with its objectives. [12]

61. Thus, in an action in respect of the incorrect or incomplete transposition of the abovementioned provisions of Directive 2001/14, Germany cannot be criticised for failing to adopt specific rules

— designed to enable the regulatory body to monitor compliance with the independence obligations of the charging body, and even of the allocation body;

— prohibiting members of the board of directors of the holding company and of other undertakings in the holding company from being members of the board of directors of the entity entrusted with essential functions;

— establishing waiting periods barring members of the board of directors of the entity entrusted with essential functions and senior staff dealing with essential functions from accepting, for a reasonable number of years, any senior position with the holding or with other entities under its control;

— laying down clear conditions applying to the appointment of members of the board of directors of the entity entrusted with essential functions and making their appointment and dismissal subject to the control of an independent authority; and

— requiring that the entity entrusted with essential functions should have its own personnel and be located in separate premises, and laying down restrictions applying to communications between the staff of that entity and other entities under the control of the holding company.

62. I would point out that the action does not concern the incorrect application of Directives 91/440 and 2001/14. The Commission has not provided specific evidence showing that the requirement of independence of the entity entrusted with essential functions is not met in practice.

63. It seems to me that the German legislation permits more extensive control within a group of undertakings than that applying in Austria. Groups may therefore be more closely integrated in their legal form than in Austria. Hence, the different bans have been imposed in private law measures in order to prevent recourse to the possibilities provided for by the legislation. [13]

64. For those reasons, I suggest that the Court rejects the Commission's first complaint.

B – *The second complaint concerning charging*

1. Arguments of the parties

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

12 — See Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

13 — See the agreement cited in point 20 of this Opinion and the rules of procedure cited in point 21 above.

66. It argues that Paragraph 14(4) of the General Railways Law, by which Germany transposed those provisions, contains lacunae. Indeed, that provision does not always make it possible to determine with certainty whether and when to apply the direct costs principle provided for in Article 7(3) of Directive 2001/14 or the total costs principle provided for in Article 8(1) of Directive 2001/14.

67. Moreover, it points out, although the Federal Republic of Germany apparently opted for the total costs principle it has failed to fulfil all the necessary conditions for the application of Article 8(1) of Directive 2001/14, and inter alia to specify the circumstances in which it is necessary to carry out a test of the capacity of the market to bear the costs, which is needed in order to determine whether all segments of the market can bear them.

68. The German Government considers that, so far as taking competitiveness into account is concerned, the German provisions fully meet the requirements of 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 that article of Directive 2001/14 only requires those to whom that provision is addressed, in accordance with the wording and objective of that directive, to guarantee competitiveness, in particular of international rail freight. Thus, the national law complies with the requirements and objectives of the directive.

69. The German Government notes also that costs may be apportioned in full when determining the amount of the charge. DB Netz AG has the power therefore to set charges in such a way as to offset the infrastructure costs that are not covered by grants from the State.

70. The German Government rebuts the Commission's statement 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 in 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 the EU legislation leaves it to the undertakings operating in the market to assess the market's ability to pay. Finally, 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.

71. The Czech Government supports the German Government's arguments in favour of proper implementation of the provisions cited by the Commission, in connection both with all the complaints alleging incorrect transposition of the provisions of the European Union law at issue and with the complaint alleging infringement of the provisions of Article 7(3) in conjunction with Article 8(1) of Directive 2001/14.

72. More specifically with regard to infringement of Article 7(3) of Directive 2001/14, the Czech Government considers that it is necessary to clarify the concept 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.

2. Examination of the second complaint

73. The European Union rules concerning the charges levied by the infrastructure manager are not without their complexities. According to Directive 2001/14, the manager may require charges to be paid as follows:

— under Article 7(3), it levies for the minimum access package and track access to service facilities charges that are equal to the cost that is directly incurred as a result of operating the train service;

— under Article 7(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;

— under Article 7(5), the infrastructure charge may be modified to take account of the environmental cost;

— under Article 8(1) mark-ups may be levied in order to obtain full recovery of the costs incurred by the infrastructure manager;

— under Article 8(2), the infrastructure manager may set higher charges on the basis of the long-term costs of specific investment projects; and

— under the first paragraph of Article 12, the infrastructure manager may levy an appropriate charge for capacity that is requested but not used.

74. Determination of the infrastructure charge, in the context of the charging scheme put in place by the Member State, is a matter for the infrastructure manager, which must ensure that the charging scheme in use is based on the same principles over the whole of its network (Article 4(1) and (4) of Directive 2001/14). According to Article 8(3) of Directive 2001/14, to prevent discrimination, any given infrastructure manager's average and marginal charges for equivalent uses of its infrastructure must be comparable, and comparable services in the same market segment must be subject to the same charges. In the network statement the infrastructure manager must show that the charging scheme meets those requirements.

75. Article 6(1) of Directive 2001/14 provides that Member States are to lay down appropriate conditions to ensure that the accounts of an infrastructure manager 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.[14] Article 6(5) provides that a method for apportioning costs is to be established. Member States may require prior approval.

76. I consider that the provisions of Directive 2001/14 present a complex system that sets out the factors which must be taken into account when determining infrastructure charges, the objectives which the system seeks to attain,[15] and the respective powers of the Member State, the infrastructure manager and the regulatory body provided for in Article 30 of the directive.

77. With regard to the admissible level of the infrastructure charge, Directive 2001/14 sets a minimum level, corresponding to the cost that is directly incurred as a result of operating the infrastructure (Article 7(3)),[16] and a maximum level, resulting from the total costs incurred by the infrastructure manager (Article 8(1)). Within that range, the charge may include a charge which reflects the scarcity of capacity during periods of congestion (Article 7(4)), external environmental costs (Article 7(5)), and specific investment to improve infrastructure (Article 8(2)). Moreover, it is possible to apply discounts (Article 9).

78. With regard to the respective roles of the State and the infrastructure manager, it should be noted that it is the State which lays down the charging framework and is responsible for providing funding to balance the accounts of the infrastructure manager. However, 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.

14 — See, in that regard, point 36 et seq. of my Opinion in Case C-483/10 *Commission* v *Spain*.

15 — The fact that the provisions of Directive 2001/14 concerning charging form a particularly complex body of different economic and social objectives can be seen from recitals 7, 11, 16, 20, 21, 25, 32, 34 to 42 and 44 of that directive. See point 9 above.

16 — Interpretation of that concept is also covered in Case C-512/10 *Commission* v *Poland*, and Case C-545/10 *Commission* v *Czech Republic*.

79. However, it is the infrastructure manager which determines the infrastructure charge. Recital 12 in the preamble to Directive 2001/14 states that the objective of charging and capacity-allocation schemes is to encourage railway infrastructure managers to optimise use of their infrastructure within the framework set out by Member States. Such optimisation through charging does not seem to me possible unless the infrastructure manager is allowed some room to manoeuvre, as expressly referred to in recital 20. The same applies with regard to the powers of the infrastructure manager provided for in Articles 8(2) and 9 of Directive 2001/14 to mark up or discount charges.

80. The relevant texts show that Directive 2001/14 establishes, in respect of charging, an area which is reserved for the infrastructure manager. As regards the State, the upper limit of that area is defined by the requirement of room for manoeuvre within charging, which allows it to be used as a management tool. [17] As regards non-independent operators, the lower limit of that area is the point where 'collection' starts. [18]

81. It is clear from the overall scheme of the directive that it envisages for the infrastructure manager, with regard to charging, a role that includes choices requiring discretion in the methods to be applied and coordination of the various legislative objectives, which are not always without contradictions. Such choices are to be based only on a market study, as regards for example the definition of market segments, to find out what 'the market can bear'.

82. Consequently, in my view, the assessment of the failures with regard to the transposition of Directive 2001/14 in the context of the present complaint [19] should be based on an overall analysis of the rules of the directive concerning infrastructure charges.

83. With regard to the Commission's argument that Paragraph 14(4) of the General Railways Law contains lacunae because that provision does not always make it possible to determine with certainty whether and when to apply the direct costs principle provided for in Article 7(3) of Directive 2001/14 or the total costs principle provided for in Article 8(1) of Directive 2001/14, I consider that that argument might be based on a false dichotomy. As I stated above, in my view, the directive does not provide for two alternative methods but for a range comprising a minimum, namely the cost that is directly incurred, and a maximum, corresponding to the full costs incurred by the infrastructure manager. Between those extremes, the manager may apply additional charging criteria provided for in the directive, and discounts according to the conditions of Directive 2001/14 and, possibly, the charging framework adopted by the Member State.

84. I do not consider that, to avoid a declaration of failure to fulfil obligations, Member States should, in order to reduce the latitude enjoyed by the infrastructure manager in determining charges, lay down more detailed, or even more specific, charging rules, than those which reproduce in national law legislative requirements corresponding to those laid down by the European Union legislature. Use of the term 'charging framework' in my view shows that they may do so within a certain limit, but only if they respect the management independence provided for in Article 4 of Directive 91/440. [20]

85. Paragraph 14(4) of the General Railways Law, which takes as a starting point, although it does not make it an absolute rule, full recovery of infrastructure costs whilst allowing access to the market, as opposed to offsetting costs directly incurred as a result of operating the service, seems to me to define the infrastructure manager's room for manoeuvre in respect of charging whilst faithfully complying with the requirements of Directive 2001/14. More specifically, the national provision allows the infrastructure manager to distinguish between long-distance passenger services, short-distance passenger services and rail freight services, and also between market segments within those services. I

17 — See my Opinion in Case C-483/10 *Commission* v *Spain*.

18 — See my Opinion in Case C-473/10 *Commission* v *Hungary*.

19 — The same applies also with regard to the third complaint.

20 — See also in that regard Case C-545/10 *Commission* v *Czech Republic*.

do not think that transposition of the relevant provisions of Directive 2001/14 requires a Member State to lay down more detailed rules in that regard, but it may entrust to the infrastructure manager the task of transposing them more specifically, or even of applying them, especially as regards examination of the economic capacity of a market segment.

86. For those reasons, I suggest that the Court rejects the Commission's second complaint.

C – *The third complaint relating to the incentive scheme*

1. Arguments of the parties

87. The Commission submits that Article 6(2) of Directive 2001/14 has not been transposed into German law. In its view, none of the measures described by the German Government 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 does not contain any provision envisaging a reduction in infrastructure costs and charges.

88. The German Government 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 provided for 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.

89. The German Government also argues that the directive does not require an actual reduction in costs or access charges. Such a requirement should, on the contrary, balance out against the other charging structure requirements. The overall balance should therefore be regulated in such a way as to achieve the long-term objective of balancing income and infrastructure expenditure.

90. The German Government 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, 'LuFV') meets the conditions 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.

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

92. Lastly, 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 exercising competition-oriented business management in order to maximise profits, which constitutes for DB Netz AG autonomous and effective motivation to reduce its costs.

2. Examination of the third complaint

93. The parties' discussion of the third complaint seems to me complex, and the issues relating to it difficult to grasp.

94. That said, the Commission's position can, in my view, be summarised as meaning that the Federal Republic of Germany is not encouraging the infrastructure manager either to limit infrastructure costs or to reduce the level of access charges.

95. I interpret the Federal Republic of Germany's position as being that the LuFV constitutes an effective system in its view for encouraging reduction of the costs of provision of infrastructure. With regard to access charges, that Member State seems to me to be stating in essence that Directive 2001/14 does not require Member States to adopt separate measures to encourage the reduction of access charges, but does require that objective to be sought indirectly by means of measures to encourage reduction of the costs of provision of infrastructure.

96. With regard to the first part of this plea, relating to the costs of provision of infrastructure, I note first of all that, according to Article 6(3) of Directive 2001/14, the provision laid down in Article 6(2) may be implemented through a contractual agreement between the competent authority and the infrastructure manager, covering a period of not less than three years, which provides for State funding. The LuFV seems to me to comply with that formal condition.

97. I observe that the LuFV limits grants from the Federal State to a fixed annual sum, regardless of inflation, and thus requires the infrastructure manager to improve efficiency, since it remains subject to quality standards which may stay unchanged or may be raised. In addition, the manager is required to provide each year a minimum amount for replacement of capital assets. The manager is furthermore required to use its own resources for track maintenance, and to do this in a way that will guarantee the same quality at a reduced cost.

98. The measures contained in the LuFV seem to me to be appropriate in order to encourage the infrastructure manager to reduce the costs of provision of infrastructure. The Commission's third complaint could succeed only if Article 6(2) of Directive 2001/14 required Member States always to adopt separate incentives to reduce the level of access charges.

99. According to the Commission, Member States are under such an obligation, irrespective of the profitability of the infrastructure management. In other words, even if the infrastructure manager is not in a position to recover all the infrastructure costs the Member State is required to encourage it to pass on some of the surpluses generated by the increased efficiency to the network users.

100. The Commission's position is supported by the wording of Article 6(2) of Directive 2001/14, which mentions both costs of provision of infrastructure and the level of access charges. None the less, according to recital 40 in the preamble thereto, '[i]t is … necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently'. Only costs are mentioned in that recital.

101. In my view, the Commission's interpretation is not reasonable in the light of the overall scheme of Article 6 of Directive 2001/14. The second subparagraph of Article 6(1) provides that '[w]ithout 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'. [21]

102. The Commission's interpretation requires the State to fund infrastructure even where, through improved efficiency encouraged by the Member State, the infrastructure manager has generated surpluses which it can use to balance its accounts instead of using them to reduce access charges.

103. In addition, even if the manager's accounts are balanced, the provisions of Chapter II of Directive 2001/14 on charging, based on the principle of charging on the basis of costs, are likely to have the effect that, in the long term, reductions in the level of access charges will stem automatically from reductions in the costs of provision of infrastructure.

104. For those reasons, I suggest that the Court rejects the Commission's third complaint.

D – *The fourth complaint concerning the powers of the regulatory body*

1. Arguments of the parties

105. The Commission contends 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.

106. 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, irrespective of specific complaints or any specific suspicion of infringement of the directives, to question rail undertakings and infrastructure managers, and unless it has the right to compel them to respond by using appropriate threats of penalties. Unless it has information obtained by means of this type of questioning the regulatory body will not be in a position to institute proceedings on its own initiative, since it will always be required to rely on the information provided by complainants.

107. In addition, the Commission considers that the transposition of Article 30(4) of Directive 2001/14 is incomplete, on the ground that that article does not distinguish between infrastructure managers and transport undertakings.

108. Lastly, unless the regulatory body has the possibility of enforcing a request for information it can only rely on the information which the railway undertakings see fit to provide to it, which does not correspond to the objectives of the directive.

109. The German Government 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 reason or suspicion. That provision should, on the contrary, be interpreted in the context of the scope and legislative objective of that directive, namely the allocation of railway infrastructure capacity and infrastructure charging. In that context, 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, without the question of penalties for infringement of such rights being raised in the directive.

110. Similarly, Article 10(7) of Directive 91/440 does not confer on regulatory bodies rights to obtain information or to impose penalties in the area of monitoring competition.

21 — See also recital 39 in the preamble to Directive 2001/14, cited in point 9 of this Opinion.

2. Examination of the fourth complaint

111. With regard to the first subparagraph of Article 10(7) of Directive 91/440, that provision requires Member States to provide that the regulatory body set up in accordance with Article 30 of Directive 2001/14 monitors competition in the rail services markets, unless another body enjoying the same degree of independence is entrusted with that task.

112. According to the Commission, it is clear from that task that that body, irrespective of specific complaints or any specific suspicion of infringement of the directives, is authorised to question rail undertakings and infrastructure managers and to compel them to respond by using appropriate threats of penalties.

113. According to established case-law, the Member States are required to establish the administrative structures needed in order to apply the directives and supply adequate penalties to enforce the obligations laid down in those directives, even where European Union law contains no provisions to that effect. That case-law seems to support the Commission's complaint. [22]

114. However, the obligation on the Member State, which the Commission seeks to infer from Article 10(7) of Directive 91/440 with regard to the monitoring of competition, amounts in fact to granting a regulatory body powers authorising it to initiate sector inquiries. In my view, the legislative tradition of Community competition law has always adhered to the principle that such powers must be laid down expressly and clearly by the European Union legislature. [23]

115. For that reason and given that Article 10(7) makes no mention of inquiries conducted by regulatory bodies, I think that the Federal Republic of Germany cannot be criticised for not having made provision in its legislation for the regulatory body to have such powers to conduct inquiries and impose penalties irrespective of specific complaints or any specific suspicion of infringement of the directives.

116. With regard to Article 30 of Directive 2001/14, Article 30(4) provides that the regulatory body has the power to request relevant information from the infrastructure manager, applicants and any other third party involved within the Member State concerned; such information must be supplied without delay. The second subparagraph of Article 30(5) provides that a decision of the regulatory body is binding on all parties covered by that decision.

117. According to the Commission, Article 30(4) of Directive 2001/14 requires Member States to make provision for powers to conduct inquiries and impose penalties, which may also be effective against any railway undertaking, in the context of the monitoring of competition referred to in Article 10(7) of Directive 91/440. I do not share that view.

118. As I have already stated, no obligation for Member States to make provision for powers to conduct inquiries and impose penalties in the context of monitoring competition can be inferred from Article 10(7) of Directive 91/440 on its own. That interpretation is supported by the fact that the second subparagraph of Article 10(7) of Directive 91/440 contains no reference, express or implicit, to Article 30(4) of Directive 2001/14. [24] In the context of competition monitoring provided for in Article 10(7), Article 30(4) of Directive 2001/14 does not appear to be applicable.

22 — See Case 14/83 *Von Colson and Karmann* [1984] ECR 1891; Case C-341/94 *Allain* [1996] ECR I-4631; Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285; and Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883.

23 — See to that effect the provisions of the Chapter V of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

24 — That provision refers implicitly to Article 30(2), (3), (5) and (6) of Directive 2001/14 and expressly to Article 30(6).

119. However, Article 30 of Directive 2001/14 does not require the regulatory body to possess powers to conduct inquiries and impose penalties in the context of monitoring competition in situations falling outside the scope of that article. The scope of that article is limited to issues of fair and non-discriminatory access, more specifically to the treatment of applicants and the monitoring of charges, under Article 30(2) and (3). That matter in itself covers the objective of allowing fair competition in the provision of rail services, set out in recital 16 in the preamble thereto. Empowerment of the regulatory body to request the relevant information provided for in Article 30(4) is subject to the same limitations.

120. For those reasons, I suggest that the Court should reject the Commission's fourth complaint.

V – **Costs**

121. Under Article 69(2) 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.

122. As the Federal Republic of Germany has claimed that the Commission should be ordered to pay the costs, this claim must be upheld if, as I propose, the action for failure to fulfil obligations is dismissed in its entirety.

123. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Czech Republic and the Italian Republic, which have sought leave to intervene in this case, are to bear their own costs.

VI – **Conclusion**

124. Having regard to the foregoing considerations, I propose that the Court should:

(1) dismiss the action;

(2) order the European Commission to pay the costs;

(3) order the Czech Republic and the Italian Republic to bear their own costs.