Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
Delivered on 14 January 2021 [1]

Case C-718/18

European Commission
v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Internal markets for electricity and natural gas – Directives 2009/72 and 2009/73 – Concept of 'vertically integrated undertaking' – Effective separation of transmission system operation from production and supply activities – Independence of staff and management of transmission system operator – Exclusive powers and independence of national regulatory authorities – Principle of democracy)

1. What is meant by a 'vertically integrated undertaking' in the electricity and gas sectors and, more specifically, does that concept encompass activities undertaken outside the European Union? What is the extent of the exclusive powers conferred by EU law on national regulatory authorities ('NRAs') in the electricity and gas sectors and what scope for legislative intervention do the Member States have with regard to those powers?

2. These, in essence, are the more important questions raised in the present case, in which the European Commission asks the Court of Justice to find that the Federal Republic of Germany has failed to fulfil its obligations under various provisions of 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, [2] and of 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 [3] (together, 'the Directives').

[1] Original language: Italian.

[2] OJ 2009 L 211, p. 55. Directive 2009/72 is repealed with effect from 1 January 2021 by Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) (OJ 2019 L 158, p. 125).

[3] OJ 2009 L 211, p. 94.

I. Legal framework

A. EU law

1. Directive 2009/72

3. In accordance with Article 2(21) of Directive 2009/72, 'for the purposes of this directive, the following definitions apply: "vertically integrated undertaking" means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity'.

4. Paragraphs 3, 5 and 8 of Article 19 of Directive 2009/72, which is headed 'Independence of the staff and the management of the transmission system operator' provide as follows:

'3. 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 shall 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 who are subject to this paragraph.

…

5. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.

…

8. Paragraph 3 shall apply to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator.

The persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are not subject to paragraph 3 shall have exercised no management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment.

The first subparagraph of this paragraph and paragraphs 4 to 7 shall be applicable to all the persons belonging to the executive management and to those directly reporting to them on matters related to the operation, maintenance or development of the network.'

5. Article 35 of Directive 2009/72, headed 'Designation and independence of regulatory authorities', provides:

'1. Each Member State shall designate a single national regulatory authority at national level.

…

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this directive and related legislation, the regulatory authority:

(a) is legally distinct and functionally independent from any other public or private entity;

(b) ensures that its staff and the persons responsible for its management:

(i) act independently from any market interest; and

(ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a) the regulatory authority can take autonomous decisions, independently from any political body …

6. Article 37 of Directive 2009/72, headed 'Duties and powers of the regulatory authority', provides:

'1. The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;

(b) the provision of balancing services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; …'.

2. Directive 2009/73

7. With respect to the natural gas sector, Article 2(20), Article 19(3), (5) and (8), Article 39(1), (4) and (5) and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73 correspond, *mutatis mutandis*, to the abovementioned provisions of Directive 2009/72.

B. German law

8. Under Paragraph 3(38) of the Energiewirtschaftsgesetz (Energy Industry Act, 'the EnWG'),[4] a vertically integrated energy supply undertaking is 'an undertaking operating in the European Union in the electricity or gas sector, or a group of electricity or gas undertakings that are connected with one another, within the meaning of Article 3(2) of … Regulation (EC) No 139/2004 … on the control of concentrations between undertakings, [5] where the undertaking or group in question performs in the European Union, in the electricity sector, at least one of the functions of transmission or distribution and at least one of the functions of generation or sale of electricity or, in the natural gas sector, at least one of the functions of transmission, distribution, operation of a liquefied natural gas (LNG) plant, or storage and at the same time one of the functions of extraction or sale of natural gas'.

9. Paragraph 10c(2) of the EnWG provides:

'The majority of the persons responsible for the management of the transmission system operator may not, during a period of three years prior to their appointment, be employed in or have maintained commercial relationships with a company in the vertically integrated undertaking or controlling shareholder therein that, in the energy sector, performs one of the functions of generation, distribution, supply or purchase of electricity or, in the natural gas sector, one of the functions of extraction, distribution, supply, purchase or storage of natural gas or that performs commercial, technical or maintenance tasks in connection with such functions. The remaining persons responsible for the management of the independent transmission system operator may not, during a period of at least six months prior to their appointment, perform managerial tasks or tasks similar to those performed within the independent transmission system operator for a company within the vertically integrated undertaking or controlling shareholder therein that, in the electricity sector, performs one of the functions of generation, distribution, supply or purchase of electricity or, in the natural gas sector, one of the functions of extraction, distribution, supply, purchase or storage of natural gas or that performs commercial, technical or maintenance tasks in connection with such functions. …'.

10. Paragraph 10c(4) of the EnWG provides as follows:

'The independent transmission system operator and the vertically integrated energy supply company shall ensure that the persons responsible for management and the other employees of the independent transmission system operator do not, after 3 March 2012, acquire any shares in the capital of the vertically integrated energy supply company or any part thereof unless they are shares in the independent transmission system operator. Persons responsible for management shall, by no later than 31 March 2016, dispose of any shares in the vertically integrated energy supply company or any part thereof. …'

4 Energiewirschaftsgesetz of 7 July 2005 (BGBl. 2005 I, p. 1970 and p. 3621), as amended.

5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

11. Pursuant to Paragraph 10c(6) of the EnWG, Paragraph 10c(2) applies *mutatis mutandis* to all persons who report directly to senior management and are responsible for the operation, maintenance or development of the network.

12. Paragraph 24 of the EnWG is headed 'Provisions relating to the conditions for access to the network, network access fees and the procurement and supply of balancing services; authority to issue regulations' and provides as follows:

'The federal government is empowered, by means of regulation and with the consent of the Bundesrat, to:

1. determine the conditions for network access, including the procurement and supply of balancing services, and to establish the methodologies used for determining such conditions and the methodologies for fixing the tariffs for network access …;

2. regulate in which cases and on what conditions the regulatory authority may define these conditions and methodologies or approve them at the request of the system operator;

3. regulate in which special cases of network use and on what conditions the regulatory authority may, in individual cases, authorise or withhold authorisation for individual tariffs for network access …'.

II. The pre-litigation procedure and the proceedings before the Court

13. On 20 May 2014, in the course of an *ex officio* investigation into the transposition of Directive 2009/72 and 2009/73 into German law, aimed at determining whether there were any inconsistencies with EU law, the Commission addressed a series of questions to the Federal Republic of Germany concerning the transposition of those directives, to which the German authorities replied by letter of 12 September 2014.

14. Taking the view that German law did not comply with the Directives in various respects, on 27 February 2015 the Commission sent the Federal Republic of Germany a letter of formal notice in the context of infringement proceedings No 2014/2285, to which that Member State replied by letter of 24 June 2015.

15. On 29 April 2016, the Commission sent the Federal Republic of Germany a reasoned opinion in which it re-stated the view it had expressed in its letter of formal notice, which was that certain provisions of German law did not conform to Directives 2009/72 and 2009/73. The Federal Republic of Germany replied by letter of 29 August 2016, stating that legislative amendments addressing some of the complaints raised in the reasoned opinion were in the process of being adopted. On 19 September 2017 it sent the text of the amended law, which came into force on 22 July 2017.

16. Taking the view that the legal provisions adopted by the Federal Republic of Germany were still not fully in conformity with the two directives, the Commission brought the present action.

III. Legal analysis

17. The Commission's action is based on four complaints, all of which concern the incorrect transposition by the Federal Republic of Germany of Directives 2009/72 and 2009/73 in the EnWG.

A. The first complaint, concerning incorrect transposition of the concept of 'vertically integrated undertaking'

1. Arguments of the parties

18. The Commission maintains that the definition of the concept of 'vertically integrated undertaking' contained in Paragraph 3(38) of the EnWG is inconsistent with Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73, and that the Federal Republic of Germany has therefore failed to fulfil its obligations under those provisions of the Directives.

19. The Commission points out that, in the definition contained in the EnWG, the concept of 'virtually integrated undertaking' encompasses only undertakings which operate in the European Union. Undertakings which, although controlled by the vertically integrated undertaking, carry on activities outside the European Union are thus excluded from that definition. As a result, production and supply activities, for example, carried on outside the European Union do not fall within the scope of the definition. The German NRA, when deciding whether a business is a vertically integrated undertaking, will not take into account activities carried on outside the European Union and so will not examine whether such activities give rise to conflicts of interests.

20. According to the Commission, the German legislation is inconsistent with both the wording of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 and the objectives pursued by those provisions, relating to effective separation (or 'unbundling') of the activities covered by the Directives.

21. In so far as their wording is concerned, neither of these two provisions includes any restriction of the geographical area within which the activities of the vertically integrated undertaking must be carried out. On the contrary, it is apparent from recital 24 of Directive 2009/72 and recital 21 of Directive 2009/73 that the effective separation of network activities from supply and production activities should apply throughout the European Union, both to EU undertakings and to non-EU undertakings.

22. As regards the objectives, the rules relating to effective separation are designed to ensure that transmission system operators obtain certification only when there is a guarantee that they will operate the network independently and in a non-discriminatory manner. Their aim is to eliminate the incentives for vertically integrated undertakings to discriminate against competitors with regard to network access, access to commercial information and investment. According to the Commission, such a conflict of interests could arise not only when the activities of the vertically integrated undertaking are carried out within the European Union, but also when they are carried out outside the European Union.

23. The inclusion within the scope of the concept of vertically integrated undertaking of activities carried on outside the European Union does not, according to the Commission, imply that non-EU undertakings become direct addressees of the rights and obligations provided for by EU

law and does not extend the EU's sphere of jurisdiction. Indeed, the transmission system operators that are subject to the rules relating to effective separation always operate within the European Union. The inclusion of activities carried out outside the European Union in the definition of vertically integrated undertaking makes it possible to evaluate those activities in the European Union. There is no principle of competition law or international law that precludes an interpretation of this kind.

24. The Federal Republic of Germany disputes the Commission's arguments.

25. In the first place, in so far as the wording is concerned, it is clear from the case-law that the Member States are not required to transpose directives verbatim, provided that their substantive transposition is ensured. The definition of the concept of 'vertically integrated undertaking' in Paragraph 3(38) of the EnWG is not inconsistent with the wording of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73. Those provisions, in fact, give no indication as to geographical scope and, when they are transposed into the national laws of the Member States, clarification of that point is therefore required. Moreover, the Court of Justice has recently made clear that, if a provision in a directive requires further detail in order to satisfy the principle of legal certainty, it is for the Member States to provide that additional detail at the time of transposition.[6] Recitals 24 and 25 of Directive 2009/72 and recitals 21 and 22 of Directive 2009/73 corroborate the German Government's interpretation.

26. In the second place, the argument which the Commission puts forward is not consistent with the aims of the Directives' rules on effective separation. First of all, the Commission has failed to discharge its burden of proof regarding the failure to fulfil obligations and has provided no examples of potential conflicts of interests. According to the German Government, the objectives of the provisions concerning effective separation do not require that activities carried on outside the European Union by energy supply undertakings should be encompassed in the definition of vertically integrated undertaking. Indeed, a conflict of interests can only exist if the parts of a vertically integrated undertaking that carry on activities in the competing sectors of electricity and gas production and distribution operate in the European Union. In the absence of activities within the European Union, there can be no risk of a negative influence being exerted on a transmission system operator.

27. In the third place, broadening the definition of the concept of 'vertically integrated undertaking' so as to encompass activities carried on outside the European Union by third-country undertakings would be contrary both to the case-law in accordance with which EU law should be applied only when the conduct in question has an immediate and substantial effect within the European Union, and to international law. Such third-country undertakings would in fact acquire rights and become subject to obligations without operating on the territory of the European Union and without the activities which they carry out outside the European Union producing any effects in the European Union.

28. In the fourth place, the German Government maintains that an interpretation of the Directives in the light of their legal bases and of fundamental rights and freedoms supports its position. It emphasises, first, that the Directives were adopted on the basis of Articles 47(2), 55 and 95 of the EC Treaty,[7] the aim of which is to make it easier to exercise the freedom of establishment and the freedom to provide services and the object of which is the establishment and functioning of the internal market. Consequently, those provisions of the Treaty cannot

6 Judgment of 30 January 2019, *Planta Tabak* (C-220/17, EU:C:2019:76, paragraph 33).

7 Now Articles 53(2), 62 and 114 TFEU.

constitute the legal basis for the adoption of provisions which apply to the economic activities of undertakings operating in a third country. Secondly, the Directives impose obligations on vertically integrated undertakings that restrict the free movement of capital, within the meaning of Article 63 TFEU, as well as the freedom of undertakings and those who work for them to conduct a business, enshrined in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'), as well as the right to property enshrined in Article 17(1) of the Charter. To the extent that the activities of third-country undertakings carried on outside the European Union produce no effects on the internal market, such restrictions of fundamental rights and freedoms are not necessary to attain the objective of ensuring the efficient, non-discriminatory operation of transmission systems within the European Union.

2. Assessment

29. The assessment of the validity of the first complaint in the Commission's action depends on what the scope of the concept of 'vertically integrated undertaking', as defined in Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73, is determined to be. In particular, it is necessary to assess whether national legislation, such as the German legislation at issue, is consistent with that definition where it excludes from that concept – and consequently from the scope of the provisions concerning the effective separation of networks from the activities of electricity generation and gas production and the supply of those energy products – activities carried on by an undertaking or group of undertakings outside the European Union.

30. In this connection it must first of all be noted that neither Article 2(21) of Directive 2009/72 nor Article 2(20) of Directive 2009/73 contains any reference to the laws of the Member States in so far as concerns the definition of the concept of 'vertically integrated undertaking'.

31. According to the settled case-law of the Court on this point, it follows from the requirement for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which does not contain any express reference to the laws of the Member States for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the European Union, one which takes into account not only the wording of that provision but also its context and the objective pursued by the legislation in question. [8]

32. As regards, in the first place, the wording of the two provisions in question, I would immediately point out that, by contrast with Paragraph 3(38) of the EnWG, they contain no express geographical restriction of the scope of the definition of the concept of 'vertically integrated undertaking', in the sense of its being confined solely to activities carried on in the European Union.

33. It is necessary to bear in mind in this connection that it is settled case-law that, although Member States are not required to transpose the definitions laid down in a directive literally and therefore the transposition of a directive into national law does not necessarily require its provisions to be reproduced verbatim in a law or regulation, it is necessary that the Member States should effectively ensure the full application of the directive in a sufficiently clear and precise manner. [9]

[8] See, *ex multis*, the judgment of 8 October 2020, *Crown Van Gelder* (C-360/19, EU:C:2020:805, paragraph 21 and the case-law cited).

[9] See, to that effect, inter alia, the judgment of 25 January 2018, *Commission* v *Czech Republic* (C-314/16, EU:C:2018:42, paragraph 35 and the case-law cited).

34. Accordingly, the decisive question is whether the restriction, laid down in German law, of the scope of the concept of 'vertically integrated undertaking' so that it encompasses only activities carried on in the European Union is merely a refinement of the definition of that concept contained in the Directives, as the German Government maintains, or an unwarranted restriction of the scope of that definition, as the Commission maintains.

35. While the wording of these provisions does not permit a definitive conclusion to be reached, I think that a systematic and teleological interpretation of them militates in favour of the second option and confirms that the fact that the wording of the Directives contains no express restriction of the scope of the concept of 'vertically integrated undertaking' so as to encompass only activities carried on in the European Union means that the scope of that definition is not confined to such activities.

36. Indeed, in the second place, with regard to the context in which the definition of the concept of 'vertically integrated undertaking' is given, I would point out that it appears among the provisions of the Directives that are aimed at ensuring the effective separation of networks from the activities of electricity generation, gas production and the supply of both of those energy products. [10]

37. It is useful to remember in this connection that, in order to ensure effective separation, the Directives offer the Member States three options. The first option allows them to provide for ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests. In the scheme of the Directives, this configuration is the most effective way to eliminate conflicts of interest, which the Directives describe as 'inherent', between producers and suppliers, on the one side, and transmission system operators, on the other. [11]

38. However, Directive 2009/72 also permits the Member States to allow electricity undertakings (or groups of electricity undertakings) that carry on activities of generation or supply to maintain ownership of network assets and to choose between establishing an independent system operator (the second option) or establishing an independent transmission operator (the third option), [12] provided that effective separation can still be ensured. [13]

39. This is the context in which the concept of 'vertically integrated undertaking' comes into play, [14] that concept playing a fundamental role in determining which entities are subject to the obligations laid down in the Directives in order to ensure effective separation in the absence of ownership unbundling, which is to say, in the case of independent system operators, the provisions of Articles 13 and 14 of Directive 2009/72 or Articles 14 and 15 of Directive 2009/73 and, in the case of independent transmission operators, the provisions of Chapter V of Directive 2009/72 or Chapter IV of Directive 2009/73. It is by reference to the general scheme of those provisions and in the light of the objectives pursued by the Directives by means of those provisions that the concept of 'vertically integrated undertaking' must therefore be interpreted.

10 See recital 9 of Directive 2009/72 and recital 6 of Directive 2009/73.

11 See recital 11 of Directive 2009/72 and recital 8 of Directive 2009/73.

12 See, on this point, the judgment of 26 October 2017, *Balgarska energiyna borsa* (C-347/16, EU:C:2017:816, paragraph 33).

13 See recital 16 of Directive 2009/72 and recital 13 of Directive 2009/73.

14 See Article 9(8) of Directive 2009/72 and of Directive 2009/73..

40. Again from a systematic point of view, it is also appropriate to mention that the concept of 'vertically integrated undertaking' refers to the concept of 'control', the definition of which, as is apparent from recital 13 of Directive 2009/72 and recital 10 of Directive 2009/73, is taken from Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. [15] I do not, however, think that the definition of that concept is relevant to the analysis of the present complaint. [16]

41. It is by reference to the general scheme that I have outlined that it is necessary, in the third place, to address the objectives of the Directives and, in particular, the rules relating to effective separation.

42. As is apparent from various recitals in each of the Directives [17] and as I have already indicated, the objective of these rules is to eliminate the inherent conflict of interests between undertakings active in the generation of electricity or production of gas and in the supply of those energy products, on the one side, and transmission system operators, on the other, so as to ensure fair access to the network, promote investments in infrastructure in a non-discriminatory way, promote transparency in the market and ensure security of supply, with the ultimate aim of creating an internal market in electricity and natural gas. [18]

43. In this connection, I consider that, as the Commission has stated, it cannot be ruled out that a conflict of interests will exist between a transmission system operator established in the European Union and undertakings active in the generation of electricity or the production of gas and in the supply of those energy products even when those activities take place outside the European Union. Accordingly, the inclusion of such activities, for the purposes of classifying an entity as a vertically integrated undertaking cannot be systematically ruled out.

44. In its written pleadings and at the hearing, the Commission provided the particular example of a situation in which gas or electricity produced outside the European Union by an undertaking is transported in a transmission system within the European Union that is owned by the same undertaking. In a situation of that kind there is an obvious risk that discriminatory conduct in the operation of the network will be adopted (such as non-investment or delayed investment) to the detriment of parts of the network that are used to transport the energy products of competitors. Also, in a situation of this kind, the system operator would have access to sensitive information concerning competitors that could be used to its own advantage in its production or supply activities. There can be no doubt that, in light of the objectives pursued by the provisions of the Directives relating to effective separation, situations of this kind must fall within the scope of the Directives.

[15] OJ 2004 L 24, p. 1.

[16] In the context of merger control, the concept of 'control' rests essentially on criteria relating to the person who has control, the object of control (undertaking or assets), the means by which control is exercised and the type of control exercised (exclusive or joint): see the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1), in particular, Section II. However, the German Government has clarified that, for the purposes of Paragraph 3(38) of the EnWG, as interpreted by the NRA, classification as a 'vertically integrated undertaking' is not dependent on the vertically integrated undertaking's exercising control over undertakings that are or are not established in the European Union; that provision does, however, lay down a geographical criterion which requires that, for the purposes of such classification, the activities in the electricity or gas sector are carried on in the European Union. It follows that, for the purposes of the analysis of the present complaint, the exercise of control (and thus also the concept of control) is not relevant; what is relevant is the question of whether the electricity or natural gas undertaking or group of undertakings carries on activities outside the European Union independently of any possible control over an undertaking established outside the European Union.

[17] See recitals 9, 11, 12, 15, 16, 19 and 24 of Directive 2009/72 and recitals 6, 8, 9, 12, 13, 16 and 21 of Directive 2009/73.

[18] Regarding Directive 2009/72, see the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 22 and the case-law cited), and, regarding Directive 2009/73, the judgment of 19 December 2019, *GRDF* (C-236/18, EU:C:2019:1120, paragraph 34 and the case-law cited). See also point 108 of this Opinion.

45. It follows that a restrictive interpretation of the concept of 'vertically integrated undertaking', such as that proposed by the German Government, undermines the practical effectiveness of the provisions of the Directives relating to effective separation and that the exclusion from the scope of that concept of situations where there is a potential conflict of interests, such as that mentioned in the preceding paragraph, resulting from a restriction of the scope of that concept to activities carried on solely within the European Union, as under Paragraph 3(38) of the EnWG, is not consistent with the objectives pursued by the Directives.

46. I would also point out in this connection, first, that, with regard to Directive 2009/72, the Court has already had occasion to make clear that it follows from recitals 16, 17 and 19 and Article 47(3) of that directive that the unbundling requirements are intended to ensure the *complete* and *effective* independence of transmission system operators from generation and supply activities. [19] The same considerations apply to Directive 2009/73. [20]

47. Secondly, it follows from recital 24 of Directive 2009/72 and recital 21 of Directive 2009/73 that fully effective separation of network activities from supply and production activities must apply throughout the European Union to both EU and non-EU undertakings. Situations such as that mentioned by way of example in point 44 of this Opinion do not ensure in the European Union, where the transmission system that is regulated is located, the full separation of network activities from supply and production activities.

48. I should point out in this connection that, contrary to what the German Government argues, an interpretation of the concept of 'vertically integrated undertaking' which includes within the scope of that concept production or supply activities carried on outside the European Union entails neither extraterritorial application of EU law, contrary to the case-law of the Court of Justice and international law, nor infringement of the fundamental rights and freedoms of undertakings that do no operate within the European Union. Indeed, as the Commission has rightly pointed out, the Directives do not constitute a set of rules that governs activities carried on outside the European Union by vertically integrated undertakings; they do, however, determine the conditions with which such undertakings must comply in order to be able to operate electricity or gas transmission systems within the European Union. [21]

49. It follows from all of the foregoing that, in my opinion, the first of the Commission's complaints should be upheld.

[19] Judgment of 26 October 2017, *Balgarska energiyna borsa* (C-347/16, EU:C:2017:816, paragraph 34).

[20] The recitals and provision of Directive 2009/72 mentioned in point 46 correspond to recitals 13, 14 and 16 and Article 52(3) of Directive 2009/73.

[21] See also, to that effect, the judgments of 28 February 2013, *Commission* v *Austria* (C-555/10, EU:C:2013:115, paragraph 60), and of 28 February 2013, *Commission* v *Germany* (C-556/10, EU:C:2013:116, paragraph 64). Article 11 of each of the Directives, concerning certification procedures in relation to third countries, which the German Government cites in its written pleadings, should, in my opinion, be interpreted in the same way. I do not think it can in any way be inferred from those provisions that activities carried on outside the European Union in the electricity and gas sectors must be excluded from the concept of 'vertically integrated undertaking'.

B. The second complaint, concerning inadequate transposition of the provisions relating to transition periods in the context of the independent transmission operator model

1. Arguments of the parties

50. The Commission maintains that the provisions of Paragraph 10c(2) and (6) of the EnWG unduly limit the scope of the provisions of Article 19(3) and (8) of each of the Directives and therefore represent an inadequate transposition of those provisions. The Federal Republic of Germany has therefore failed to fulfil its obligations under those provisions of the Directives.

51. According to the Commission, Article 19(3) of the Directives applies to all positions and functions and to all interests and commercial relationships, both direct and indirect, in the vertically integrated undertaking, its business divisions and component undertakings and its controlling shareholders. The scope of these provisions is not limited to the parts of the vertically integrated undertaking and controlling shareholders which, in the energy sector, carry on the activities listed in Paragraph 10c(2) of the EnWG.

52. The restriction to the latter activities laid down in German law is therefore consistent neither with the wording of Article 19(3) and (8) of the Directives nor with the objectives of the rules relating to effective separation. In accordance with the independent transmission operator model, an independent transmission operator may remain a part of a vertically integrated undertaking only if certain rigorous conditions laid down in the Directives and relating to organisation, management and investment – which ensure its effective independence from the vertically integrated undertaking as a whole – are satisfied. Indeed, the interests of the part of a vertically integrated undertaking that operates in the energy sector could have repercussions for the policies and interests of the entire vertically integrated undertaking, including the parts thereof that do no operate in the energy sector.

53. The exclusion of parts of the vertically integrated undertaking that do not operate directly in the energy sector would make it possible to circumvent the rules relating to effective separation. In fact, the component parts of a vertically integrated undertaking are, necessarily, strictly interdependent. It cannot therefore be ruled out, *a priori*, that, in the necessary interactions between various components of the vertically integrated undertaking constraints upon the components that do not operate in the energy sector could arise from the interests of the vertically integrated undertaking in the sectors of production and supply. It is precisely in order to avert such risks and to ensure the effective separation of the transmission operator from the vertically integrated undertaking that the EU legislature decided to include the whole of the vertically integrated undertaking within the scope of the provisions of Article 19(3) and (8) of the Directives, rather than restrict the scope of those provisions solely to the component parts that operate in the energy sector, as the German legislation transposing the Directives does.

54. The Federal Republic of Germany disputes the Commission's arguments. It maintains, in the first place, that the relevant provisions of the Directives and of the EnWG have the same scope. Indeed, it may be understood from Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 that a 'vertically integrated undertaking' is made up of electricity undertakings or natural gas undertakings, not of undertakings operating in other sectors of the economy. Therefore, in the Directives, as in German law, the classification of an electricity or natural gas undertaking is dependent on a specific sphere of activity.

55. In the second place, in order to attain the objectives pursued by the Directives, in particular the elimination of conflicts of interests between producers and suppliers and transmission system operators, it is necessary, but also sufficient, to ensure the independence of the transmission system operator from the parts of the vertically integrated undertaking that operate in the energy sector. In order to avert such conflicts of interests it is not, however, necessary to extend the scope of the provisions relating to transition periods to parts of the undertaking that do not operate in the energy sector. It is not even conceivable that the transfer of staff from a part of the undertaking that does not operate in the energy sector to the transmission system operator could create a conflict of interests between producers and suppliers and transmission system operators.

56. In the third place, the provisions relating to transition periods could have an effect on the free movement of workers, under Article 45 TFEU, and on the fundamental right to pursue a freely chosen occupation, under Article 15(1) of the Charter. Restrictions of those rights are justified only if they pursue objectives of general interest and are necessary and proportionate to the achievement of such objectives. However, ensuring effective separation and averting conflicts of interests, in the context of the independent transmission operator model, render it necessary temporarily to suspend the transfer of staff only between the various parts of the vertically integrated undertaking that operate in the energy sector, and not between other parts of the undertaking.

2. Assessment

57. The assessment of the validity of the second complaint in the Commission's action depends on what the scope of Articles 19(3) and (8) of the Directives is determined to be, those provisions providing that, during certain transition periods (either for three years or for six months prior to their appointment), persons responsible for the management of the independent transmission operator and/or members of the administrative bodies of the independent transmission operator, and all the other persons mentioned in Article 19(8), must not, essentially, have had a professional or commercial relationship with the vertically integrated undertaking or parts thereof or with its controlling shareholders.

58. In particular, it is necessary to assess the compatibility with the provisions of the Directives mentioned of national transposing legislation, such as the German legislation at issue, that restricts the applicability of the necessary transition periods provided for in the Directives solely to staff of the parts of the vertically integrated undertaking and of its controlling shareholders that, in the energy sector, carry on the activities listed in Paragraph 10c(2) of the EnWG.

59. As I made clear in point 31 of this Opinion, the scope of the relevant provisions of the Directives must be determined taking into account not only the wording of those provisions but also their context and the objective pursued by the legislation in question.

60. In so far as the wording is concerned, I should point out that, by contrast with the transposing provisions of the EnWG, Article 19(3) and (8) of the Directives contain no express restriction of their scope to staff of the parts of the vertically integrated undertaking that operate in the energy sector. On the contrary, both paragraph 3 and the second subparagraph of paragraph 8 refer to the vertically integrated undertaking as a whole, and paragraph 3 also refers to parts of the vertically integrated undertaking, without further specification.

61. From a contextual and teleological viewpoint, the provisions of Article 19(3) and (8) of the Directives form part of the rules laid down in Chapter V of Directive 2009/72 and Chapter IV of Directive 2009/73 which, in the context of the third option I mentioned in point 38 of this Opinion, are aimed at ensuring the independence of the transmission operator from the vertically integrated undertaking, so as to eliminate the inherent conflicts of interests between interests relating to the generation of electricity or the production of gas and supply interests, on the one hand, and operation of the transmission system, on the other, so that the further objectives I mentioned in point 42 of this Opinion can be attained.

62. It must be borne in mind that, as I observed in point 46 of this Opinion, the provisions relating to effective unbundling are intended to ensure the *complete* and *effective* independence of transmission system operators within vertically integrated undertakings in the event that options other than ownership unbundling (which the EU legislature regards as the preferred solution) are chosen. [22] It follows from those considerations that the provisions relating to effective unbundling, which play a fundamental role within the scheme created by the Directives, cannot be interpreted restrictively and must instead be understood in a broad sense, in order to ensure the complete and effective independence of transmission system operators with regard to vertically integrated undertakings.

63. More specifically, I think that, as the Commission argues, it cannot be ruled out, *a priori*, that situations could arise within a vertically integrated undertaking where there is a conflict between the interests of the vertically integrated undertaking considered as a whole and the interests of the transmission operator that could have the effect of influencing the operation decisions of the latter. Within a necessarily complex structure, such as that which a vertically integrated undertaking operating, inter alia, in the energy sector may have, it cannot be ruled out that interests relating to production and supply could impose constraints upon the activities of parts of the undertaking that do not directly operate in the energy sector. I think that it was precisely for that reason that the EU legislature referred, in Article 19(3) and (8) of the Directives, to the vertically integrated undertaking as a whole, rather than expressly restricting the scope of those provisions to the parts thereof that operate in the energy sector.

64. I would observe in this connection that, as the German Government points out, the definitions of the concept of 'vertically integrated undertaking' given in Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 do indeed refer respectively to 'electricity undertakings' and 'natural gas undertakings' (or groups of such undertakings), as defined in Article 2(35) and Article 2(1) respectively. However, while it may be gleaned from these definitions that these concepts include within their scope natural and legal persons carrying on at least one of the functions mentioned in the relevant definition, [23] it may not, however, be inferred that the concept of 'vertically integrated undertaking' should exclude the component parts thereof that do not operate in those sectors, with the result that such component parts are excluded from the scope of the Directives' provisions relating to effective separation. As the Commission points out, a restrictive interpretation of that sort would give rise to an artificial compartmentalisation of the undertaking that does not accord with economic reality and which would, in my opinion, be contrary to the requirement, mentioned in point 62 of this Opinion, for the abovementioned provisions to be interpreted broadly.

[22] See recital 11 of Directive 2009/72 and recital 8 of Directive 2009/73 and point 37 of this Opinion.

[23] Namely generation, transmission, distribution, supply and purchase of electricity, or production, transmission, distribution, supply, purchase and storage of natural gas, as well as related commercial, technical and maintenance tasks.

65. Next, as regards freedom of movement for workers, under Article 45 TFEU, to which the German Government refers, I think that, although the provisions of Article 19(3) and (8) of the Directives might indeed constitute a barrier to the exercise of that freedom, as the German Government maintains, they are nevertheless responsive to objectives of general interest pursued by the European Union and are justified and proportionate.

66. I would observe in this connection that, according to the case-law, a measure that constitutes an impediment to the free movement of workers cannot be accepted unless it pursues one of the legitimate aims listed in the TFEU or is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be capable of ensuring the achievement of the objective in question and not go beyond what is necessary to attain that objective. [24]

67. I would point out here that the objective of ensuring effective unbundling pursued by the provisions of Article 19(3) and (8) of the Directives is necessary in order to ensure the functioning of the internal energy market, mentioned in Article 194(1) TFEU. Those provisions are also appropriate to the attainment of that objective, inasmuch as the stipulation of transition periods within the vertically integrated undertaking and its controlling shareholders prior to the appointment of individuals to positions of responsibility or managerial positions within the transmission system operator is appropriate to ensuring the latter's independence from structures in the vertically integrated undertaking that could be influenced by interests relating to the activities of electricity or gas production and supply. Given the limited duration of the restrictions laid down, I also think that the provisions in question do not go further than is necessary to attain the established objectives.

68. On the other hand, in so far as concerns the fundamental right to pursue a freely chosen occupation, under Article 15(1) of the Charter, it should be remembered that, according to the case-law of the Court, that is not an absolute right, but one that must be considered in relation to its social function, and, consequently, restrictions may be imposed on the exercise of that right, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right. [25]

69. It follows from what I said in point 67 of this Opinion that the provisions of Article 19(3) and (8) of the Directives are indeed responsive to objectives of general interest pursued by the European Union. Given their limited temporal impact, they cannot be regarded, in my opinion, as a disproportionate and intolerable interference impairing the very substance of the fundamental right to pursue a freely chosen occupation, guaranteed by Article 15(1) of the Charter.

70. It follows from all the foregoing considerations that, in my opinion, the Commission's second complaint should also be upheld.

[24] See, with regard to previous periods of relevant activity, the judgment of 23 April 2020, *Land Niedersachsen* (C-710/18, EU:C:2020:299, paragraph 34 and the case-law cited), as well as the judgments of 16 March 2010, *Olympique Lyonnais*, (C-325/08, ECLI:EU:C:2010:143, paragraph 38), and of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850, paragraph 55).

[25] See the judgments of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraph 73), and of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54 and the case-law cited).

C. The third complaint, concerning inadequate transposition of the provisions of Article 19(5) of Directives 2009/72 and 2009/73

1. Arguments of the parties

71. The Commission complains that the Federal Republic of Germany has failed to transpose adequately into national law the provisions of Article 19(5) of the Directives, which provide, in the context of the independent transmission operator option, that persons responsible for the management of the transmission system operator, members of its administrative bodies and its employees may not hold any interest in or receive any benefit from any part of the vertically integrated undertaking other than the transmission system operator.

72. The obligation to dispose of any shares held in the capital of the vertically integrated undertaking that were acquired up to 3 March 2012, laid down in Paragraph 10c(4) of the EnWG applies, in fact, solely to persons responsible for the management of the transmission system operator, and not to employees, whereas, under Article 19(5) of the Directives, that obligation applies to the managers and employees of the transmission system operator alike. According to the Commission, even though the employees of a transmission system operator are not able to take managerial decisions, they are in a position to influence the activities of their employer, and this justifies the application to them of the obligation to dispose of any shares held in the capital of the vertically integrated undertaking. An obligation of that kind does not, according to the Commission, undermine employees' rights to property, given that it is merely of future application, and so any dividends already distributed will not be affected. Moreover, any such shareholdings will be disposed of only with the consent of their holder and in return for reasonable payment.

73. The Federal Republic of Germany disputes the Commission's arguments. The different treatment of those responsible for the management of the transmission system operator by comparison with other employees, in so far as concerns the obligation to dispose of shareholdings in the vertically integrated undertaking, is due to their pre-eminent position. For persons responsible for management, in fact, stock options and shareholdings usually form part of their remuneration, which, accordingly, will depend on movements in the price of those shares. Moreover, such individuals have a decisive strategic influence on the management of the transmission operator, which entails a particular risk of conflicts of interests. Other employees, on the other hand, are not able to exert any significant influence upon the daily management of the system. Furthermore, prior to the entry into force of the enhanced independence requirements under the Directives, shareholdings in the vertically integrated undertaking were usually an integral part of the constitution of assets or individual savings of employees. In order to avoid the imposition of a disproportionate restriction of employees' rights to property, which are guaranteed under the Constitution, it was therefore decided merely to prohibit employees from acquiring shareholdings in the vertically integrated undertaking in the future. That decision was the outcome of a weighing in the balance of the requirements relating to effective unbundling and the protection of employees' rights to property. In any event, the Directives do not determine how shareholdings which employees had acquired prior to the cut-off date must be treated, and so the Member States were free to adopt such transitional provisions as they thought fit.

2. Assessment

74. The assessment of the validity of the third complaint in the Commission's action depends on what the scope of the provisions of Article 19(5) of the Directives is determined to be. In particular, it is necessary to assess the compatibility with those provisions of national transposing legislation, such as Paragraph 10c(4) of the EnWG, which lays down an obligation to dispose of shares in the capital of the vertically integrated undertaking, or in a part of it, solely for persons responsible for management, to the exclusion, therefore, of other employees of the transmission system operator.

75. As I made clear in point 31 of this Opinion, the scope of the relevant provisions of the Directives must be determined taking into account not only the wording of those provisions but also their context and the objective pursued by the legislation in question.

76. In so far as the wording is concerned, it must be observed that the provisions of Article 19(5) of the Directives are clear in prohibiting both the persons responsible for the management and/or members of the administrative bodies of the transmission system operator and employees of the transmission system operator from holding any interest in any part of the vertically integrated undertaking. Those provisions make no distinction between the first and the second groups of persons concerned.

77. From a contextual and teleological viewpoint, I think that considerations similar to those set out in points 61 and 62 of this Opinion with reference to Article 19(3) and (8) of the Directives also apply when determining the scope of the provisions of Article 19(5). In particular, the requirement underlying the provisions relating to effective unbundling, which is to ensure the complete and effective independence of transmission system operators within vertically integrated undertakings, in the event that options other than ownership unbundling[26] are chosen, justifies, in my opinion, a broad interpretation of the prohibition on holding shares in the vertically integrated undertaking which is consistent with the wording of those provisions and therefore includes an obligation upon employees to dispose of any such shares they may hold. As the Commission has pointed out, even if employees do not participate in the everyday managerial decisions of the transmission system operator, it cannot be ruled out, *a priori*, that they may be in a position to influence the activities of their employer or, consequently, that conflicts of interests could arise if employees hold shares in the vertically integrated undertaking or in parts of it.

78. In that context I therefore think that the Member States have no margin of discretion in transposing the provisions in question of the Directives and to exclude employees of the transmission system operator from the obligation to dispose of interests in the vertically integrated undertaking.

79. As for the question of the proportionality of the prohibition on holding interests in the vertically integrated undertaking for *all* employees of the transmission system operator, it is clear from the wording of the provisions in question that the EU legislature chose not to differentiate between the various types of employees of the independent transmission operator concerned by the prohibition. In that context, to reopen discussion of that choice amounts, in my opinion, essentially to calling into question the lawfulness of the provisions of the Directives.

[26] See point 38 of this Opinion.

80. In this connection, it must however be borne in mind that, according to the settled case-law of the Court, in the absence of a provision of the FEU Treaty expressly permitting it to do so, a Member State cannot properly plead the unlawfulness of a directive addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that directive. The position could be different only if the act in question contained such particularly serious and manifest defects that it could be categorised as a non-existent act.[27] That question does not, however, arise in the present case.

81. Lastly, as regards the German Government's argument that the national legislation enables employees' rights to property to be observed, it must be recalled that the right to property guaranteed by Article 17(1) of the Charter is not absolute and that its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Consequently, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed.[28]

82. I would add, first, that, as I made clear in point 67 of this Opinion, the provisions relating to the effective separation of transmission system operation from the activities of electricity or natural gas production and supply, of which Article 19(5) of the Directives is part, are in fact responsive to objectives of general interest pursued by the European Union.

83. Secondly, I also think that the prohibition laid down in those provisions does not impair the very substance of the right to property guaranteed by Article 17(1) of the Charter. The Court has pointed out, in this regard, that the protection afforded by that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit.[29] The provisions of the Directives in question do not, however, undermine the asset value of any shareholdings held by employees. Indeed, the Directives in no way preclude the sale of such shareholdings at the market price or other methods by which employees concerned by the obligation to dispose of shares may realise the asset value of their shareholdings.

84. In light of all the foregoing considerations, I think that the Commission's third complaint should also be upheld.

D. The fourth complaint, concerning infringement of the exclusive powers of the national regulatory authority

1. Arguments of the parties

85. The Commission maintains that the Federal Republic of Germany has infringed the exclusive powers which EU law has conferred on NRAs by attributing to the government, under Paragraph 24(1) of the EnWG, powers to set transmission and distribution tariffs, conditions for

[27] See, on this point, *ex multis*, the judgment of 11 October 2016, *Commission* v *Italy* (C-601/14, ECLI:EU:C:2016:759, paragraph 33 and the case-law cited).

[28] Judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited).

[29] See, regarding usufruct over agricultural land, the judgment of 21 May 2019, *Commission* v *Hungary* (C-235/17, EU:C:2019:432, paragraph 69 and the case-law cited).

access to the national networks and conditions for the provision of balancing services and by adopting, on the basis of that provision, a series of regulations governing the exercise of regulatory powers.[30] That Member State has therefore incorrectly transposed Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

86. The Commission states that the national provisions in question do not simply lay down 'general policy guidelines issued by the government', within the meaning of Article 35(4)(b)(ii) of Directive 2009/72 and Article 39(4)(b)(ii) of Directive 2009/73. Instead, they directly attribute to the government certain powers that, under the Directives, are reserved solely to NRAs and which relate to the tasks and powers of NRAs. The national regulations adopted on the basis of Paragraph 24(1) of the EnWG constitute extremely detailed sets of instructions addressed to the NRA regarding the manner in which its regulatory tasks are to be performed. These regulations establish the procedure and methods for determining network tariffs, setting out details such as the method of amortisation and indexation.

87. While these national regulatory provisions leave the NRA a certain margin of discretion regarding their application, they are very detailed and considerably reduce the powers of the NRA in so far as concerns determining methodologies, applicable tariffs and the costs to be taken into account. Moreover, these regulatory provisions lay down detailed rules regarding the conditions for network access, as well as detailed guidelines regarding interconnection agreements between transmission system operators, the capacities that may freely be assigned and the number of territorial markets. According to the Commission, the stipulation of such detailed rules prevents the NRA from carrying out its own assessments and therefore reduces it margin of discretion, depriving it of powers which the Directives assign to it exclusively.

88. As regards the reference to the principle of the separation of powers and the preservation of the sovereignty of the legislature, the Commission does not dispute that the tasks entrusted to the NRA must be established in legislative acts. Indeed, that is indispensable, since it is necessary to transpose the Directives into national law. The Commission does, however, object that, on transposing the directives, the German legislature failed to entrust the NRA with the tasks provided for by the EU legislature. Instead of defining those tasks as exclusive powers of the NRA, as the Directives require, the German legislature provided in the EnWG that the conditions under which the NRA can perform those tasks are to be laid down by means of government regulatory act. However, in accordance with the Directives, the Member States are required to ensure that the NRA is given exclusive power to carry out the tasks defined in Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73.

89. According to the Commission, the Directives define the tasks and powers of NRAs in detail, laying down requirements both procedural and substantive with which NRAs must comply in the exercise of their powers. In their interaction with other relevant acts of EU law,[31] the Directives ensure that the NRA will perform the tasks entrusted to it by the EU legislature within the sphere

[30] The Commission mentions the Stromnetzentgeltverordnung (StromNEV, Electricity Network Fee Regulation) of 25 July 2005, BGBl. I p. 2225; the Gasnetzentgeltverordnug (GasNEV, Gas Network Fee Regulation) of 25 July 2005, BGBl. I p. 2197; the Anreizregulierungsverordnung (ARegV, which governs the regulation of energy supply networks by means of incentives) of 29 October 2007, BGBl. I, p. 2529; the Stromnetzzugangsverordnung (StromNZV, Electricity Network Access Regulation) of 25 July 2005, BGBl. I p. 2243; and the Gasnetzzugangsverordnug (GasNZV, Gas Network Access Regulation) of 3 September 2010, BGBl. I p. 1261.

[31] The Commission refers to Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15), as amended ('Regulation No 714/2009'), and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36), as amended ('Regulation No 715/2009').

of competence defined by the EU legislature. The provisions of EU law are, according to the Commission, sufficient to establish the necessary legal framework for the NRA's administrative action and to satisfy the principle of the separation of powers. Other requirements arising from national law and relating to the performance of the NRA's tasks must not give rise to infringement of the exclusive powers attributed to the NRA. The regulatory provisions in question, adopted in Germany, do not merely lay down general rules that must be followed by national bodies as regards the lawfulness and basis of administrative action; they constitute sets of detailed rules that apply to the performance of the regulatory tasks laid down by the Directives. The Court has already found this to constitute a failure on the part of a Member State to fulfil its obligations, in its judgment of 29 October 2009, *Commission* v *Belgium*, (C-474/08, not published, EU:C:2009:681, '*Commission* v *Belgium*').

90. The Federal Republic of Germany, supported by the Kingdom of Sweden, disputes the arguments raised by the Commission. As a preliminary point, it submits, in its reply, that the Commission has raised a new complaint concerning breach of the NRA's independence. That new complaint constitutes an *a posteriori* broadening of the scope of the dispute, which, as such, is inadmissible.

91. As to the substance, the Federal Republic of Germany maintains that the EnWG is based on the principle of *normative Regulierung* (normative regulation), in accordance with which the NRA adopts specific regulatory decisions in full independence, but in so far as concerns the definition of methodologies for network access, is bound by the decisions of principle of the parliamentary legislature that are formally expressed in the regulations adopted by the government. Within that framework, the NRA enjoys a broad margin of discretion, but the exercise of its powers is structured in advance (*vorstrukturiert*), so as to ensure that the chain of democratic legitimacy is not broken, as is required by German constitutional law. It is not for the NRA, but for the legislature to adopt decisions of principle in the field of energy policy, such as those which are necessary in the context of the transition to renewable energies.

92. The EnWG does not confer regulatory powers on the federal government, but authorises it, by means of a delegation of legislative powers, to exercise a normative regulatory power, with the approval of the Bundesrat (Federal Council, Germany), in accordance with Paragraph 80(1) of the Grundgesetz (Basic Law of the Federal Republic of Germany). The regulations adopted by the federal government do not concern individual network access conditions, but the definition, in abstract and general terms, of methodologies which the NRA will refine and apply in individual cases. Under German constitutional law, regulations of that kind do not constitute general policy guidelines, but substantive normative acts.

93. The rules laid down in the EnWG are consistent with the Directives' provisions concerning the tasks of NRAs. The Federal Republic of Germany, supported on this point by the Kingdom of Sweden, in fact considers that the Directives in no way preclude the national legislature from adopting provisions that are more specific, more precise than the general provisions of the Directives concerning the regulatory methodologies which the NRA must take as a basis. Moreover, it would be contrary to the principle of the procedural autonomy of the Member States, recognised by the Court, if the provisions of the Directives left the Member States with no margin of discretion in the transposition of the rules concerning the powers of NRAs.

94. The Directives permit the Member States to adopt different regulatory systems, all of which transpose the Directives adequately. In the case of 'normative regulation', the legislature and the authority vested with the power to adopt regulations establish calculation methodologies in

general and abstract terms, and the NRA has power to supplement and, to an extent, modify those methodologies. Moreover, in this situation, the NRA adopts a precise regulatory decision on the basis of the aforementioned calculation methods. The interpretation which the Commission proposes would, on the other hand, mean that the NRA has power both to determine tariffs and to define methodologies, which would be contrary to the wording, the spirit, the objectives and the drafting history of the Directives.

95. The judgment in *Commission* v *Belgium* is not relevant, since the regulations adopted on the basis of Paragraph 24 of the EnWG in the present case are substantive laws, not instructions given by the government in its capacity as an executive authority of a higher level than the NRA. Moreover, the 'advance structuring' of the NRA's discretion by means of regulatory provisions is not an encroachment upon its independence, which lies in its not being subject to instructions from government or other authorities. That circumstance is guaranteed by German law.

96. Furthermore, the principle of 'normative regulation' is recognised even in EU law, as is demonstrated by the fact that the Commission itself has power to adopt network codes, which are not mere general policy guidelines but detailed methodological prescriptions in the true sense. EU law, and the Directives in particular, do not contain sufficiently precise substantive requirements regarding the establishment of methods for network access and the fixing of tariffs. The provisions of Regulation No 714/2009 and Regulation No 715/2009 are not applicable to exchanges of electricity and gas within a single Member State, or at the level of distribution networks. In that context, in order to ensure the correct transposition of the Directives, the Member States are required to draw up their own criteria within which to frame the regulatory powers of NRAs.

97. Lastly, the Federal Republic of Germany maintains that the principles established in the case-law following on from the judgment of the Court of Justice of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7, '*Meroni*'), are also applicable where the EU legislature entrusts certain powers to independent NRAs. In accordance with those principles, the delegation of powers to such authorities is possible only if the legislature has already laid down sufficiently precise requirements regarding their tasks and powers. The EU legislation does not contain such requirements, and so it is for the Member States to adopt them. The same obligation arises from the principles of democracy and the rule of law, which form part of the fundamental political and constitutional structures of the Federal Republic of Germany, which, in accordance with Article 4(2) TEU, the EU must respect.

2. Assessment

98. As a preliminary point, the Federal Republic of Germany's objection that the Commission's arguments concerning breach of the NRA's independence amount to a new and therefore inadmissible complaint should be dismissed.

99. I would observe in this connection that, by its fourth complaint, the Commission argues that the Federal Republic of Germany has transposed various provisions of the Directives incorrectly, in that the national legislation at issue infringes the exclusive powers which the Directives confer on the NRA. The national legislation attributes to the government some of the powers reserved by the Directives to the NRA and, by laying down a detailed set of rules governing the exercise of its powers, considerably reduces the breadth of discretion which the NRA enjoys in the sphere of competence reserved to it.

100. I must observe in this connection that both the attribution to a body other than the NRA of power to intervene in areas reserved to the NRA and the imposition upon the NRA of provisions adopted by other bodies that regulate in detail the exercise of its powers within the sphere of competence reserved to it are liable to affect the NRA's ability to adopt decisions falling within in its sphere of competence independently, completely freely and without any external influence. It follows that the fourth complaint addresses issues relating to encroachment upon the independence which the Directives guarantee the NRA and that the arguments raised by the Commission in this regard cannot, therefore, be viewed as a new complaint different from that initially put forward and consequently inadmissible.

101. As regards the substance, in order to assess the validity of the Commission's fourth complaint, it is necessary, in my opinion, to analyse the relevant provisions of the Directives in accordance with their wording, the objectives pursued by the rules of which they are part and their context. [32]

102. It should first of all be noted that the provisions governing the designation, objectives, duties and powers of NRAs in the electricity sector and in the national gas sector are to be found in Chapter IX (Articles 35 to 40) of Directive 2009/72 and Chapter VIII (Articles 39 to 44) of Directive 2009/73 respectively.

103. With regard to those provisions, the Court has already had occasion to point out that Article 35(4) of Directive 2009/72, to which Article 39(4) of Directive 2009/73 corresponds *expressis verbis*, requires the Member States to guarantee the independence of NRAs and to ensure that they exercise their powers impartially and transparently. [33] The same provision then provides that, for that purpose, the Member States are to ensure that, when carrying out the regulatory tasks conferred on them by the Directives and related legislation, NRAs are legally distinct and 'functionally independent from any other public or private entity' and that their staff and the persons responsible for their management 'act independently from any market interest' and 'do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks'. Article 35(5) of Directive 2009/72, to which Article 39(5) of Directive 2009/73 corresponds, goes on to add that, in order to protect the independence of NRAs, the Member State must ensure, inter alia, that NRAs 'can take autonomous decisions, independently from any political body'. [34]

104. The meaning of 'independence' is not defined in Directive 2009/72 or Directive 2009/73. However, the Court has already held, with particular reference to NRAs in the energy sector, that, in the case of public bodies, independence usually and commonly refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or pressure. [35] More specifically, in the energy sector, independence in decision-making, as guaranteed by the Directives, implies that, within the sphere of the regulatory duties and powers referred to in Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73, NRAs take their own

[32] See, to that effect, *ex multis*, the judgment of 16 July 2020, *Commission* v *Hungary* (concerning charges for access to the networks for the transmission of electricity and natural gas) (C-771/18, EU:C:2020:584, paragraph 42 and the case-law cited).

[33] On this point, see the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 31).

[34] Judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 50).

[35] Judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 32), which refers to the judgment of 13 June 2018 (*Commission* v *Poland*, C-530/16, EU:C:2018:430, paragraph 67).

decisions autonomously and solely in the public interest, so as to ensure compliance with the objectives pursued by the Directives, without being subject to external instructions from other public or private entities. [36]

105. The Court has also had occasion expressly to explain that the requirements laid down in the Directives to which I referred in point 103 of this Opinion mean that NRAs must perform their regulatory duties free from *any* external influence. [37] I would also point out here that the repeated explanations in the Directives of the need to ensure the functional independence of NRAs dispels any doubt that that independence must be ensured not only in relation to private entities and commercial interests, but also in relation to *any* public entity, and therefore not only in relation to the government as the holder of executive power. The wording used in the Directives is unequivocal in establishing, first, that functional independence must be ensured in relation to *any* political body, and so not only the government but also the parliament, and, secondly, that this guarantee must be complete and not confined to certain specific acts that might be identified by reference to their form or content. The requirement that NRAs must be independent of *any* political interest is, moreover, expressly stated in recital 34 of Directive 2009/72 and recital 30 of Directive 2009/73.

106. It follows that the independence of NRAs which the Directives guarantee within the sphere of the duties and powers attributed to them exclusively by Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73 cannot be restricted, not even by a law enacted by parliament or by acts which, to use the categories to which the German Government referred at the hearing, are, according to a classification typical of national constitutional law, 'substantive laws', such as government regulations.

107. An interpretation of the Directives which guarantees the broad functional independence of NRAs is, moreover, consistent with the objectives of the Directives. Accordingly, their literal interpretation is confirmed by their teleological interpretation.

108. In this connection, the Court has already held that Directive 2009/72 seeks, in essence, to establish an open and competitive internal market in electricity which enables all consumers freely to choose their suppliers and all suppliers freely to supply their customers, to create a level playing field in that market, to ensure security of supply and to combat climate change. [38] The Court has identified the objective pursued by Directive 2009/73 in very similar terms. [39]

109. I should add that, as is clear from a number of the recitals of the Directives, [40] the primary objective of completing the internal market in electricity and natural gas and of creating a level playing field for all electricity undertakings established in the European Union was set because the previous rules and measures did not provide the necessary framework for creating an internal market that functioned perfectly well, while at the same time protecting consumers, promoting investment and ensuring security of supply. The adoption of new directives was expressly intended, inter alia, to avert the inherent risk, in the absence of effective separation of networks

[36] See, with regard to Directive 2009/72, the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 54), which is applicable by analogy to Directive 2009/73. See also the judgment of 3 December 2020 *Commission* v *Belgium* (C-767/19, EU:C:2020:984, paragraph 111).

[37] See, regarding Directive 2009/72, the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 33) (my italics). The same considerations apply, by analogy, to Directive 2009/73.

[38] Judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 22 and the case-law cited).

[39] Judgment of 19 December 2019, *GRDF* (C-236/18, EU:C:2019:1120, paragraph 34 and the case-law cited).

[40] See, inter alia, recitals 1, 6, 7, 19, 25, 37, 42, 46 and 50 of Directive 2009/72 and recitals 1, 5, 16, 21, 22, 30, 57 and 58 of Directive 2009/73.

from activities of production and supply – which the previous directives [41] had not managed to achieve – of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks. Hence the Directives' objective of introducing rules aimed at achieving the effective separation of production and supply activities from network operations. [42]

110. As the Court has already pointed out, it was precisely in order to achieve those objectives that the Directives conferred on NRAs substantial regulatory and supervisory powers in the electricity market. [43]

111. Within the framework established by the Directives, NRAs are responsible for ensuring the proper functioning of the system as a whole. In particular, as is expressly stated in recital 36 of Directive 2009/72 and recital 32 of Directive 2009/73, and as is reflected in the corresponding Article 37(1)(a) and Article 41(1)(a), they must be able to fix or approve tariffs or the methodologies underlying the calculation of tariffs, on the basis of a proposal from the transmission system operator or distribution system operator, or on the basis of a proposal agreed between those operators and users of the network. In carrying out those tasks, NRAs must ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective and must also take account of long-term marginal costs saved thanks to distributed generation and demand-side management measures.

112. Achieving those objectives requires the utmost guarantee of NRA independence, in the broad terms which may be understood from the wording of the provisions to which I referred in point 102 of this Opinion and the following points. Indeed, complete independence from economic actors and public entities, be they administrative bodies or political bodies (and in the latter case, be they the holders of executive power or of legislative power) is instrumental in ensuring that the decisions taken are truly impartial and non-discriminatory, while the possibility of undertakings and economic interests connected with the government, the majority or political power being treated in some way more favourably is excluded from the outset. [44] In this way, as the Commission has rightly pointed out, the risk – which, if it materialised would jeopardise the creation of an internal energy market open to cross-border access for new suppliers of electricity from different energy sources and for new providers of power generation – that national undertakings or undertakings connected with political power will be treated more favourably is neutralised. It is a particularly serious risk, given that, in many countries, the vertically integrated undertaking was formerly the State monopoly and still maintains links, through shareholdings for example, with the government. [45]

[41] Namely, Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37), and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

[42] Recitals 9 and 10 of Directive 2009/72 and recitals 6 and 7 of Directive 2009/73.

[43] See, regarding Directive 2009/72, the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 23).

[44] Complete independence from political power enables NRAs to take a long-term approach to their activities. This is necessary if the objectives of the Directives are to be achieved. Their decisions are thus freed from demands associated with the electoral cycle, by which the holders of political office are, on the other hand, constrained. While that constraint admittedly creates a connection with the demands and needs of society, as represented in public opinion, and is the principal virtue of democratic representation, it can become an 'Achilles' heel' if, in technical fields, it inhibits long-term thinking resistant to sectoral pressures.

[45] Regarding the need to neutralise the risk of conflicts of interests of this type by recognising the independence of NRAs, see, by analogy, paragraph 35 of the judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125), concerning the independence of personal data protection authorities.

113. Furthermore, as is expressly stated in recital 33 of Directive 2009/72 and recital 29 of Directive 2009/73, it was precisely for this reason that the Directives were specifically intended to strengthen the independence of NRAs and that, as is clear from recitals 34 and 30 of the Directives, they lay down provisions which, in order for the internal market in electricity to function property, enable energy regulators to take decisions in relation to all relevant regulatory issues and to be fully independent from any other public or private interests. [46]

114. The general framework for the independence of NRAs which I have described is further specified in the provisions of the Directives which define, analytically, the objectives, duties and powers. The literal and teleological interpretation is thus confirmed by a systematic interpretation: Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73 precisely determine the powers of NRAs, which are those defined in the Directives and those alone.

115. Moreover, these powers are framed within a legal structure that defines, on various levels, their objectives and the criteria for their exercise. In exercising the powers entrusted to them, NRAs are in fact required to act in accordance with the objectives indicated in Article 36 of Directive 2009/72 and Article 40 of Directive 2009/73. These are specific objectives which circumscribe the scope of the decisions entrusted to the NRAs and establish the criteria that must be followed in achieving the established objectives. [47]

116. Certain of these criteria are described in further detail, with reference to specific powers, in Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73. For example, transmission and distribution tariffs and the methodologies for calculating them, referred to in the first paragraph of each of these two articles, must be fixed in accordance with transparent criteria. In accordance with paragraph 6(a) of the two articles, these tariffs, and the conditions for connection and access to national networks, must be fixed in accordance with the need for the necessary investments to be made in the networks to ensure their viability. [48] In accordance with paragraph 10 of the same articles, such terms and conditions, tariffs and methodologies must be proportionate and applied in a non-discriminatory manner. As regards the provision of balancing services, on the other hand, Article 37(6)(b) of Directive 2009/72 and Article 41(6)(b) of Directive 2009/73 establish that these services must be performed in the most economic manner possible, must provide appropriate incentives for network users to balance their energy input and off-takes, must be provided in a fair and non-discriminatory manner and be based on objective criteria. In addition, in accordance with paragraph 8 of the abovementioned articles, in fixing or approving the tariffs or methodologies and the balancing services, NRAs are to ensure that transmission and distribution system operators are granted appropriate incentives, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities. [49]

[46] Judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraphs 24 and 25).

[47] For example, in accordance with Article 36(d) of Directive 2009/72 and Article 40(d) of Directive 2009/73, the objective of helping to achieve the development of secure, reliable and efficient non-discriminatory systems must be achieved in the most cost-effective way and with the consumer in mind.

[48] See, on this point, the judgment of 16 July 2020, *Commission* v *Hungary* (concerning tariffs for access to electricity and natural gas distribution networks) (C-771/18, EU:C:2020:584, paragraph 49).

[49] See, on this point, the judgment of 16 July 2020, *Commission* v *Hungary* (concerning tariffs for access to electricity and natural gas distribution networks) (C-771/18, EU:C:2020:584, paragraph 50).

117. The Directives also provide for a series of procedural guarantees with which NRAs must comply in the performance of the tasks, such as the obligation to publish their decisions, the obligation to preserve the confidentiality of commercially sensitive information and the obligation to reason their decisions fully. [50]

118. The criteria which the Directives require NRAs to follow in the exercise of the powers attributed to them are further specified in other legislative acts, such as Regulation No 714/2009 and Regulation No 715/2009. For example, Article 14 and Article 13 of those two regulations respectively [51] provide specific criteria for setting charges and tariffs and methodologies for setting network access charges. [52] Article 21 of Regulation No 715/2009 lays down provisions concerning balancing rules.

119. Those provisions are further supplemented and specified by various network codes established by means of Commission regulations containing detailed provisions relating, inter alia, to harmonised transmission tariff structures for gas, [53] the requirements for the grid connection of demand facilities, distribution facilities and distribution systems, [54] the requirements at EU level for the grid connection of power-generating facilities [55] and the requirements for the grid connection of high-voltage systems. [56] Given such a detailed regulatory framework, the Federal Republic of Germany cannot, in my opinion, maintain that, in order to transpose Directives 2009/72 and 2009/73 properly, the Member States are obliged to develop their own criteria for the calculation of tariffs. Moreover, as the Commission has rightly pointed out, the establishment of a fair tariff system is traditionally a fundamental task of NRAs, such that they have at their disposal (as they must) specialised departments capable of performing that task.

120. Two important consequences flow from the way in which the powers of NRAs are structured and defined. First of all, given that the EU legislation defines precisely those powers, the criteria for their exercise and the objectives to be achieved, there seems to be no room for measures to be taken at national level that would stand between the Directives and the performance by NRAs of the tasks which the Directives assign to them exclusively. The definition of functional independence in broad terms and the rules governing the powers of NRAs tend to support this conclusion. Consequently, it may be said that the Directives provide for a 'reservation of powers' to NRAs with respect to the duties listed in Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73. It follows that any advance structuring by the national legislature (*Vorstrukturierung*) of the way in which NRAs operate must not impinge on the exercise of the core powers reserved to them by the Directives. Secondly NRAs must confine themselves to

[50] See Article 37(7) and (16) of Directive 2009/72 and Article 41(7) and (16) of Directive 2009/73.

[51] See, on this point, the judgment of 16 July 2020, *Commission* v *Hungary* (concerning tariffs for access to electricity and natural gas distribution networks) (C-771/18, EU:C:2020:584, paragraph 43 *et seq.*).

[52] As for Germany's argument, contested by the Commission, that the criteria contained in these provisions apply only to cross-border exchanges at the level of transmission systems, I would observe that, even if that were true, tariffs and related calculation methodologies would still need to be fixed and applied in a non-discriminatory manner and with a view to the creation of an internal electricity and gas market, such that tariffs and methodologies must be determined on the basis of uniform criteria for both national and cross-border exchanges.

[53] Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (OJ 2017 L 72, p. 29).

[54] Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a Network Code on Demand Connection (OJ 2016 L 223, p. 10).

[55] Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators (OJ 2016 L 112, p. 1).

[56] Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct-current-connected power park modules (OJ 2016 L 241, p. 1).

acting within the limits defined by the EU legislation and may not introduce new interests or criteria in addition to those already identified by the EU legislature. They must ensure the technical implementation of what is prescribed in the secondary EU legislation.

121. The conclusions I have reached are not countered by the fact that the Directives leave the Member States with power to establish 'general policy guidelines'.[57]

122. Two observations are relevant in this connection. First, since the Directives expressly allow only *general* policy guidelines, *specific* guidelines or rules, giving detailed instructions, would certainly be inconsistent with them. Secondly, as the Court has already pointed out,[58] the relevant provisions of the Directives make expressly clear that general policy guidelines issued by the government of the Member State concerned may not relate to the regulatory powers and duties under Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73, which include duties and powers relating to the fixing, approving and monitoring of various tariffs and prices, in particular, those described in paragraph 1(a) of those articles, which consist in fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies. It follows that, while the Member States, and thus parliaments and governments, certainly retain powers in the field of energy policy, as is confirmed by Article 194 TFEU, the fact remains that the general policy guidelines address matters other than those covered by the reservation of regulatory powers to NRAs. I must also observe that the German Government has, in any event, made clear that the provisions which the Commission calls into question by the present complaint do not constitute general policy guidelines within the meaning of the Directives.

123. The interpretation given above, resulting from a literal, teleological and systematic analysis of the relevant provisions of the Directives is confirmed, moreover, by the approach which the Court has taken in its case-law.

124. In its judgment in *Commission* v *Belgium*, the Court clarified, with specific reference to the electricity sector, that the attribution by a Member State to an authority other than an NRA of powers to define the factual elements relevant for the calculation of transmission and distribution tariffs, such as the determination of amortisations or profit margins, constituted a failure to fulfil obligations under the provisions of Directive 2003/54 attributing powers in that area to the NRA. The Court held that the attribution of such powers to the executive reduced the scope of the powers conferred by the directive in question, inasmuch as the NRA was bound, when determining tariffs, by specific rules governing the determination of those elements that had been established by a different authority.[59] That approach has been confirmed by the Court in a very recent ruling, one that again involves the Kingdom of Belgium and specifically concerns Article 37(6)(a) of Directive 2009/72 and Article 41(6)(a) of Directive 2009/73.[60] Contrary to what the Federal Republic of Germany maintains, that case-law is relevant even in the event that the legislation called into question provides for intervention within the sphere of competence reserved to NRAs by means of substantive laws, rather than merely by way of instructions given by the government in its capacity as an executive authority of a higher level than the NRA. Indeed, as is clear from my earlier points, the powers attributed exclusively to NRAs by the directives, and their independence, must be ensured in relation to *any* political body, and so not

[57] Under Article 35(4)(b)(ii) of Directive 2009/72 and Article 39(4)(b)(ii) of Directive 2009/73.

[58] Judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 52).

[59] See paragraph 27 *et seq*.

[60] Judgment of 3 December 2020 *Commission* v *Belgium* (C-767/19, EU:C:2020:984).

only the government, but also in relation to the national legislature, which can and must establish such powers in legislative acts but cannot, however, take powers away from the NRA and attribute them to other public bodies.

125. Moreover, even in other sectors covered by EU law, in which it has been necessary to establish independent authorities with duties aimed at creating a market both competitive and capable of protecting other interests expressly indicated and governed by EU law, such as specific fundamental rights or consumer rights, the interpretation of the concept of 'independence' provided by the Court has been as broad as possible.

126. Of relevance here is the judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125). The point at issue in that case was the meaning of the expression 'complete independence' when applied to national supervisory authorities responsible for monitoring compliance with provisions relating to the protection of personal data.[61] The case turned on two opposing conceptions of the independence of the supervisory authorities: on the one hand, a broad interpretation according to which the requirement for independence must be interpreted as meaning that supervisory authorities must be free from any influence and, on the other, the narrower interpretation, put forward by the Federal Republic of Germany, which proposed independence merely from bodies outside the public sector and under the authorities' supervision, while an administration's internal mechanisms for monitoring the supervisory authorities would be permissible. The Court gave a reading of 'independence' that took account of the objectives of the directive in question and settled on the first interpretation, holding that 'the supervisory authorities responsible for supervising the processing of personal data outside the public sector must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data'.[62]

127. Similarly, in the electronic communications sector, the Court's case-law is aimed at ensuring that the discretion which NRAs are guaranteed in the exercise of their powers is protected.[63]

128. In conclusion, I consider that a broad interpretation of the rules relating to the independence of NRAs in the electricity and gas sectors is fully supported by a systematic analysis, as confirmed by the case-law of the Court. The system of EU law favours a broad understanding of the concept of independence with regard to the specific powers entrusted to the supervisory authorities.

129. That conclusion is not called into question by the other arguments raised by the Federal Republic of Germany.

130. As regards, in the first place, the Federal Republic of Germany's reference to the principle of the procedural autonomy of the Member States, it must be remembered that it follows from Article 288 TFEU that the Member States are required, when transposing a directive, to ensure

[61] Within the meaning of the second subparagraph of Article 28(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

[62] See paragraph 30 of the judgment.

[63] To that effect, see, for example, the judgment of 3 December 2009, *Commission* v *Germany* (C-424/07, EU:C:2009:749, paragraphs 80 to 83).

that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain. [64]

131. It follows that, while the Member States enjoy institutional autonomy as regards the organisation and the structuring of NRAs covered by directives, as the Court has pointed out, that autonomy must nevertheless be exercised only in accordance with the objectives and obligations laid down in the directives themselves, [65] and with full observance of the spheres of competence which those directives guarantee NRAs.

132. In the second place, contrary to what the German Government maintains, I consider that that interpretation of the relevant provisions of directives relating to the independence and powers of NRAs is consistent with the case-law following on from the judgment in *Meroni*, the approach taken in which was extended by the Court to EU agencies in its subsequent judgment concerning the powers attributed to the European Securities and Markets Authority. [66]

133. In particular, it follows from that case-law that the Court regards as not being permissible the conferral upon an EU agency, by way of delegation, of a 'wide margin of discretion' implying a very large measure of discretion which may, according to the use which is made of it, make it possible to take political decisions in the true sense and thus bring about an 'actual transfer of responsibility'. [67] What may, on the other hand, be conferred on such agencies are clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria. [68]

134. However, even assuming that case-law to be applicable to a case such as the present case, which concerns national authorities established not by the EU itself but designated by the Member States pursuant to a directive, I would observe that the interpretation I propose is in any event consistent with that case-law. Indeed, first, the powers reserved to the NRAs are executive powers that are based on the technical and specialist assessment of factual realities and do not confer any power that goes beyond the bounds of the regulatory framework established by EU law [69] or imply decision-making of a political nature. [70] Secondly, as analysed in points 114 to 119 of this Opinion, the rules contained in the EU legislation circumscribe the content of those powers and govern the criteria and conditions which delimit the scope of action of NRAs. [71]

135. In the third place, the interpretation which I propose is not called into question by the arguments which the Federal Republic of Germany puts forward concerning the principle of democracy.

64 See the judgments of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 37), and of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros* (C-424/15, EU:C:2016:780, paragraph 29 and the case-law cited).

65 See the judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraph 38 and the case-law cited).

66 Judgment of 22 January 2014, *United Kingdom* v *Council and Parliament* (C-270/12, EU:C:2014:18, paragraph 41 et seq.).

67 *Meroni*, p. 152, and the judgment of 22 January 2014, *United Kingdom* v *Council and Parliament* (C-270/12, EU:C:2014:18, paragraphs 41, 42 and 54).

68 *Meroni*, p. 152, and the judgment of 22 January 2014, *United Kingdom* v *Council and Parliament* (C-270/12, EU:C:2014:18, paragraph 41).

69 See, to that effect, the judgment of 22 January 2014, *United Kingdom* v *Council and Parliament* (C-270/12, EU:C:2014:18, paragraph 44).

70 For more detail, see point 141 of this Opinion.

71 See, to that effect, the judgment of 22 January 2014, *United Kingdom* v *Council and Parliament* (C-270/12, EU:C:2014:18, paragraph 45).

136. With regard to the interaction between the principle of democracy and NRAs, the Court has already offered some guidance, in its judgment of 9 March 2010, *Commission* v *Germany* (C 518/07, EU:C:2010:125), which I mentioned earlier. In that judgment, the Court first of all noted that the principle of democracy forms part of European Community law and has been expressly enshrined in Article 6(1) TEU as one of the foundations of the European Union. As one of the principles common to the Member States, it must be taken into consideration when interpreting acts of secondary law. [72]

137. The Court then went on to note that the principle of democracy does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution, and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. [73]

138. The Court also pointed out that EU law does not require 'the absence of [all] parliamentary influence', inasmuch as, first, the management of the supervisory authorities may be appointed by parliament or the government and, secondly, the legislature may impose an obligation on the supervisory authorities to report their activities to parliament. [74]

139. The findings of the Court which I have mentioned in the preceding points also apply to NRAs in the electricity and gas sectors and explain why NRA independence is consistent with the principle of democracy. In particular, first of all, it is clearly stated in recital 34 of Directive 2009/72 and recital 30 of Directive 2009/73 that the independence of NRAs guaranteed by the Directives does not preclude parliamentary supervision in accordance with the constitutional laws of the Member States. It follows that, while NRAs remain free from any influence from political bodies, they are not relieved of the obligation to account to parliament for their actions. The need for reconciliation with the principle of democracy thus results in the introduction of a form of accountability for NRAs, to which the individual Member States may give effect.

140. Secondly, an important point of clarification needs to be made. NRAs in the electricity and gas sectors operate, as we have seen, within the sphere of competence reserved to them, applying EU law without interference from national political bodies, even by way of formal or substantive laws. EU legislation takes the place that laws enacted by parliament under the national government model had in order to reconcile them with the principle of democracy. The decision-making process which produces EU legislation is a democratic process involving the participation of the European Parliament, which is elected by Union citizens, and the Council, in which are present the interests of the Member States through democratically elected governments and, in this way, NRAs are brought back within the circuit of democratic legitimacy.

141. In addition, as I observed in points 114 to 119 of this Opinion, not only are the powers of NRAs determined and set out in detail by the Directives, but the objectives and criteria for their exercise are also defined by secondary EU law. NRAs give effect to provisions of secondary legislation through the highly technical work they do. Therefore, in accordance with the case-law

[72] Judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraph 41).

[73] Judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraph 42).

[74] Judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraphs 43 to 45).

following on from *Meroni*, they do not have the very large measure of discretion that is associated with political power and they cannot therefore make decisions in the field of energy policy, competence for which is instead shared between the European Union and the Member States. NRAs do not exercise any powers of a political nature; they do not replace the bodies which hold political power and act on the basis of democratic legitimacy. The scope of action available to NRAs thus circumscribed, the interpretation which I propose is entirely consistent with the principle of democracy.

142. The general scheme which I have outlined of the relationships between NRA independence, the powers which NRAs have and the legislation which defines the scope of their actions also leads me to conclude that the principles of the rule of law are fully observed. The rule of law, which is a basic tenet of the European Union asserted in Article 2 TEU and which, as such, must also serve as a guide in the interpretation of EU law, requires the administration to act on the basis of the law, in such a way that arbitrariness is avoided, the rights of citizens are guaranteed and the administration's actions are subject to judicial review. The constitutional laws of the Member States require that administrative action, to borrow the expression used by the German Government, is structured in advance by the law. The law provides the basis for administrative powers, not only in the sense that every administrative power has its basis in law, but also in the sense that substantive provisions of law regulate how that power is exercised and circumscribe administrative discretion so that individuals may enjoy the protection afforded by an independent court in the event that the administration departs from the legal framework. In the German legal system this is referred to as the requirement of legal enactment, or *Vorbehalt des Gesetzes*, and it relates to the principles of democracy and the rule of law guaranteed under Paragraph 20(2) and (3) of the Basic Law of the Federal Republic of Germany. Similar formulae have been adopted in other constitutional systems, but Italian constitutional academics prefer to speak of legality in the substantive sense, or *legalità in senso sostanziale*, when referring to the need for administrative action to be preceded by legislation.

143. The requirement of *Vorbehalt des Gesetzes* as it relates to the administration, which is to say, the requirement for the exercise of discretion to be circumscribed and for criteria for the assessment of the administration's actions to be defined, is fully satisfied in so far as NRAs in the electricity and gas sectors are concerned. This requirement is no longer satisfied by virtue of an existing provision of law, but by virtue of the rules laid down in advance in EU legislation. Owing to these rules, the exercise of the powers reserved to NRAs is channelled by the objectives and criteria set by the EU legislature. If the latter are not observed – as in the case of infringement of the national rules which, in accordance with the powers conferred on NRAs by EU law, govern their activities – the individuals concerned will be able to bring an action before an independent court or tribunal in order to protect the rights conferred on them.[75]

144. In the present case, with regard to the Commission's fourth complaint, I should point out, in light of all the foregoing considerations, that it is not disputed that Paragraph 24(1) of the EnWG attributes to a body other than the NRA, that is to say, to the federal government, power to determine the conditions for network access, including the procurement and supply of balancing services, and to establish the methodologies used for determining such conditions and the methodologies for fixing the tariffs for network access. Nor is it disputed that the regulations adopted by the federal government on the basis of that provision of the EnWG which the

[75] See Article 37(15) and (17) of Directive 2009/72 and Article 41(15) and (17) of Directive 2009/73.

Commission mentions[76] are aimed at providing detailed specifications relating to important elements in the setting of transport and distribution tariffs,[77] the conditions for access to the national networks and the conditions for the supply of balancing services.[78]

145. In that context, in light of all the foregoing considerations, the Commission's fourth complaint should also, in my opinion, be upheld and it should be found that the Federal Republic of Germany has failed to fulfil its obligations under Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and under Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

IV. Conclusion

146. In light of all the foregoing considerations, I propose that the Court should:

(1) Declare that the Federal Republic of Germany has failed to fulfil its obligations under 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 and under 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, in that it has failed to transpose correctly:

– Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73;

– Article 19(3) and (8) of Directives 2009/72 and 2009/73;

– Article 19(5) of Directives 2009/72 and 2009/73; and

– Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73;

(2) Order the Federal Republic of Germany to pay the costs.

[76] See footnote 30.

[77] StromNEV and GasNEV both contain a section (Teil 2) headed 'Method for determining network tariffs' which contains detailed provisions relating, inter alia, to amortisation methods, applicable price indices, various methods of network cost sharing for different types of network and thresholds and calculation parameters for various tariffs. Similarly, ARegV contains lists of fixed cost components, efficiency comparison parameters for network operators and detailed formulae for calculating revenue limits.

[78] Both StromNZV and GasNZV contain detailed instructions relating to interconnection agreements between network operators, capacities that may be freely assigned and the number of territorial markets. They also contain a whole series of provisions relating to balancing services.