Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 May 2016[1]

Case C-482/14

European Commission
v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations — Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area — Separate accounts for infrastructure management and the provision of transport services and also for the different types of transport services provided — Prohibition on transferring public funds from one area of activity to another)

I – Introduction

1. In this action, the Commission complains that Germany has failed to fulfil the obligations incumbent on it under Article 6(1), (3) and (4) and Article 31(1) of Directive 2012/34/EU,[2] and Article 6(1) of Regulation (EC) No 1370/2007.[3]

2. The dispute essentially concerns the transfer to the parent company, the German railway holding company, of the profits generated by its subsidiaries, and the accounting systems of those subsidiaries. The Commission submits that the Federal Republic of Germany has failed to observe the prohibitions (and the accounting rules on which they are based) on transferring to other areas public funds which are earmarked for infrastructure, compensation for regional passenger transport services and charges for use of the railway network. Underlying the dispute are a number of problems associated with disguised aid (possible cross-subsidies) in vertically integrated companies which provide railway transport services and manage the infrastructure required for that activity.

1 — Original language: Spanish.

2 — Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

3 — Regulation of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

II – Legal framework. EU law

A – *Directive 2012/34*

3. In the interests of greater clarity, Directive 2012/34 partially amended, recast and merged the following: Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways,[4] Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings[5] and Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure.[6]

4. Article 65, first paragraph, of Directive 2012/34 repealed Directives 91/440 and 2001/14 'with effect from 15 December 2012' (the date of entry into force of Directive 2012/34), 'without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex IX'.

5. However, on 12 March 2015, a corrigendum was published in the *Official Journal of the European Union*[7] which postponed the date for repeal of Directives 91/440 and 2001/14 to 17 June 2015, that is the day after the deadline for transposition into national law laid down in Article 64(1) of Directive 2012/34.

B – Directive 91/440[8]

6. Recital 2 of Directive 2001/12 states:

'Fair and non-discriminatory access to the infrastructure needs to be guaranteed through the separation of certain essential functions and/or the creation of a rail regulator fulfilling the control and implementation functions as well as through the separation of profit and loss accounts and the balance sheets.'

7. According to Article 2 of Directive 91/440:

'1. This Directive shall apply to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State.

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

8. In accordance with the final indent of Article 3 of that directive:

'For the purpose of this Directive:

…

— "regional services" shall mean transport services operated to meet the transport needs of a region.'

4 — OJ 1991 L 237, p. 25.

5 — OJ 1995 L 143, p. 70.

6 — OJ 2001 L 75, p. 29.

7 — Corrigendum to Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2015 L 67 p 32)

8 — As amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ 2001 L 75, p. 1).

9. Article 6(1) provides:

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

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

10. Article 9(4) [9] provides:

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

C – *Directive 2001/14*

11. Recitals 38 and 39 of Directive 2001/14 read as follows:

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

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

12. The first subparagraph of Article 6(1) (‘Infrastructure cost and accounts’) provides:

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

13. Article 7(1) provides:

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

9 — Paragraph inserted by Article 1(10) of Directive 2001/12.

14. Pursuant to Article 8(1):

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

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

…’

D – *Regulation No 1370/2007*

15. According to Article 1(1), second subparagraph, of Regulation No 1370/2007, the purpose of that regulation is:

‘1. … [to lay down] the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.’

16. Under the heading ‘Public service compensation’, Article 6(1) provides:

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

17. That annex contains a set of rules applicable to compensation in the situations referred to in Article 6(1). Point 5 of the annex reads as follows:

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

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

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

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

III – Factual frame of reference

18. The Deutsche Bahn group of undertakings, headed by the holding company Deutsche Bahn AG ('DB AG'), operates in the sectors of national and international passenger transport and freight transport, logistics and the provision of ancillary rail transport services.

19. Paragraph 9a of the AEG [10] provides that management of the different components of the railway infrastructure referred to in Article 3(3) of Directive 2012/34, in conjunction with Annex I thereto, is to be carried out by: (a) DB Netz AG, as regards the main railway network, the ancillary network and related facilities; (b) DB Station & Service AG, which provides services connected with the operation of the network such as passenger and freight platforms, including those at stations; and (c) DB Energie GmbH, which is responsible for plant for transforming and carrying electric power for train haulage.

20. The transport of passengers and freight (and ancillary services such as catering) is dealt with by a number of companies forming part of DB Mobility Logistics AG ('DB ML AG'), a subsidiary of the Deutsche Bahn group, whose share capital is wholly owned by DB AG. The companies which are part of DB ML AG include DB Regio AG, which is responsible for regional rail transport services [11] throughout the Federal Republic of Germany.

21. DB AG concluded a number of agreements on the control and transfer of profits ('profit transfer agreements') with its subsidiaries DB Netz AG, DB Station & Service AG and DB Energie GmbH. Under those agreements: (a) the profits of subsidiaries are transferred to the parent company, without any clause limiting the use to which DB AG may put them; and (b) DB AG undertakes to cover any losses incurred by the subsidiaries.

22. The German Government offered a number of clarifications in its defence. In particular, the German Government pointed out that: (a) the profit transfer agreements are ambivalent in appearance, for DB AG also assumes liability for bridging any operating deficit incurred by its subsidiaries, and (b) the financial resources which DB Netz AG has received from its parent company far exceed the profits transferred to the latter, according to a cumulative analysis of the last few years.

23. Further, the German Government stated in the rejoinder that, on 1 January 2015, Service and Funding Agreement II [12] entered into force, pursuant to which (clause 2a, point 1) the net profits after tax of subsidiaries must be transferred in their entirety to the federal State, in the context of the distribution of dividends, and must be invested, also in their entirety, in infrastructure.

IV – The prior administrative procedure and the procedure before the Court of Justice

A – *Pre-litigation stage*

24. In the letter of formal notice of 22 November 2012, the Commission informed the German authorities of a possible infringement of Directives 91/440 and 2001/14, which were still in force at that time, and of Regulation No 1370/2007. The Commission complained that the Federal Republic of Germany permits the accounting system of DB AG to breach the prohibitions on transfers to other

10 — The Allgemeines Eisenbahngesetz (German General Railways Law; 'AEG') of 27 December 1993 transposed (in Article 9 thereof) into German law the obligation to keep separate accounts laid down in Article 6 of Directive 91/440.

11 — And also bus services, which are not relevant to these proceedings.

12 — Leistungs- und Finanzierungsvereinbarung ('LuFV II').

areas, in particular to rail passenger transport services, of: (a) public funds earmarked for infrastructure; (b) compensation for regional passenger transport services, operated as public service remits; and (c) charges for use of the rail network. Those diversions of funds take place under the profit transfer agreements.

25. The German Government replied by letter of 20 March 2013 in which it rejected the Commission's complaints, whereupon the Commission sent the German Government a reasoned opinion on 21 June 2013, restating the view previously set out in the letter of formal notice. The Commission urged to the German Government to adopt, within two months, the measures necessary to comply with its opinion.

26. By letter of 21 August 2013, the German Government repeated its rejection of the Commission's complaints. In the light of that reply, the Commission brought the present proceedings.

B – *Procedure before the Court of Justice*

27. The application was received at the Court Registry on 31 October 2014 and the defence was received on 4 February 2015. The Commission lodged its reply on 16 April 2015 and the German Government lodged the rejoinder on 11 June 2015.

28. On 12 March 2015, the Italian Republic applied for leave to intervene in support of the forms of order sought by the German Government. Leave to intervene was granted by decision of 14 April 2015, following which the Italian Government lodged its statement in intervention on 14 May 2015.

29. At the request of the German Government under Article 76 of the Rules of Procedure, a hearing was held on 3 March 2016, at which oral argument was presented by the representatives of the German Government and the Commission.

V – Forms of order sought by the parties

30. The Commission claims that the Court should:

— declare that, by allowing public funds paid for the management of railway infrastructure to be transferred to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440;

— declare that, by failing to ensure, through proper account-keeping, compliance with the prohibition on transferring public funds for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440;

— declare that, by failing to ensure that infrastructure charges can be used only to fund the infrastructure manager's business, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(1) of Directive 2001/14;

— declare that, by failing to ensure that public funds paid for the provision of public passenger transport services are shown separately in the relevant accounts, the Federal Republic of Germany has failed to fulfil its obligations under Article 9(4) of Directive 91/440 and under Article 6(1) in conjunction with point 5 of the Annex to Regulation No 1370/2007;

— order the Federal Republic of Germany to pay the costs.

31. The German Government claims that the Court should declare, primarily, that the action is inadmissible and, in the alternative, that the action is unfounded, and that it should order the Commission to pay the costs.

32. The Italian Republic claims that the Court should dismiss the action as unfounded.

VI – Analysis of the action

A – *The claim that the action is inadmissible*

1. The inadmissibility of the action in its entirety

33. The Federal Republic of Germany puts forward two pleas of inadmissibility in relation to the action: the complaints generally lack clarity, and the Commission relies on Directive 2012/34, the period for transposition of which had not yet expired when it brought its action.

(a) The general lack of clarity of the complaints

34. The German Government submits that the action, and particularly the complaints put forward therein, lack the necessary clarity to ascertain whether the Commission alleges that its transposition of EU law into national law is defective, that it incorrectly implemented EU law or that it acted unlawfully.

35. It is well known that Article 120(c) of the Rules of Procedure and the case-law interpreting that provision lay down certain requirements for an application, including in proceedings for failure to fulfil obligations. Thus, the application must state the subject matter of the proceedings and a summary of the pleas in law on which the application is based, and that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. The essential points of law and of fact on which an action is based must be indicated coherently and intelligibly in the application itself. [13]

36. The Commission set out in the application in these proceedings both the provisions of EU law allegedly infringed by the Federal Republic of Germany (points 2 to 12 of the application) and the relevant provisions of national law, in particular Paragraph 9 of the AEG (point 13 of the application), together with certain facts (points 14 to 26), meaning that it is possible to understand the complaints as they appear in the examination of each one and in the application.

37. As regards the coherence of those complaints, it is clear from the beginning (point 1) of the application and from the subsequent reasoning therein (for example, in points 35, 52, 59 and 75 to 77) that the infringements complained of do not relate to defective transposition of EU law into national law but rather to certain conduct which is identified and specified in the application.

38. Therefore, to my mind, from a procedural point of view, the application does not lack the necessary clarity or coherence, in accordance with the requirements of the abovementioned case-law, and it enables the Member State to exercise its rights of defence, as indeed the Member State has done. Since the Commission does not allege that transposition was defective, the German Government's arguments concerning the bringing of its national law into line with the provisions at issue are irrelevant. Accordingly, this ground of inadmissibility must be rejected.

13 — Judgment of 16 January 2014, *Commission* v *Spain*, C-67/12, EU:C:2014:5, paragraphs 41 and 42 and the case-law cited.

(b) Whether it is possible to rely on Directive 2012/34

39. The application was lodged on 30 October 2014 and in it the Commission alleged a breach of Directive 2012/34. It is clear that that directive was already in force (Article 66) and that it had repealed (Article 65), with effect from 15 December 2012, inter alia Directives 91/440 and 2001/14. However, on 12 March 2015, a corrigendum was published in the Official Journal, postponing the date of repeal of those directives to 17 June 2015, that is, the day after the expiry of the deadline for transposition into the national laws of the Member States.

40. As a result of that alteration, the Commission, whose application alleging the infringement of Directive 2012/34 had arrived at the Court on 30 October 2014 (before the corrigendum), requested in the reply that, should Directive 2012/34 be considered irrelevant, its heads of claim should be taken to be based on the corresponding articles of Directives 91/440 and 2001/14.

41. The German Government argues that Directive 2012/34 cannot be relied on against it because the period for transposition of the directive had not yet expired when the Commission lodged the application, which means that the application is manifestly inadmissible.

42. I do not believe that that argument can be upheld. First, it is clear from point 4 of the originating application that, although the Commission refers to Directive 2012/34, the complaints cover elements of that directive which were already included in Directives 91/440 and 2001/14. Second, the Commission cannot be criticised for the choice of that legislative basis because, in order to found its action on current law, it had no alternative other than to rely on the only directive in force at the time it lodged its application: Directive 2012/34. Had the Commission confined its action to the two repealed directives (Directives 91/440 and 2001/14), it would have risked a plea of inadmissibility alleging that it had relied on provisions devoid of legal effect *ratione temporis*. Furthermore, the complaints put forward in the application include, in brackets, immediately after the references to Directive 2012/34, the corresponding provisions of Directive 91/440 or Directive 2001/14, as the case may be.

43. The manner in which the Commission invokes the legislation in support of its claims is not only correct but also the most appropriate, in the light of the unusual retroactive revival of Directives 91/440 and 2001/14, adopted by the Council by means of an anomalous corrigendum on 12 March 2015, when both directives were no longer in force. [14]

44. In short, it would be extremely formalistic of me, and a display of ill-conceived rigour, were I to propose that the action should be ruled inadmissible on this ground.

2. The inadmissibility of each of the complaints

45. The German Government contends that the first three complaints are vitiated by a lack of clarity, particularly through their use of the expressions ‘by allowing’ (first complaint) and ‘by failing to ensure’ (second and third complaints).

14 — I do not believe that it is important, for the purposes of these proceedings, to determine whether the corrigendum technique is suitable for triggering the legal effect achieved, namely the bringing back into force of repealed directives.

46. The clarity and coherence of the complaints set out in an application for failure to fulfil obligations cannot be assessed in the light of certain words taken in isolation from the rest of the sentence in which they are used and the context of the application in which they appear. The expressions which the German Government criticises are in fact a summation of the whole series of prior arguments on which the Commission relies in support of its complaints. [15]

47. In the context of these proceedings, the two expressions refer to each instance of conduct by the defendant which the Commission considers to be incompatible with the obligations of the Federal Republic of Germany derived from the directives (and the regulation) at issue. Moreover, the lengthy arguments set out in the defence and rejoinder submitted by the German Government, and their subject matter, make it abundantly clear that the German Government has understood the complaints made against it and that it has been able to defend itself without any limitations arising from the alleged ambiguity of those complaints. Accordingly, this plea of admissibility should be rejected.

48. The fact that the Commission failed to mention the specific provision of national law to which the infringement alleged in the first and fourth complaints relates is not open to criticism for the purposes of the inadmissibility of the action either, for, as I stated above, the Commission does not allege defective transposition on the part of the German Government.

49. In summary, I believe that the pleas of inadmissibility should be rejected and that it is appropriate to move on to an analysis of the substance, in which, for schematic reasons, I shall begin by addressing the second complaint.

B – *The second complaint, alleging infringement of Article 6(1) of Directive 91/440 on the ground that the Federal Republic of Germany fails to ensure, through proper account-keeping, compliance with the prohibition on transferring public funds paid for the management of railway infrastructure to the provision of transport services*

1. Arguments of the parties

50. The Commission alleges that the Federal Republic of Germany is in breach of Article 6(1), second subparagraph, of Directive 91/440 because the accounting systems of the undertakings responsible for railway infrastructure do not make it possible to verify compliance with the prohibition on transferring public funds earmarked for railway infrastructure to transport services.

51. In particular, the Commission criticises the fact that capital financed by public funds is not recorded as assets in the accounts of the companies in the group and nor is it possible to deduce from the profit transfer agreements the size of the transfer of such funds because the accounts of the holding company do not reflect whether the profits come from activities other than the management of infrastructure.

52. The German Government puts forward three arguments in the defence. First, it contends that Article 6(4) of Directive 2012/34 is a completely new provision which was not included in Article 6(1) of Directive 91/440 and is not, therefore, applicable to the present case. [16]

15 — The Court uses those expressions in the operative parts of a number of judgments in actions for failure to fulfil obligations. Also in the area of legislation on railways, see point 1 of the operative part of the judgment of 3 October 2013, *Commission* v *Italy*, C-369/11, EU:C:2013:636.

16 — In that connection, the German Government submits that the period for transposing Directive 2012/34 into national law had not expired on the date of the reasoned opinion.

53. Second, and in the alternative, the German Government disputes the interpretation of Article 6(4) of Directive 2012/34 suggested by the Commission. In the German Government's submission, that provision requires only that the accounts of rail transport undertakings be kept separate from those of railway infrastructure undertakings, a requirement with which the DB AG group complies through the organisational separation of transport services (DB ML AG and its subsidiaries) from infrastructure management DB Netz AG, DB Station & Service AG and DB Energie GmbH). The German Government observes that this approach is the same as that favoured by the Commission in its proposal for a new directive within the so-called 'Fourth Railway Package',[17] Article 7a(3) of which requires completely separate financial circuits for infrastructure managers and transport managers; this establishes, *a contrario*, that the legislation in force does not seek such a radical separation.

54. Third, and also in the alternative and on a precautionary basis, the German Government maintains that it correctly transposed Article 6(4) of Directive 2012/34 into national law before the end of the period for transposition. The German Government goes on to state that the absence of any reference to public funds on the assets side of the balance sheet does not mean that such funds are not recorded for internal accounting purposes.

55. The Commission counters that, in fact, the German Government has not refuted the claim of failure to enter public funds in the accounts of infrastructure undertakings. That failure prevents the checking of compliance with the prohibition on transferring public funds to transport services, a matter which is, in itself, contrary to Article 6(1) of Directive 91/440. The Commission concedes that part of Article 6(4) of Directive 2012/34 is completely new but only as far as the wording is concerned, since the spirit and the substance have not changed, as demonstrated by the proposal for a directive.[18]

56. As regards the accounting system for public funds, the Commission maintains that the second subparagraph of Article 6(1) of Directive 91/440 must be interpreted in the light of the first subparagraph thereof, which refers unequivocally to balance sheets and profit and loss accounts; these have to be published, from which it follows that it is not sufficient for the information to be included in the 'internal' accounts.

57. In its statement in intervention, the Italian Government agrees with German Government's submission that Article 6(4) of Directive 2012/34 is completely new and Member States cannot therefore be required to comply with it. The Italian Government adds that the phrase 'allows for monitoring' must be read in conjunction with Article 56(12) of that directive, which grants the regulatory body the power to carry out audits of infrastructure managers specifically to verify compliance with the accounting separation provisions. The Italian Government points out that Article 56 refers to Annex VIII and draws attention to the innovation of the degree of precision with which that annex sets out the accounting information which infrastructure managers are required to make available to the regulator.

58. In response to those observations, the Commission points out that the purpose of Article 56 is not to limit the subject matter of Article 6, to which it refers, but to grant the regulator a number of powers in the interests of facilitating its work; for example, gathering the documents referred to in Annex VII which that body particularly requests.

17 — Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (COM(2013) 29 final of 30 January 2013), p. 14.

18 — Proposal for a Directive of the European Parliament and of the Council establishing a single European railway area (COM(2010) 475 final of 17 September 2010), p. 6.

2. Assessment

59. The complaint which the Commission directs against the Federal Republic of Germany (essentially, infringement of Article 6(1) of Directive 91/440) is based on the assumption that the public funds provided by the German authorities to finance the assets are not reflected adequately in the balance sheet or the profit and loss account of the infrastructure manager; nor are those funds included on the asset side of the group's accounts. The keeping of those accounts does not allow for the monitoring of compliance with the prohibition on transferring public funds from infrastructure management to the provision of rail transport services.

60. The provision which has allegedly been infringed lays down three basic requirements: (a) the accounts for business relating to the provision of transport services by railway undertakings must be kept separate from the accounts for business relating to the management of railway infrastructure; this means that their respective accounts must be kept and published separately (first sentence of the first subparagraph);[19] (b) it is prohibited to transfer, also in the field of accounting, public funds from one of those two areas of business to the other, which reflects the prohibition on cross-subsidies (second sentence of the first subparagraph); and c) the accounts for each of those areas of activity must reflect that prohibition (second subparagraph).

61. The German Government contends, primarily, that the duty to keep accounts in a way that 'allows for monitoring of the prohibition on transferring public funds' was expressly introduced by Directive 2012/34, in the current Article 6(4) thereof, from which it follows that that duty was not applicable to it before, since the period for transposition of Directive 2012/34 had not expired when these proceedings were brought.

62. I do not believe that this argument can be accepted because the provision, as worded in its original 1991 version, was already aimed at the control of cross-subsidies and, therefore, called for accounting transparency. According to the original wording of Article 6(1), second subparagraph, of Directive 91/440, which was not amended by Directive 2001/12, '[t]he accounts for the two areas of activity shall be kept in a way that reflects this prohibition' on transferring public funds from one area to another.

63. It is apparent from the fourth recital of Directive 91/440 that the aim of the directive was to make the efficient operation of the railway system easier by making a distinction between the provision of services, on the one hand, and the operation of the infrastructure needed for transport services, on the other, which in all cases also entailed the need for separate accounting systems. Directive 2001/12 reinforced that approach by extending the duty to keep separate accounts to include the two most important types of document: the profit and loss account and the balance sheet. Directive 2001/12 also extended that duty to passenger transport and freight transport undertakings, in accordance with recital 9 thereof.

64. The rationale for that separation was, in both directives, to achieve full transparency and clarify the inclusion of certain infrastructure costs, such as those relating to public service obligations, sunk costs of infrastructure construction, maintenance costs, infrastructure management costs and the costs of allocation of infrastructure capacity.[20]

19 — Judgment of 28 February 2013, *Commission* v *Germany*, C-556/10, EU:C:2013:116, paragraph 55.

20 — Di Pietrantonio, L., and Pelkmans, J., *The Economics of EU Railway Reform*, Bruges European Economic Policy Briefings; Briefing No 8, September 2008, p. 17.

65. Transparency, achieved through the accounting system,[21] was also to be used to identify cross-subsidies, which has been prohibited by the second sentence of Article 6(1) of Directive 91/440 since its original wording. Against that background, the verb 'reflects'[22] can be understood only as meaning that it is necessary to facilitate monitoring of the prohibition, which would be difficult to achieve if that prohibition were not given expression in the accounts. Moreover, the new wording provided by Directive 2012/34 does not introduce a specific obligation to monitor the prohibition (which would have amounted to a new feature vis-à-vis the previous version) but rather makes it possible for monitoring to take place, provided that the accounting system adequately 'reflects' the prohibition.

66. Accordingly, the main argument put forward by the German Government must be rejected.

67. In the alternative, the German Government contends, essentially, that Article 6(1) of Directive 91/440 requires the accounts for infrastructure management and the accounts for transport services to be kept separate but does not require that public funds received must be entered in the profit and loss account or the balance sheet. In the German Government's submission, it is enough for those funds to be recorded in the internal accounts, as occurs in the case of the German railway undertakings.

68. I agree with the Commission that that interpretation cannot be accepted. Regulation (EEC) No 2830/77[23] laid down the obligation to include public funds in the balance sheet ('Contributions to investment costs', which includes the contribution by the State to the implementation of specific investment projects),[24] and in the profit and loss account (account 74 — 'Compensation and aids', and account 91.5 — 'Balancing subsidy').[25] The first recital in the preamble to that regulation pointed out that rules concerning financial relations between the State and railway undertakings should be based on the financial and accounting principles applicable to commercial undertakings. Moreover, the regulation laid down the objective of improving the transparency of the financial results of such undertakings and of the financial interventions of the State.

69. Although Regulation No 2830/77 was repealed by Article 37 of Directive 2001/14, the Commission, in explaining the reasons for the amendment of Directive 91/440, which was presented in the same block of measures as Directive 2001/12, stated that, notwithstanding the fact that those obligations for railway undertakings were in force under Regulation No 2830/77, they should be inserted *clearly and unequivocally* into Directive 91/440 (by means of Directive 2001/12).[26] The final wording of Article 6(1) of Directive 91/440 is identical to that of the proposal.

70. It follows from those explanations that the reference in Article 6(1) of Directive 91/440 to the balance sheet and the profit and loss account replaced, with the same coercive force, the obligation to include public funds in those accounts, which had previously existed since 1978 under Regulation No 2830/77.

21 — Commission working paper — Explanation of the individual articles in the proposal for a Directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (COM(1998) 480 final), p. 5 ('Document COM(1998) 480 final').

22 — The language versions that I have compared use the same verb or expressions having a similar meaning: 'reflects' in English; 'refléter' in French; 'Dieses Verbot muss … zum Ausdruck kommen' in German; 'riflettere' in Italian; 'reflectir' in Portuguese; 'Dit verbod moet terug te vinden zijn' in Dutch; and 'återsplegar' in Swedish.

23 — Council Regulation of 12 December 1977 on the measures necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings (OJ 1977 L 334, p. 13).

24 — Article 4(1) of, in conjunction with Annexes I and II to, Regulation No 2830/77.

25 — Article 4(2) of, in conjunction with Annexes III and IV to, Regulation No 2830/77.

26 — Document COM(1998) 480 final, p. 9.

71. Moreover, it would be contradictory if that were not the case and the amendment of Directive 91/440, which was specifically intended to afford greater transparency to the accounting systems of undertakings, weakened the obligation to use the profit and loss account and the balance sheet to achieve — *quod non* — the aim of greater clarity in financial relations between the State and railway companies.

72. In short, the mere inclusion of public funds in the internal accounts of railway undertakings, to which the German Government refers, does not satisfy the conditions laid down in Article 6(1) of Directive 91/440. Accordingly, the second argument put forward in defence cannot be accepted either.

73. The third argument advanced by the German Government, in which it insists that the EU provisions were correctly transposed into its domestic law, is irrelevant because, as I have pointed out, the Commission has not complained that transposition was defective.

74. Nor can the correlative argument put forward by the Italian Government be accepted either, because the breach should not be examined in the light of Directive 2012/34 (which contains Article 56, to which the Italian Government refers), but of Directive 91/440, which contains no such provision. Article 56 describes the functions and powers which Member States must grant to their railway regulators, including those relating to audits which, in accordance with Article 56(12), also concern compliance with the accounting separation provisions laid down in Article 6.

75. It follows from the foregoing considerations that, since the public funds earmarked for infrastructure are not reflected in the public accounts of either the subsidiaries or the parent company, a point which the German Government definitively does not deny, those accounts prevent verification, one way or another, of compliance with the prohibition on transferring those funds to the area of rail transport services. The second compliant in the action must therefore be upheld.

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

1. Arguments of the parties

76. The Commission submits that, through the profit transfer agreements (concluded between the parent company and the three subsidiaries responsible for infrastructure), the Federal Republic of Germany allows some of the public funds paid for the management of railway infrastructure to be transferred to activities associated with transport services. That conduct is contrary to Article 6(1) of Directive 91/440.

77. That occurs, in particular, where the profits of the railway infrastructure undertakings (DB Netz AG, DB Station & Service AG and DB Energie GmbH) are generated solely as a result of the public funds granted to those undertakings. In the light of the obligation assumed by DB AG in the profit transfer agreements, whereby it undertakes to cover any losses incurred by its subsidiaries, profits transferred in this way could be used to reduce the deficit in the area of transport services.

78. The Commission argues that it is immaterial that those funds cannot be transferred directly from some undertakings in the group to others and that the transfer takes place indirectly through the transfer of profits to the parent company: both arrangements are contrary to the letter and the spirit of Article 6(1) of Directive 91/440.

79. The German Government interprets that provision as meaning that it does not preclude the subsidiaries from making a profit or the subsequent transfer of those profits to the parent company, and that it prohibits only the transfer of public funds earmarked for infrastructure but not the transfer of income earned by infrastructure management undertakings from the commercial operation of that infrastructure, which comes under Article 7(1) of Directive 2001/14. In any event, the distinction which the two provisions make between public funds (Article 6(1) of Directive 91/440) and income from charges for the use of infrastructure (Article 7(1) of Directive 2001/14) is separate from the issue of whether income is obtained through subsidised assets.

80. As regards the transposition into German law of Article 6(1) of Directive 91/440, the German Government submits that it correctly transposed that provision in Paragraph 9(1b) of the AEG.

81. The German Government denies that the public funds are disguised, as the Commission asserts, because they appear in the accounts of DB AG, although only the net value of the public subsidies is included in the annual accounts, a factor used to calculate the profits to be transferred to the parent company or the losses which that company must offset. Moreover, public funds paid to railway infrastructure undertakings have to be used in their entirety for the investment projects to which they are allocated, which prevents those funds from swelling the profits. While such undertakings bear the costs of maintaining and repairing their railway lines, it is for the *Bund*, the Federal State, in accordance with the task assigned to it under the constitution,[27] to plan for the needs of the railway network and to finance, through subsidies, investment projects.[28]

82. In the reply, the Commission challenges the defendant's interpretation of Article 6(1) of Directive 91/440. In the Commission's view, it is clear from the proposal for Directive 2001/12 that that article was aimed at guaranteeing equal treatment and non-discrimination for all railway undertakings, an aim which could be achieved only by taking into account the funding of infrastructure as a whole, including all costs, on the one hand, and all income (public funds and charges for use of the lines), on the other. The Commission maintains that the allegedly systematic interpretation put forward by the German Government deprives the provision at issue of practical effect.

83. The Commission also disputes that the term 'public funds' in Article 6(1) of Directive 91/440 refers only to public funds granted through a public budget and in accordance with a clear legal basis. That provision actually seeks to prevent cross-subsidies and both its wording and the preparatory documents[29] confirm that the funds concerned are public funds within the meaning of the rules on State aid (Article 107 TFEU), which use the same terminology.

84. The Commission claims, first, that Germany does not guarantee that public funds paid to the infrastructure management undertakings in the DB AG group are limited to the financial deficit caused by insufficient income. Second, the Commission submits that Article 8 of Directive 2001/14, as a whole, does not grant the infrastructure operator the right to calculate infrastructure charges in such a way that they systematically generate a profit. The Commission further submits that the internal checks established in Germany are not suitable for curbing the transfer of public funds.

27 — The German Government cites Paragraph 87e(4) of the Grundgesetz (Basic Law).

28 — Paragraph 8(1) and (4) of the Gesetz über den Ausbau der Schienenwege des Bundes (Bundesschienenwegeausbaugesetz, Federal Law on the extension of railway lines; BGBl. I. p. 1874).

29 — See p. 30 of the Commission working paper cited in footnote 21 above.

85. In the rejoinder, the German Government criticises the Commission for failing to adduce proof of its allegations and defends the checks on the spending of public funds carried out *ex ante* and *ex post* by the Bundesnetzagentur [30] and the Bundesrechnungshof. [31] The German Government also maintains that the complaint has become devoid of purpose since 1 January 2015, when the LuFV II entered into force. [32]

86. For its part, the Italian Government contends that Article 6(1) of Directive 91/440 takes account of the existence of financial flows between the State and the railway network manager, but merely lays down accounting rules designed to prevent the risk of cross-subsidies. The Italian Government also argues that there is nothing to preclude the network manager from managing the profits independently.

87. In that connection, the Italian Government points out that the Court has recognised the lawfulness of undertakings structured in the form of a holding company [33] and that the Commission's approach restricts the managerial independence of groups of railway undertakings, contrary to Articles 4 and 5 of Directive 91/440.

88. The Commission counters by insisting that the lawfulness of the holding company structure does not of itself lead to the lawfulness of financial flows within a group of undertakings.

2. Assessment

89. For the purpose of analysing the first complaint, it must be noted first that, according to the case-law of the Court on the interpretation of Article 6(1) of Directive 91/440, that provision requires only that the accounts for business relating to the provision of transport services by railway undertakings be kept separate from the accounts for business relating to the management of the rail infrastructure. [34] Therefore, neither the lawfulness of companies which adopt the structure of a holding company nor their implications may be called into question, directly or indirectly.

90. It is also desirable to identify the funds to which Article 6(1) of Directive 91/440 refers, because the Commission seeks to include infrastructure charges within such funds, which does not seem to me to be appropriate. Those charges are paid by users in return for the services of railway infrastructure undertakings and therefore they are not public funds made available to those undertakings by the State. However, aid to offset the deficit which such undertakings may incur if the charges do not cover the costs of maintaining and operating that infrastructure (balancing subsidy) does constitute public funds, since it is paid directly by a public administrative authority. As will be seen in the analysis of the third complaint, Germany adopted a pricing system based on the average cost, which also allows railway infrastructure undertakings to make profits, from which it follows that they should not receive any additional subsidy in that connection. Accordingly, the Commission's complaint must be deemed to be restricted to public funds paid directly by the German State (or by any of the bodies which it comprises in the broad sense).

30 — Federal Agency for Regulated Services.

31 — German Federal Court of Auditors; pursuant to Paragraph 91 of the Bundeshaushaltsordnung (Federal Budget Law; latest amendment in BGBl. I pp. 2178 et seq., in particular p. 2182).

32 — See point 23.

33 — Referring to the judgment of 28 February 2013, *Commission* v *Germany*, C-556/10, EU:C:2013:116, paragraph 55.

34 — Ibid.

91. In relation to cross-subsidies, Article 6(1) of Directive 91/440 provides that the prohibition of such subsidies must be reflected in the accounts for the two areas of railway business (operation of transport services and management of infrastructure). If the Commission alleges that a Member State has breached that article, it must provide sufficient evidence to establish that State aid paid to one of those areas of business has been transferred to the other and that the accounts kept (in relation to both areas) have not reflected that irregularity.

92. According to settled case-law, in proceedings under Article 258 TFEU for failure to fulfil obligations it is for the Commission to prove the alleged failure to fulfil obligations; that is, it must provide the information needed for the complaint to be examined, without being able to rely on any presumption.[35] Moreover, with regard to an action concerning the implementation of a national provision, proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action concerning solely the terms of a national provision. In those circumstances the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration for which the Member State concerned is answerable.[36]

93. The documents lodged by the Commission in support of its position make clear the evolution of profits and losses of the subsidiaries with responsibility for infrastructure (Annex A.2 to the originating application). The Commission also lodged a copy of a profit transfer contract between DB AG and DB Netz AG (Annex A.1). Using all these documents, the Commission seeks to show that, since, in its view, profits were obtained solely by entering into the accounts public funds in the area of infrastructure, the profit transfer agreement allowed the transfer of these to the loss-making operation of transport services (there is, as already indicated, a duty to offset those losses, laid down in the applicable agreement with the transport undertakings).[37]

94. The Commission constructs a discourse, not entirely devoid of logic, intended to bolster its suspicion that the transfer of profits to DB AG from its infrastructure subsidiaries is financed by public funds earmarked for infrastructure which are subsequently allocated to the transport undertakings. However, that suspicion is not enough to confirm the infringement complained of, since, conjecture aside, it has not in fact been established that public funds have actually been transferred from one area of business to the other.

95. The allegation that there are insufficient guarantees to prevent such a transfer of funds cannot be used as a ground for judgment against the defendant. Since it is not disputed that German law prohibits such transfers in the same terms as Directive 91/440, and given that there are national supervisory bodies which are able to identify such transfers, the complaint relating to the breach of Article 6(1) of that directive calls for proof that the transfers actually took place, rather than a mere assertion that there are insufficient precautions to prevent them.

96. Admittedly, a *probatio diabolica* cannot be imposed on the Commission; in other words, the Commission cannot be required to provide documents which do not exist or are impossible to obtain. However, on the one hand, the profit and loss accounts and balance sheets of the subsidiaries and the parent company are audited and published. On the other hand, and in particular, if — as I proposed in relation to the analysis of the second complaint — the public funds to which the Commission refers are not reflected in those accounts or balance sheets, and that defect is established, the Commission may have its form of order granted, that is a declaration that there has been a infringement of the accounting rules.

35 — Judgment of 3 October 2013, *Commission* v *Italy*, C-369/11, EU:C:2013:636, paragraph 68 and the case-law cited.

36 — Judgment of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 49 and the case-law cited.

37 — The documents and annexes appended are not, strictly speaking, accounting documents for the purposes of Article 6. They do not indicate which resources or which accounting entries for those undertakings fail to reflect the prohibition.

97. In other words, if there is insufficient information relating to public funds in the accounts of the rail companies, and that omission hinders the provision of evidence for the examination of the first complaint, I believe it would be consistent to make a declaration to that effect rather than insist on an allegation which, although it is set out in the application, the Commission is not in a position to substantiate by means of documentary evidence.

98. In short, the arguments regarding the allocation of profits obtained, in whole or in part, from public funds (in that, for a number of years, the profits of DB Netz AG have been possible only because of subsidies) remains conjecture in the absence of solid proof enabling that part of the action to be upheld, which would require the substantive and accounting reality of the unlawful transfers to be demonstrated conclusively. In addition, the existence of the LuFV II [38] appears to have clarified, with effect from 2015, the intended use of the net profits of infrastructure undertakings, which must be transferred to the Federal State for reinvestment in the same sector.

99. Therefore, I believe that the Commission has failed to adduce sufficient evidence to support its first complaint.

D – *The third complaint, alleging infringement of Article 7(1) of Directive 2001/14 on the grounds of failure to ensure that infrastructure charges can be used only to fund the infrastructure manager's business*

1. Arguments of the parties

100. The Commission contends that the profit transfer agreements concluded between DB AG and its railway infrastructure subsidiaries entail the transfer to the parent company of infrastructure charges. In the Commission's submission, that conduct means that the charges are not exclusively used for the activities of infrastructure managers, contrary to Article 7(1) of Directive 2001/14. That is the case because, if there were no income from charges, there would be no profits.

101. The German Government criticises that position, arguing that, from a systematic point of view, Articles 6(1), 7(1), first subparagraph, and 8(1) of Directive 2001/14 allow infrastructure managers to obtain a certain rate of return, which is an integral part of the charges payable. Moreover, there is no provision governing the use of profits obtained by infrastructure managers, which enjoy complete freedom to transfer those profits to the parent company.

102. Therefore, the German Government contends that Directive 2001/14 does not preclude the transfer of profits when these have been achieved as a result of infrastructure charges, calculated on the basis of an appropriate rate of return on the undertaking's own funds. Paragraph 14(4), first subparagraph, of the AEG provides that the charges must be fixed so that they cover the infrastructure manager's costs (in the light of the option provided for in Article 8(1) of Directive 2001/14) and a rate of return may be added if the market can bear this. Contrary to the view put forward by the Commission, income generated in this way does not create any infrastructure funding deficit.

103. Lastly, the German Government contends that its interpretation is corroborated by a recent proposal for amendment, drawn up by the Commission in the context of the Fourth Railway Package (Article 7a), which does not require income received in return for use of the infrastructure necessarily to be used for the operation or maintenance of railway lines. [39]

38 — See again point 23.

39 — Proposal for a directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of railway infrastructure (COM(2013) 29 final, 30 January 2013, p. 14).

104. In the reply, the Commission states that Article 6 of Directive 2001/14 is explained by the method of calculating the charges, which is usually based on the direct costs (Article 7(3)), and by the chronic deficit which infrastructure managers face if the public authorities do not assume, at least in part, liability for infrastructure costs. Viewed in that way, Article 6 requires Member States to take financial responsibility vis-à-vis infrastructure managers by balancing their budgets.

105. The Commission refers in the reply to an opinion of the Bundesrat [40] which, the Commission contends, supports its position and makes clear the negative consequences of profit transfer agreements. The Commission states that the entry into force of the LuFV II on 1 January 2015 was specifically intended to satisfy that 'political claim' of the Bundesrat by providing that the profits of infrastructure managers should be transferred directly to the Federal State (*Bund*) for investment in infrastructure.

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

107. The Italian Government did not submit any observations of its own on the third complaint and confined itself to supporting the position of the German Government.

2. Assessment

108. The parties to the proceedings disagree about the interpretation of Article 7(1) of Directive 2001/14, pursuant to which infrastructure charges are to be paid to the infrastructure manager and 'used to fund his business.' The Commission proposes a strict approach linked to the wording of the provision, whereas the German Government submits that the provision does not impose any obligation regarding the allocation of profits obtained from the collection of charges; further, in the German Government's submission, in so far as it implies the intention to make a profit, the term 'business' does not limit the use made of the charges which, since they include a rate of return, may lawfully be passed to the parent company.

109. When interpreting Article 7(3) of Directive 2001/14, the Court, relying on recitals 12 and 20 in that directive, acknowledged that the directive grants some degree of flexibility to railway infrastructure managers. [41] The latter have a scale for calculating the amount of their charges ranging from a minimum (corresponding to the cost that is directly incurred as a result of operating the railway service), which is set in Article 7(3) of the directive, and a maximum (arising from the total costs incurred by the infrastructure manager) which is provided for in Article 8(1) of the directive. [42]

110. Between those two limits, Directive 2001/14 allows the charge to vary by the inclusion of a charge which reflects the scarcity of capacity (Article 7(4)), the cost of environmental effects (Article 7(5)), specific investment projects (Article 8(2)), or discounts provided for (Article 9). [43]

40 — Bundesrat document (Bundesrat-Drucksache) No 559/2/12, p. 25. In particular, the Commission reproduces this passage from the document: '*In recent years, DB AG has started to develop the sectors of activity in which it had a natural monopoly — running tracks, passenger stations and energy — to convert them into profitable pillars which generate a return. … Under a profit transfer agreement concluded between DB AG and its subsidiaries responsible for infrastructure, the profits of the infrastructure undertakings are transferred automatically to the holding company where they are used on a global scale without being allocated to a particular purpose, for example to acquire businesses in the logistics sector. … Ultimately, the policy results in excessively high charges for the use of tracks and stations and for transmission of energy …*'

41 — Judgment of 28 February 2013, *Commission* v *Germany*, C-556/10, EU:C:2013:116, paragraph 82.

42 — Ibid., paragraph 85.

43 — Ibid., paragraph 86.

111. I do not believe that the wording, the structure or the purpose of Article 7(1), or its schematic connection with other articles of Directive 2001/14, allow for an interpretation as favourable to infrastructure managers as that advanced by the German Government.

112. As regards the wording of the provision, while it is true that Article 6(1) of Directive 2001/14 refers to 'surpluses from other commercial activities', the fact remains that the term 'business' in Article 7(1) refers to the task which characterises an infrastructure manager, that is, the task which enables him lawfully to demand and receive payment of the charge for use of railway lines and other components closely connected thereto.

113. As regards the structure of the provision, it can be seen that, unlike the methods of charging (in respect of which Directive 2001/14 provides for a number of options), the wording of Article 7(1) is mandatory with regard to the use of charges collected: there are no qualifications or exceptions to the requirement that those charges must be allocated to the funding of infrastructure. [44] It is consistent that this should be the case because the directive is based on the principle that the charge will cover only the cost that is directly incurred as a result of operating the train service, in other words the short-term marginal cost [45] (Article 7(3), read in conjunction with recital 39), in addition to other costs which may be considered, in part, to be directly incurred as a result of operating the train service, such as signalling costs, traffic management costs and maintenance costs. [46]

114. Given that a user who pays the charge covers only the marginal cost which his own use of the infrastructure generates, undertakings which manage the railway network are set to incur a structural operating deficit. [47] Therefore, in accepting the principle of charging based on the marginal cost, Article 6(1) of Directive 2001/14 assumes that there will be State funding (the balancing subsidy) which must be reflected in the accounts of the infrastructure manager.

115. In that connection, the allocation of income generated through the charge to the financing of the infrastructure manager's business aims to ensure not only that the charge is levied but also that it is used specifically for that business. This was intended to achieve a leverage effect, that is, to encourage the infrastructure manager to achieve increased traffic and to use his network in the best way possible, [48] perhaps with the long-term objective of balancing the accounts without a public invitation to tender. [49]

116. There is no legal basis in Directive 2001/14 for a charging system which would release an infrastructure manager from the obligation laid down in Article 7(1) thereof to use income from infrastructure charges to finance his business. Since the legislature did not provide for any alteration of the binding requirement to use revenue raised through infrastructure charges for that purpose, that requirement must be observed. In the event that the charging method adopted by a Member State generates so much income that it turns a profit, that profit will continue to form part of the income collected through the infrastructure charge, with all the associated consequences.

44 — As is the case of the mark-ups and the charges based on specific costs, referred to in Article 8(1) and (2).

45 — The Commission made that point in the judgment of 30 May 2013, *Commission* v *Poland*, C-512/10, EU:C:2013:338, paragraph 63, and some support for it can be found in legal literature: see Amaral, M., Danielowitzova, N., '(Co)régulation économique des industries de réseau: le cas de la tarification de l'infrastructure ferroviaire en Europe', in *L'espace Ferroviaire Unique Européen — Quelle(s) réalité(s)?*, under the direction of Rapoport, C., Bruylant, Brussel, 2015, p. 245.

46 — Judgment of 30 May 2013, *Commission* v *Poland*, C-512/10, EU:C:2013:338, paragraph 81.

47 — Amaral, M., Danielowitzova, N., op. cit., p. 249.

48 — Document COM(1998) 480 final, p. 76.

49 — Article 6(2) of Directive 2001/14 appears to invite the Member States to aim to achieve that objective.

117. In fact, the Commission's complaint against the German Government does not relate to the transfer of profits obtained through infrastructure charges but rather to the failure to ensure that those profits are reused to fund the business of infrastructure managers. In that connection, the submissions of the German authorities concerning the lawfulness, in general, of the transfer of profits to DB AG are not key to the dispute since, I repeat, the infringement alleged in this complaint does not concern the transfer as such.

118. Against that background, the claim put forward by the Commission in this complaint is vitiated by the same weakness or insufficiency of evidence as the first complaint. In this instance, the Commission relies again on a combination of circumstances or facts which make likely (but do not demonstrate rigorously) the conclusion it seeks to reach; in other words, the Commission relies on more conjecture.

119. The Commission has adduced as evidence the document of the Bundesrat referred to above.[50] That document consists of observations, or the adoption of an official position, by the upper chamber of the German parliament on a bill adopting new regulations in the railway sector.[51] It should be noted that, since 1 January 1996, local passenger transport services have fallen within the competence of the *Länder*,[52] which have a logical interest, as customers, investors and authorities responsible for providing those services, in the use to which the money raised by the infrastructure subsidiaries of DB AG is put.

120. Without diminishing the value of that document (notwithstanding the political character to which the German Government refers), it cannot be inferred with the necessary certainty from it that profits transferred by infrastructure managers to the parent company have not been earmarked for infrastructure during the period of time to which the action for failure to fulfil obligations refers. Admittedly, in its observations on Paragraph 25(3) of the amendment bill, the *Bundesrat* makes clear its requirement that profits made in the area of infrastructure should be used 'exclusively' for infrastructure,[53] but it would be risky to infer from those observations, *pro futuro*, a solid basis for a categorical declaration against the defendant in relation to past events, as sought by the Commission.[54]

121. As I stated in connection with the first complaint, since the accounts of the railway undertakings do not enable the different items to be clearly identified (that complaint concerned public funds, this one concerns charges), thereby fully ensuring that these items and their respective intended uses can all be traced, the claim examined cannot succeed.

122. The third complaint should therefore be dismissed.

50 — See point 105.

51 — Stellungnahme des Bundesrates, of 23 November 2012, on the 'Entwurf eines Gesetzes zur Neuordnung der Regulierung im Eisenbahnbereich'.

52 — Pursuant to Paragraph 106a, first sentence, of the Basic Law, they are eligible for financial assistance from the *Bund* (Federal State) and its contribution amounts to 60% of the cost of that segment of passenger transport. See Gersdorf, H., 'Finanzierung und Regulierung der Eisenbahninfrastruktur — zwei Seiten einer Medaille', in *Eisenbahn zwischen Markt und Staat in Vergagenheit und Generwart*, Miram, F. and Schmoeckel, M. (editors), Mor Siebeck, Tübingen, 2015, p. 110.

53 — Stellungnahme des Bundesrates, cited above, p. 27.

54 — I shall point out again that, according to the contractual framework agreed between DB AG and the Federal State and laid down in the LuFV II 2015, the transfer to the State of profits made through charges for the use of railway lines entails the requirement that those profits are to be used in their entirety to fund infrastructure. The main purpose of the action for failure to fulfil obligations (essentially that the German authorities should alter their conduct in line with the Commission's position on that point) therefore appears to have been achieved.

E – *The fourth complaint alleging infringement of Article 9(4) of Directive 91/440 and Article 6(1) of Regulation No 1370/2007, in conjunction with point 5 of the annex thereto, on the grounds of failure to ensure that public funds paid for the provision of public passenger transport services are shown separately in the relevant accounts*

1. Arguments of the parties

123. The Commission criticises the Federal Republic of Germany for the fact that the public funds granted for the activities of DB Regio AG (transport as a public service remit) are not shown separately in that company's accounts, contrary to Article 9(4) of Directive 91/440 and Article 6(1) of Regulation No 1370/2007, read in conjunction with point 5, last indent, of the annex thereto.

124. The Commission submits that compensation payments for public service obligations and income from ticket sales are shown only as a total or aggregate sum for all services provided, meaning that it is not possible to check whether those compensation payments, granted in each case, are excessive for the purpose of detecting possible cross-subsidies.

125. The Commission submits that undertakings like DB Regio AG cannot rely on the exclusion from Directive 91/440 laid down in Article 2(2) thereof. The Commission contends that that directive is applicable to undertakings which are entitled to compensation through a parent company, as otherwise the relevant provisions could easily be circumvented.

126. The German Government argues that the fourth complaint is actually based on the new wording which Article 6(3) of Directive 2012/34 gave to Article 9(4) of Directive 91/440, amending the scope of its application to regional transport undertakings to exclude from that category undertakings which provide services on stand-alone networks.[55] That new wording is not applicable *ratione temporis* to the instant case.

127. As regards Article 9(4) of Directive 91/440, the Federal Republic of Germany maintains that DB Regio AG, in its capacity as an operator of regional transport services, did not fall within the scope of that provision, in accordance with Article 2(2). Contrary to the interpretation put forward by the Commission, Germany refers to the definition of 'regional services' in Article 3 of Directive 91/440, which includes 'transport services operated to meet the transport needs of a region'. In that connection, Germany submits that the definition finally adopted in the directive (the 1991 version) included the amendments presented by the European Parliament broadening the more restrictive definition proposed by the Commission, which referred to the definition in Regulation (EEC) No 1191/69,[56] a reference which was also deleted by the Parliament.

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

55 — The German Government lists as the most important amendments: (a) the reference to Article 7 of Regulation No 1370/2007, which did not appear in the previous version; (b) the limitation of the reference to public funds to the provision of passenger transport services as public service remits whereas before that reference was broader and included all transport services; and (c) the exclusion from the scope of Chapter II of Directive 91/440 of railway undertakings 'which only operate … regional services on local and regional stand-alone networks for transport services on railway infrastructure or on networks intended only for the operation of urban or suburban rail services.'

56 — Regulation of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969(I), p. 76).

129. As regards the substance, the Commission counters that the complaint is focused on the substantive provisions laid down in Article 9(4) of Directive 91/440, taking account of the wording of Article 2 of that directive, in accordance with which DB Regio AG should not be considered in isolation but in the context of its connection with the DB AG group, from which it follows that it is not possible to rely on Article 2(2) of that directive.

130. As concerns Article 6(1) of Regulation No 1370/2007, whilst the Commission acknowledges that point 5 of the annex does not explicitly mention a contract-by-contract breakdown in the accounts, it submits that such an obligation can be inferred from the regulation as a whole and from its objective, and in particular from a joint reading of points 2 and 5 of the annex (the former sets a limit for compensation while the latter lays down certain accounting requirements).

131. In the rejoinder, the German Government insists that Directive 2012/34 substantially altered the scope with regard to regional transport undertakings, a new body of rules which are applicable to Member States only with effect from 17 June 2015. In relation to the alleged infringement of Article 6(1) of Regulation No 1370/2007, the German Government contends that the aim of point 5 of the annex is not to prevent cross-subsidies between different types of public service contract but between contracts which give rise to the payment of compensation and those which do not.

132. The Italian Government agrees with the arguments put forward by the German Government: none of the provisions at issue require the separate publication of accounts for each contract for the provision of transport services as public service remits. The Italian Government submits that the preparatory documents for the directive make clear that the EU legislature rejected the Commission's original proposal, which provided for itemised publication in respect of each public service contract, since the Council preferred to insert the general reference to Article 7 of Regulation No 1370/2007.

133. The Commission refutes that argument because, in its view, it arises from the erroneous assumption that the reference by Article 6(3) of Directive 2012/34 to Article 7(1) of Regulation No 1370/2007 moderated the obligations derived from Article 9(4) of Directive 91/440.

2. Assessment

(a) Preliminary point: subject matter of the complaint and scope of Directive 91/440

134. Although in point 76 of the application the Commission appears to approach the fourth complaint also from the perspective of the profit transfer agreement, the fact is that later it does not develop that line of argument and nor does it do so in the reply. The Commission focuses its criticism on the compensation for public service obligations and on the income obtained from ticket sales, which are reflected in the accounts as a total sum, thereby making it impossible to check, in every case, whether the amount of compensation granted is excessive. The complaint must therefore be confined to those parameters, without being ruled inadmissible as the German Government claims it should be.

135. As regards the applicable provisions for deciding on this specific infringement, the arguments of the German and Italian Governments do not take sufficient account of the fact that the complaint is confined to the provisions in force when it was formulated; in other words, only the provisions of Directive 91/440 (in particular, as far as this complaint is concerned, Article 9(4) of that directive).

136. Having thus defined the terms of the dispute, it is necessary to analyse the plea of the German Government to the effect that DB Regio AG is exclusively responsible for the provision of regional transport services, which removes it from the scope of Directive 91/440 (Article 2(2)).

137. In my opinion, the amendment of Article 2(2) of Directive 91/440 does not predetermine whether DB Regio AG is included in or excluded from the scope of that directive. The wording of the provision must be read in parallel with the definition of 'regional services' contained in Article 3, final indent, of that directive, which associates such services with transport services operated to meet the transport needs of a region.[57] It may be inferred from both provisions that only railway undertakings whose activity is restricted to operating the services of a region are not caught by the obligations laid down in the directive.

138. DB Regio AG cannot rely on that exception. According to the annual report for 2013, published by DB Regio AG,[58] it is a subsidiary whose share capital is wholly owned by DB AG and which is part of the business area (*Geschäftsfeld*) of the parent company known as 'DB Bahn Regio'. The report also states that '*the DB Bahn Regio area of business brings together all the regional transport services (rail and bus) of the DB group in Germany, and the transport services between Germany and neighbouring countries*'.[59] The report goes on to state that '*the head office of DB Regio is responsible for business development, carries out cross-cutting tasks and provides services for the regional departments*'.

139. Against that background, DB Regio AG is merely one part of a consortium with highly specialised functions and activities, and the regional transport services it provides — although it does so as a company which is limited by shares and legally independent — are not restricted to one region but cover a number of *Länder*. Moreover, not all aspects of the management of those services are the responsibility of the subsidiary, since some of them are performed by its parent company (DB ML AG) or even by the holding company DB AG.[60]

140. Accordingly, the exception laid down in Article 2(2) of Directive 91/440 cannot be invoked in favour of DB Regio AG.

(b) The substance of the complaint

141. The Commission's argument might succeed if the obligation to refer to each public service contract separately in the corresponding accounts were stipulated specifically in the articles allegedly infringed. As I shall now go on to explain, I do not believe that to be the case.

i) Interpretation of Article 9(4) of Directive 91/440

142. In order to decide on this issue it is helpful to turn to legislative developments,[61] by examining not only Article 9 but also Article 6; this is because the inclusion (by means of Directive 2001/12) of paragraph 4 in Article 9 lacked logic from a schematic perspective, which is why the 2012 amendment moved it to Article 6, of which it now constitutes paragraph 3.

57 — See points 7 and 8.

58 — Document provided by the Commission as Annex C.7 to its reply, p. 6.

59 — Ibid.

60 — I am not persuaded either by the 'historical' argument, according to which the legislature retained the exclusion of regional services from Directive 91/440, in the knowledge that most of those services were provided by vertically integrated railway undertakings. Given that only a few companies limited that type of service to one region, it may be inferred, on the contrary, that only those companies were excluded from the scope of the directive, while regional services provided by vertically integrated groups were covered by its provisions.

61 — The Court has allowed recourse to the origins of provisions of EU law as a criterion for interpretation. See, inter alia, judgment of 11 September 2014, *Commission* v *Germany*, C-525/12, EU:C:2014:2202, paragraph 43 and the case-law cited.

143. The original version of Article 6(1) of Directive 91/440 required the accounts for business relating to the provision of transport services (freight and passengers) and those for business relating to the management of railway infrastructure to be kept separate. According to the fourth recital in that directive, those two activities (services and infrastructure) needed to be separately managed 'and have separate accounts'. It is striking that, in that original version, a distinction was made only between the provision of transport services and the operation of infrastructure, categories for which it was proposed the management and accounts should be kept separate.

144. Directive 2001/12 took a further step towards separation, providing also that accounts relating to passenger transport services should be kept separate from those relating to freight transport services. That is the meaning of recital 9 in that directive. However, Directive 2001/12 only amends Article 6 to include the requirement to keep and publish separate profit and loss accounts and balance sheets in relation to the two areas of activity identified in the previous point (once again, the provision of transport services and the management of infrastructure).

145. It follows from the foregoing that the requirement of accounting separation has always been expressed in relation to areas of activity and the distinction between infrastructure management, passenger transport and freight transport has only materialised gradually. The idea of 'separation' (or 'separately') has been associated with each type of activity and also with public funds, but not with each public service contract.

146. Contrary to the Commission's submissions, the provisions on which it relies do not refer, explicitly or implicitly, to public service contracts, and nor are these mentioned in the recitals which may be used as tools for the interpretation of those provisions. In those circumstances, it is difficult to see which aim of the legislation as a whole the Commission relies on in support of its position. Further, in the preparatory documents for Directive 2001/12, the Commission itself explained that the finances of passenger transport services and freight transport services should be managed transparently, which was the reason why it proposed the amendment of Directive 91/440 to provide that the accounts for each of those activities were to be kept separate from the other,[62] but it did not refer to public service contracts or to the need to refer to them separately in the accounts of railway companies.

147. Accordingly, I do not believe that it is possible to rely on Article 9(4) of Directive 91/440 in order to require that public service contracts be referred to separately in the accounts of DB Regio AG.

ii) Article 6(1) of Regulation No 1370/2007, in conjunction with point 5 of the annex thereto

148. I have already summarised the stances adopted by the parties in relation to this provision: the Commission relies on its practical effect, drawing attention to point 5 of the annex,[63] while the German Government contends that the provision does not require the breakdown claimed by the Commission.

149. In the preparatory documents which led to Regulation No 1370/2007, the Commission explained Article 6(1) by stating that it refers to the annex as regards the conditions and methods of calculating compensation in the event of direct award.[64] In relation to the annex, the Commission added categorically, but no less significantly, that it 'simplifies the former annex and is limited to *what is strictly necessary to define the rules applicable in the absence of an invitation to tender*.'[65]

62 — Document COM(1998) 480 final (appended by the Commission as Annex C.2 to its reply), point 4, p. 9.

63 — According to the Commission's interpretation, the reference to the 'costs of the public service' in conjunction with 'operating revenue' and 'payments from public authorities' means that there must be a contract-by-contract breakdown in the accounts of DB Regio AG.

64 — Revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road of 20 July 2005 (COM(2005) 319 final), p. 14.

65 — Ibid., p. 15; emphasis added.

150. It does not appear from those rules that the requirement of separation concerns each contract and that these must be referred to separately in the accounts of an undertaking responsible for providing public services. Moreover, the three indents of point 5 of the annex follow an almost identical approach to that of Article 9(4) of Directive 91/440, which is the separation of accounts by area of activity. The difference in relation to that provision is that the annex differentiates the provision of compensated services subject to public service obligations from other activities (but only in relation to direct awards).

151. According to recital 25 of Regulation No 1370/2007, its aim is to establish a legal framework for compensation and/or exclusive rights for public service contracts, adopting a calculation scheme in the annex which makes it easier for public authorities and undertakings operating a public service to prove that overcompensation has been avoided (recital 28).

152. Recital 30 of the regulation states that directly awarded public service contracts should be subject to greater transparency. However, apart from the requirement of accounting separation already referred to, there are no other rules on compensation which develop that proposition. In fact, most of the references to transparency appear in the provisions on the award of contracts and, in particular, those on tendering. [66]

153. At all events, references to 'increased transparency' and the 'avoidance of cross-subsidies', while in tune with the general tone of the legislation in this area (and, naturally, while providing guidance on how the annex should be interpreted), cannot entail the alteration of the sense of the provision in such a way as to impose accounting requirements which do not appear in the text and cannot be read between the lines either. *De lege ferenda*, it might be desirable to require a contract-by-contract breakdown, as the Commission suggests, but, I repeat, I can find no basis in the current wording of the annex for inferring such an obligation.

154. In summary, and without needing to discuss the other arguments put forward by the parties, it is not possible to rely on Article 6 of Regulation No 1370/2007, in conjunction with point 5 of the annex thereto, in order to require public service contracts to be referred to separately in the accounts of DB Regio AG.

155. Accordingly, the fourth complaint should be declared unfounded.

VII – Costs

156. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has not succeeded on all heads, and in view of the fact that the Federal Republic of Germany applied for an order for costs against the Commission, I believe that each party to these proceedings should bear its own costs.

VIII – Conclusion

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

(1) declare that, by failing to ensure, through proper account-keeping, compliance with the prohibition on transferring public funds for the management of railway infrastructure to transport services, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1) of Directive 91/440/EEC;

66 — See Article 4(1)(b) and (4), third subparagraph, and Article 5(3) of Regulation No 1370/2007.

(2) dismiss the action as to the remainder;

(3) order the European Commission, the Federal Republic of Germany and the Italian Republic to bear their own costs.