Reports of Cases

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

Case C-555/10

European Commission
v

Republic of Austria

(Action for failure to fulfil obligations — Directive 91/440/EEC — Development of the Community's railways — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 6(3) of, and Annex II to, Directive 91/440 — Article 14(2) of Directive 2001/14 — Infrastructure manager — Organisational and decision-making independence — Holding company structure)

I – **Introduction**

1. By the present action, the Commission seeks a declaration from the Court that the Republic of Austria has failed to fulfil its obligations under Article 6(3) of, and Annex II to, Council Directive 91/440/EEC, [2] as amended by Directive 2001/12/EC, [3] ('Directive 91/440'), and Article 4(2) and Article 14(2) of Directive 2001/14/EC [4] of the European Parliament and of the Council of 26 February 2001 [5] ('Directive 2001/14'). The Republic of Austria contends that the Commission's action should be dismissed.

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

3. With regard to the single plea concerning the independence required in the exercise of essential functions, the legal issues relating to European Union law in this case seem to me to be the same *mutatis mutandis* as those relating to the same complaint in Case C-556/10 *Commission* v *Germany*, since both Member States have adopted the holding company model, in which the essential functions

1 — Original language: French.

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

3 — Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 (OJ 2001 L 75, p. 1).

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

5 — Directive of the European Parliament and of the Council of 19 April 2004 (OJ 2004 L 164, p. 44). It should be noted that Directive 2001/14 has been amended by Article 30 of Directive 2004/49/EC. It is now entitled Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying charges for the use of railway infrastructure.

6 — Cases C-473/10 *Commission* v *Hungary*; C-483/10 *Commission* v *Spain*; C-512/10 *Commission* v *Poland*; C-528/10 *Commission* v *Greece*; C-545/10 *Commission* v *Czech Republic*; C-556/10 *Commission* v *Germany*; C-557/10 *Commission* v *Portugal*; C-625/10 *Commission* v *France*; C-627/10 *Commission* v *Slovenia*; C-369/11 *Commission* v *Italy*; and C-412/11 *Commission* v *Luxembourg*.

of the infrastructure manager have been delegated to a separate company within a group of companies which also includes rail undertakings. For this reason the legal arguments put forward in my Opinion in the present case apply also in Case C-556/10 *Commission* v *Germany*, despite certain differences in the national rules.

II – **Legal framework**

A – *European Union law*

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

'Whereas the future development and efficient operation of the railway system may be made easier if a distinction is made between the provision of transport services and the operation of infrastructure; whereas given this situation, it is necessary for these two activities to be separately managed and have separate accounts.'

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

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

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

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

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

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

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

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

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

– decision making related to infrastructure charging,

– monitoring observance of public service obligations required in the provision of certain services.'

7. Recitals 11 and 16 in the preamble to Directive 2001/14 read as follows:

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

…

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

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

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

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

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

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

B – *National law*

10. Part 2 of the Federal Railways Law (Bundesbahnengesetz),[7] which includes Paragraphs 2 to 4, is entitled ‘ÖBB-Holding AG’.

11. Paragraph 2 of that law provides:

‘Constitution and formation

1. The Federal Minister for Transport, Innovation and Technology shall constitute and form a limited liability company with a share capital of EUR 1.9 billion, called “Österreichische Bundesbahnen-Holding Aktiengesellschaft” (“ÖBB-Holding AG”), with its registered office in Vienna, shares in which shall be wholly owned by the Federal State. The formation of the company shall not be the subject of any inquiry.’

12. Paragraph 3 of that law provides:

‘Management of shares

7 — BGBl. No 825/1992, in its amended version published in BGBI No 95/2009.

Shares shall be managed on behalf of the Federal State by the Federal Minister for Transport, Innovation and Technology.'

13. Paragraph 4 of that law provides:

'1. The object of ÖBB-Holding AG shall be to exercise its ownership rights in the companies in which it has a direct or indirect shareholding, in order to provide strategic guidance.

2. The main tasks of the company shall be:

(1) to provide overall coordination of the preparation and implementation of the companies' strategies;

(2) to ensure transparency for the public funds invested.

3. ÖBB-Holding AG may also adopt all measures that are necessary or appropriate in the light of the objects assigned to it and its main tasks. These may include, inter alia, in the area of human resources, strategic measures to adjust staffing between companies.'

14. Part 3 of the Federal Railways Law is entitled 'Restructuring Austrian Railways'.

15. Paragraph 25 of the Federal Railways Law provides:

'For the purposes of carrying out the restructuring of Austrian Railways, ÖBB-Holding AG is required to constitute and form, no later than 31 May 2004, a limited liability company with a share capital of EUR 70 000, named "ÖBB-Infrastruktur Betrieb Aktiengesellschaft" ("ÖBB-Infrastruktur Betrieb AG"), having its registered office in Vienna.'

16. Paragraph 62 of the Railways Law (Eisenbahngesetz 1957) [8] provides:

'Allocation body

1. The allocation body shall be the railway infrastructure undertaking.

2. A railway infrastructure undertaking which is independent of any railway undertaking at a legal, organisational and decision-making level may, however, entrust, in whole or in part, under a contract in writing, tasks pertaining to the function of an allocation body to Schieneninfrastruktur-Dienstleistungsgesellschaft mbH, to another competent undertaking or to another competent body.

3. Tasks pertaining to the function of an allocation body shall not, however, be performed by a railway infrastructure undertaking which is not independent of any railway undertaking at a legal, organisational and decision-making level. Such a railway infrastructure undertaking must therefore entrust, under a contract in writing, all tasks pertaining to the function of an allocation body either to Schieneninfrastruktur-Dienstleistungsgesellschaft mbH, or to another competent undertaking or body – and, in the case of the latter two, only provided they are independent of any railway undertaking at a legal, organisational and decision-making level –, which are then required to perform those tasks pertaining to an allocation body, under their own responsibility and in place of that undertaking; the contract must not contain any term that would hinder or prevent tasks pertaining to the function of an allocation body being performed in accordance with the law.

8 — BGBl. No 60/1957, in its amended version No 95/2009.

4. Railway infrastructure undertakings must notify Schienen-Control GmbH of the name of the undertaking to which they have entrusted under contract all or some of the tasks pertaining to the function of an allocation body.'

17. Paragraph 74 of the Railways Law provides:

'Monitoring competition

1. The rail regulator (Schienen-Control Kommission) may *ex officio*:

(1) require an allocation body to behave in a non-discriminatory manner, or prohibit discriminatory conduct, with regard to access to railway infrastructure, including all the conditions attaching thereto in terms of administrative, technical and financial arrangements, such as user charges, and with regard to the provision of other services, including all the conditions attaching thereto in terms of administrative, technical and financial arrangements, such as the appropriate reimbursement of costs and levying of charges in the sector, or

(2) require a rail transport undertaking to behave in a non-discriminatory manner, or prohibit discriminatory conduct, with regard to the provision of services and the additional provision of marshalling services, including all the conditions attaching thereto in terms of administrative, technical and financial arrangements, such as the appropriate reimbursement of costs and the levying of charges in the sector, or

(3) declare void, in whole or in part, discriminatory conditions for use of the rail network, discriminatory general sales conditions, discriminatory contracts and discriminatory documents.

2. These provisions shall be without prejudice to the powers of the Competition Court.'

18. Paragraph 70 of the Law on Limited Liability Companies (Aktiengesetz) [9] provides:

'Management of limited liability companies

1. The board of directors shall direct the company under its own responsibility, for the good of the company, taking into account the interests of shareholders and workers and the public interest.

2. The board of directors may comprise one or more persons. If one member of the board is appointed chairman, he shall have the casting vote where voting is equally divided, save as otherwise provided in the statutes.'

19. Paragraph 75 of the Law on Limited Liability Companies provides:

'Appointment and dismissal of the board of directors

1. Members of the board of directors shall be appointed by the supervisory board for a maximum period of five years. Where a member of the board of directors is appointed for a specified longer period, for an unspecified period or without any period being stated, his term of office shall last for five years. It may be renewed; such renewal must, however, be confirmed in writing by the chairman of the supervisory board. These provisions shall apply *mutatis mutandis* to the contract of employment.

2. A legal person or a partnership (general or limited partnership) shall not be appointed as a member of the board of directors.

9 — BGBl. No 98/1965.

3. If more than one person is appointed to membership of the board of directors, the supervisory board may appoint one of them to be chairman of the board of directors.

4. The supervisory board may revoke the appointment of a member of the board of directors or the appointment of the chairman of the board of directors on serious grounds. Such grounds shall include a serious breach of duty, inability to ensure sound management, and withdrawal of confidence by the shareholders' meeting, unless confidence has been withdrawn on manifestly subjective grounds. This provision shall apply also to the board of directors appointed by the initial supervisory board. The revocation shall stand so long as there has been no decision taken having the force of *res judicata* ruling it to be ineffective, but it shall not affect rights arising under the contract of employment.'

20. Paragraph 3(4) of the statutes of the ÖBB-Infrastruktur AG, in the version of 30 June 2010, provides:

'The achievement of that object is also in the common interest of the companies in which Österreichische Bundesbahnen-Holding Aktiengesellschaft has, directly or indirectly, a majority shareholding and must comply with the overall strategic objectives, provided this does not impede the legal, organisational and decision-making independence – provided for by Community law and the Austrian Railways Law – of ÖBB-Infrastruktur Aktiengesellschaft from any rail transport undertaking (in particular with regard to train path allocation, charging for train paths, safety certification and drawing up operating rules).'

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

21. In May 2007, the Commission sent a questionnaire to the Austrian authorities in order to monitor transposition by the Republic of Austria of the directives of the first railway package. That Member State replied to it by letter of 2 August 2007.

22. By letter of 27 June 2008, the Commission gave the Republic of Austria formal notice and invited it to comply with Directives 91/440, 95/18 and 2001/14. By letter of 30 September 2008 the Republic of Austria responded to that letter of formal notice.

23. By letter of 8 October 2009, the Commission sent the Republic of Austria a reasoned opinion in which it stated that Austria had failed to comply with its obligations under Article 6(3) of, and Annex II to, Directive 91/440, as amended, and also under Article 4(2) and Article 14(2) of Directive 2001/14. The Commission requested the Republic of Austria to take the measures necessary to comply with the reasoned opinion within two months of its notification. By letter of 9 December 2009, the Republic of Austria responded to the reasoned opinion and disputed the failure alleged by the Commission.

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

25. By order of the President of the Court of 26 May 2011, the Italian Republic was granted leave to intervene in support of the form of order sought by the Republic of Austria.

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

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

27. The Commission claims that the entity to which the exercise of essential functions listed in Annex II to Directive 91/440 is entrusted must be independent in economic terms – and not merely in legal terms – from the undertaking providing rail transport services.

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

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

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

31. The Republic of Austria has allegedly not established any effective mechanisms to ensure the organisational and decision-making independence of the infrastructure manager ÖBB-Infrastruktur AG. The Commission infers from this that Austria has thus failed to comply with its obligations under Article 6(3) of, and Annex II to, Directive 91/440, or Article 4(2) and Article 14(2) of Directive 2001/14.

32. In that regard, the Commission maintains, first, that compliance with the independence requirements should be monitored by an independent authority, such as the rail regulatory authority or a third party. Competitors should have the possibility to complain about any breach of the independence requirement. The Commission considers that neither of those two provisions is complied with in Austria.

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

34. The Commission contends that the fact that Paragraph 3 of the statutes and Paragraph 10(3) of the rules of procedure of the Supervisory Board of ÖBB-Infrastruktur AG provide that the Board of Directors of that company is not subject, in the exercise of essential functions, to instructions from the Supervisory Board or from ÖBB-Holding AG is not sufficient to exclude possible conflicts of interest between directors of the infrastructure manager and the holding company, given that the directors, who may be appointed and dismissed by that company, would be prompted not to take decisions that were not in the economic interests of their holding company.

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

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

37. Fourthly, there is no provision barring members of the board of directors of the entity entrusted with essential functions and senior staff members dealing with essential functions, for a reasonable number of years after leaving the entity concerned, from accepting any senior position with the holding company or other bodies under its control. In that regard, Article 15 of the Charter of Fundamental Rights, relied on by Austria, which establishes as a fundamental right the freedom to choose an occupation and the right to work, is, however, subject to the general reservation as regards lawfulness provided in Article 52 of that Charter. A reasonable limitation on the exercise of an occupation is therefore justified.

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

39. Lastly, the Commission argues that the safeguards adopted in order to ensure the independence of ÖBB-Infrastruktur AG from ÖBB-Holding AG are not sufficient.

40. The Austrian Government contends that it is not necessary to enforce the 'economic independence' of the infrastructure manager, but rather to implement the provisions of the first railway package, which concern both the objectives to be achieved – Article 6(3) of Directive 91/440 – and the functions – Article 4(2) and Article 14(2) of Directive 2001/14. Article 6(3) of Directive 91/440 requires only that an objective be achieved, that is, that the functions be entrusted to independent bodies or undertakings, and Articles 4(2) and 14(2) of Directive 2001/14 lay down the way in which those functions are to be performed, that is, by a body that is independent of any railway undertaking in its legal form, organisation and decision making.

41. Thus, in terms of the provisions of the first railway package, it is of little importance that ÖBB-Infrastruktur AG, as a 'body', within the meaning of Article 6(3) of Directive 91/440, is 'economically' independent.

42. The Austrian Government contends that the criteria for the assessment of independence contained in Annex 5 to Commission staff working document SEC(2006) 530[10] do not correspond with the relevant binding provisions in the present case, laid down in Article 6(3) of, and Annex II to, Directive 91/440 and in Articles 4(2) and 14(2) of Directive 2001/14. Furthermore, that document was not published in the *Official Journal of the European Union* and does not constitute a binding legal act. It cannot therefore be used in the present proceedings.

43. So far as monitoring by an independent authority is concerned, the Austrian Government considers that the formation of Schienen-Control GmbH and the Schienen-Control Kommission mean that compliance with the independence requirements in order to avoid distortions of competition can be monitored. Moreover, proceedings can be brought, both *ex officio* and, in the event of a complaint, by a regulatory authority not subject to directive authority, that is, by the Schienen-Control Kommission. Thus, the independence requirements are monitored by an independent authority.

10 — Commission staff working document SEC(2006) 530 of 3 May 2006, 'Annexes to the Communication on the implementation of the railway infrastructure package Directives ("First Railway Package"), COM(2006)189 final', p. 31. Available only in English.

44. The Austrian Government maintains that, with regard to the existence of statutory or at least contractual provisions between the holding company and the different entities, the corresponding obligations arising under the directive, such as the criteria contained in Article 14(2) of Directive 2001/14 with regard to path management, and Article 6(3) of Directive 91/440, have been fully implemented by Article 62(3) of the Railways Law.

45. The Austrian Government contends that account has been taken within the ÖBB group of the requirement to separate 'infrastructure' from 'transport services', since, first, ÖBB-Infrastruktur AG is directed by a board of directors which is not subject to directive authority and, secondly, members of the board of directors are appointed to their functions for a term of between four and five years and cannot be dismissed early except in exceptional and duly justified cases. Thirdly, the exercise of influence, not only direct but also indirect, over the board of directors is excluded by the additional provisions in the statutes and the rules of procedure of the Supervisory Board and of the Board of Directors of ÖBB-Infrastruktur AG, under which none of the rights of consent of the Supervisory Board apply where such application would jeopardise the independence ÖBB-Infrastruktur AG, required by European Union law and the Austrian Railways Law, in matters relating to access to the network.

46. The Austrian Government considers that the directives concerned make no provision for a prohibition on concurrent functions. In the event of one member of the Board of Directors of ÖBB-Infrastruktur AG transferring to the Board of Directors of ÖBB-Holding AG (as a collegiate body) or a member of the Board of Directors of ÖBB-Infrastruktur AG transferring to the Supervisory Board of that company, there can be no exercising of decisive influence, since a member of the Board of Directors, or of the Supervisory Board, of ÖBB-Holding AG would be unable to exercise influence individually over ÖBB-Infrastruktur AG. The measures relating to management independence and the separation of infrastructure and business activities, adopted in the Railways Law and in the 2003 Law on the Structure of the Federal Railways, should also be applied by analogy as a criterion concerning overlapping functions.

47. As regards the absence of transitional periods between occupying a position within the entity entrusted with essential functions, as a member of the board of directors or a senior staff member dealing with such functions, and performing a role as a senior manager within the holding company, the general reservation as regards lawfulness provided in Article 15(1) of the Charter of Fundamental Rights does not justify a temporary limitation on engaging in an occupation unless it is provided for by law and is justified, a situation which it would not be possible to prove in the present case, if only because of the absence of a corresponding legislative provision. The comparison with the provisions applicable in the electricity and gas sectors is therefore not relevant either, inter alia since those provisions were only adopted recently and were not adopted in the railway sector.

48. Lastly, the Austrian Government considers that adequate safeguards have been put in place and that the objective of the directive, namely to ensure a railway market operating without discrimination, is met. Both the independence of the directors and of the entity entrusted with essential functions, and the regulation of competition by the regulatory authority are in accordance with the directives.

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

50. It states that, with regard to the holding company model, the Commission's approach is inconsistent in so far as it leads to a presumption of incompatibility; the Commission alleges that that model is legally recognised in law but is compatible with the directive only if the holding company does not possess, or does not exercise, any of the prerogatives pertaining to such a holding.

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

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

V – **Analysis**

A – *Preliminary observations*

1. The basic premises of the infringement proceedings

53. In Austria, several of the essential functions listed in Annex II to Directive 91/440 have been entrusted to the infrastructure manager, ÖBB-Infrastruktur AG. That company is legally independent but belongs to a group of companies controlled by a holding company which also includes undertakings providing rail transport services.

54. The Commission criticises the Austrian legislation for failing to lay down effective mechanisms to ensure that the infrastructure manager ÖBB-Infrastruktur AG is independent in its organisation and decision-making and performs essential functions independently, thereby failing to fulfil its obligations under Article 6(3) of Directive 91/440.

55. The Commission's reasoning is based on three premises.

56. The first is that, even if a structure in which the infrastructure manager belongs to the same group of undertakings as a railway company and both are subsidiaries of a holding company is admissible per se, independence of essential functions, as provided for in Article 6(3) of Directive 91/440, can be achieved in such a case only where the requirement of economic independence implicitly included in that provision is satisfied.

57. The second premise is that such economic independence can be achieved in the case of a holding company structure only if the Member State lays down additional safeguards, which means a positive obligation on the Member State to adopt specific, detailed rules. In the Commission's view, the measures contained in Annex 5 to Commission staff working document SEC(2006) 530 constitute such safeguards, despite the non-binding nature of the document.

58. The third premise which the Commission appears to me to presume is that because of the holding structure it is possible that the Austrian entities concerned might circumvent or infringe the obligations laid down by the European Union legislature or the national legislature.

2. The existence of a failure on the part of the Member State

59. The Court has on several occasions clarified the scope of the obligations arising under directives with regard to their proper transposition in the Member States. It has held inter alia that it is not for the Court to give an interpretation which corrects the wording of an article of a directive.

60. In that connection, the Court held in *Commission* v *Greece*[11] that the Hellenic Republic could legitimately base its national legislation on the wording of Article 23(2) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages[12] clearly allowing it to apply to ouzo a rate of excise duty lower than the minimum rate. Thus, the Court dismissed the Commission's action in which it alleged failure by that Member State to fulfil its obligations under the first paragraph of Article 90 EC and claimed that, even where express authorisation was given in secondary legislation, the Member States were not dispensed from the obligation to comply with primary legislation, so that, where a national provision was irreconcilable with primary legislation the Member State was not entitled to rely on that authorisation.

61. In the same way, in *Commission* v *United Kingdom*,[13] the Court held that the United Kingdom, whose national law complied with the clear and precise wording of Article 2(1) of the Thirteenth Directive,[14] could not be accused of failing to fulfil its obligations specifically arising from that provision because it allegedly failed to interpret that provision with the aim of correcting it, in order to comply with the overall logic of the common system of VAT and to remedy an error of the legislature of the European Union alleged by the Commission, which, it claimed, was apparent from the explanatory memorandum in the Proposal for the Eighth Directive.

62. The Court held in that case that, according to settled case-law, the principle of legal certainty means that European Union rules must enable those concerned to know precisely the extent of the obligations which those rules impose on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[15] It is true that that case-law refers to the relationship between individuals and public authorities. However, it is also relevant with regard to the transposition of a directive in the field of taxation.

63. In a recent case, the Court held that a declaration of failure to fulfil obligations must be based on an objective finding.[16] However, no failure to fulfil obligations exists where the action which the Commission requires of the Member State is not stated in the wording of the directive and that action represents only one of the possible actions to be undertaken in order to transpose the directive.

64. The Commission states that the present case concerns incomplete transposition, and not incorrect application, of the directive. It is appropriate therefore to determine whether a holding structure, comprising the infrastructure manager entrusted with essential functions and railway companies, is compatible with Article 6(3) of Directive 91/440 only where the infrastructure manager is economically independent of its parent company, and where such independence cannot be achieved unless the Member State adopts the positive measures called for by the Commission.

11 — Case C-475/01 [2004] ECR I-8923.

12 — OJ 1994 L 316, p. 21.

13 — Case C-582/08 [2010] ECR I-7191, paragraphs 46 to 51.

14 — Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40).

15 — Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44 and the case-law cited.

16 — Case C-39/10 *Commission* v *Estonia* [2012] ECR, paragraph 63.

B – *Independence of bodies entrusted with essential functions*

65. Directive 91/440 initiated the liberalisation of rail transport by introducing a right of access to railway infrastructure for transport undertakings. The significant measure accompanying that right of access was the separation of infrastructure management from the activity of transport services. However, the separation principle applied not to structures but to functions, and then only to the accounting function. It is merely stated, as an option, that separation may include 'distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity'. The integrated national model thus continues to be preserved.

66. The aim of the directives adopted in 1995,[17] and subsequently of those of the first railway package of 2001, was to implement a fair and non-discriminatory right of access, by providing for the introduction of licencing for transport undertakings and rules for the allocation of capacity and the levying of infrastructure charges. In order to ensure such access, Article 6(3) of Directive 91/440, as amended by Directive 2001/12, laid down the principle of the independence of the body entrusted with essential functions.

67. The essential functions are listed in Annex II to the Directive 91/440. They include licencing of railway undertakings, allocation of capacity, allocation of individual train paths, setting of charges to be paid by transport undertakings, and monitoring compliance with public service obligations.

68. Article 6(3) of Directive 91/440 and Articles 4(2) and 14(2) of Directive 2001/14 refer, respectively, to the independence of a 'body or firm' providing access to the network, of a 'charging body' and of a capacity 'allocation body'. These are three functions which may under no circumstances be performed by a transport undertaking. They may be performed either by the manager, if it is not 'itself' a provider of transport services and is independent from any railway undertaking, inter alia the incumbent operator, or, if that is not the case, by a 'body', that is, an entity or undertaking which is independent 'in its legal form, organisation and decision-making' from any railway undertaking.

69. All the decisions of bodies entrusted with essential functions may be challenged before an independent regulatory body introduced by Article 30(1) of Directive 2001/14.

70. Within the integrated system of a holding company, the infrastructure manager is also the independent body responsible for path allocation, charging for the use of paths, safety certification and drawing up operating rules. Even after the adoption of the first railway package it was accepted that that system was still allowed.[18] In the report of 2006 on the implementation of the first railway package, Commission staff expressed the view that the directives did not formally require institutional separation, but the Commission staff had a preference for such separation.[19]

71. It is clear from Article 6 of Directive 91/440 that institutional separation cannot be required of the Member States. Article 6(1) requires, essentially in the context of State aid, the separation of accounts between the activity of transport services and the activity of infrastructure management. The wording of Article 6(2) clearly shows that in principle there is no requirement for institutional separation: 'Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity'.

17 — Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings (OJ 1995 L 143, p. 70), and Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ 1995 L 143, p. 75).

18 — At the time the Council adopted that package, Germany declared that the essential functions may be performed and rail transport services provided by 'undertakings which are legally separate, but linked in the form of a holding company'. 2324th meeting of the Council (Transport), 20 and 21 December 2000. Austria explains in detail the developments in Community legislation in that connection.

19 — 'The Directives do not formally require institutional separation between the activities of infrastructure manager and railway undertaking, but this separation seems to be the best way of ensuring fair and non-discriminatory treatment for all railway undertakings wishing to gain access to the infrastructure', see Commission staff working document SEC(2006) 530, p. 31.

72. It is only in Article 6(3), with regard to the essential 'functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II', that separation is required, since the body or undertaking must not *itself* provide rail transport services. None the less, that same provision states that there are no institutional requirements 'regardless of the organisational structures', provided the objective of equitable and non-discriminatory access can be 'shown to have been achieved'.

73. It must therefore be concluded that the directive allows the integrated system of a holding company and that it does not require institutional separation between the manager and the incumbent operator. However, it is in the context of the management of essential functions that the holding company model may raise difficulties, since the holding company controls both the transport undertaking and the infrastructure manager.

74. Directive 2001/14 states that the standard of independence of bodies entrusted with essential functions means independence 'in [their] legal form, organisation and decision-making'.[20]

75. The holding structure undoubtedly meets the first criterion, and indeed the second also. Legal independence is assured where a subsidiary is formed within a holding company. Organisational independence stems partly from a separate legal personality, which requires the company to have its own decision-making bodies. That requirement covers in part the factual aspect of organisation. The entity must not be an empty shell but must have its own personnel and actual resources. Lastly, Article 6(3) of Directive 91/440 requires that the independence of bodies entrusted with essential functions 'must be shown to have been achieved'. It is with this third criterion therefore that there is a problem.

76. The Commission calls for several positive measures which do not appear in the text of Directives 91/770 and 2001/14 to be taken in order to ensure the decision-making independence of the body entrusted with essential functions, in the present case in the holding company model, the infrastructure manager. Certainly all these measures help to ensure the effective decision-making independence of the transport manager.

77. I would point out that Article 6(3) of Directive 91/440 does not lay down any conditions for such independence. It is this void which the Commission seeks to fill, inter alia by reference to Annex 5 to the Commission staff working document SEC(2006) 530 annexed to the report on the implementation of the first railway package.

78. That annex mentions intervention by the regulatory body to monitor compliance with the independence requirement and to be involved in the appointment and dismissal of members of the board of directors of the infrastructure manager. Furthermore, it calls for the prohibition of concurrent functions on any of the boards of directors throughout the group, a waiting period for board members when they transfer from one entity to another within the holding company, and protected access to all information processed by the manager.

79. The Court is requested to impose on the Member States all of these specific conditions, which appear only in the report on the implementation of the first railway package, and do not therefore appear in the text of Directive 91/440.

20 — It should be noted that this 'independence' is of a different type from that which, in the expression 'with complete independence', applying to data protection authorities, is used in 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). See, in that regard, Case C-518/07 *Commission* v *Germany* [2010] ECR I-1885, paragraph 17 et seq. and Opinion of Advocate General Mazák in Case C-614/10 *Commission* v *Austria* [2012] ECR, point 20 et seq.

80. According to settled case-law, the burden of proof with regard to failure to fulfil obligations lies with the Commission, which must 'provide the Court with the evidence necessary to enable it to establish that an obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption'.

81. The Commission itself acknowledges that what it is asking Member States to accept, and what caused it to refer the matter to the Court, is its interpretation of the directive set out in Annex 5 to the abovementioned working document SEC(2006) 530. That annex has no binding legal value. It expresses an interpretation proposed by the Commission staff of the concept of legal, organisational and decision-making independence. I would point out that the positive obligations at issue did not appear in the text of the directive or in any other binding text of European Union law, either at the time the directive was adopted or after the period for transposition had expired.

82. The Commission expounds, in addition to a constructive interpretation of the principle of organisational and decision-making independence set out in the directives, a two-part reasoning concerning the principle of effectiveness.

83. The first is based on competition law and seeks, because of the holding company model and therefore the presence of a parent company and its subsidiaries, to infer from the principle of the independence of the manager that the latter can only be an 'autonomous undertaking' within the meaning of competition law. Some of the usual powers of a holding company over its subsidiary, the infrastructure manager, under company law would thus be short-circuited.

84. The second is based on the law of regulation, with the idea that the ordinary law of regulation should apply in the railway sector with regard to the independence of the manager and the powers of the regulatory body. The Commission relies on the case-law of the Court of Justice concerning networks.

85. According to the Commission, unless it can be proved otherwise, it must be presumed that the holding company effectively exercises economic control over its subsidiary, the infrastructure manager entrusted with essential functions. However, in my view, application of the analogy with the economic unit formed by subsidiaries and the parent company under competition law is not convincing, since it outlaws the holding company system per se, whereas it is expressly accepted in the directives. Austria is right to conclude that if a subsidiary of a holding company were unable to perform essential functions of an infrastructure manager if another subsidiary of the same holding company provides rail transport services, it would be impossible in reality to use the holding company option.

86. Furthermore, in the context of competition law, an economic unit must be proved. That is all the more so in the context of an action for failure to fulfil obligations concerning incomplete transposition which has been brought although the wording of the directive does not support it. None the less, the obligation imposed by competition law, that the independence of the subsidiary must subsequently be proved, cannot be transposed to infringement proceedings. The mere fact that the holding company owns a majority or all of the shares or voting rights in the entity entrusted with essential functions is not sufficient, otherwise the 'normal' holding company system would be outlawed. Moreover, it seems to me questionable to apply the approach proposed by the Commission in cases where the express objective of the holding company structure is to establish a subsidiary entrusted with tasks of a public nature, whose independence is required under specific provisions. In my view, any actual collusion between subsidiaries of a holding company must be proved.

87. It is therefore for the Commission to prove that the system creates an obvious conflict of interests from which it must be concluded that independence in the exercise of essential functions will be jeopardised. As the Commission acknowledges, the Court has held that the fact of being wholly controlled by the parent company does not exclude independent conduct by the subsidiary.[21] Consequently, it is for the Commission to prove that the risk of a conflict of interests is so great that it requires preventive measures not provided for in the wording of the directive.

88. As the Commission's contention is based on the premise of a form of 'automatic abuse' resulting from the holding company structure per se, it cannot be accepted in infringement proceedings which concern not incorrect application but incomplete transposition of the directive.

89. Moreover, it does not appear to be consistent to require a Member State to adopt additional rules where the parties concerned do not comply, *ex hypothesi*, with legal obligations protecting the independence of the subsidiary.

90. I would add that the issue of the system operator was the most controversial issue of the third energy package. The provisions transforming integrated undertakings into limited liability companies within which the system operator has separate management and a separate board of directors from those of the parent company are contained in Article 9 et seq. of Chapters IV and V of Directive 2009/72/EC concerning common rules for the internal market in electricity and in the twin provisions of Directive No 2009/73/EC concerning common rules for the internal market in natural gas.[22] The provisions concerned of Directive 2009/72 meet all the Commission's requirements in respect of Austria.

91. In conclusion, in my view the Commission has not succeeded in demonstrating that the only way to fulfil the requirement of legal, organisational and decision-making independence is to lay down rules, in the form of laws, regulations or agreements, corresponding to the measures listed in the application.

92. In fact, the requirements concerning the powers of the independent regulatory body provided for in Article 30(1) of Directive 2001/14 cannot be inferred from Article 6(3) of Directive 91/440, since that matter is fully regulated by Article 30(1), which confers powers on the regulatory body in cases of unfair treatment or discrimination against an applicant, and with regard to compliance with the charging rules.[23]

93. A prohibition on concurrent functions is associated with the principle of incompatibility which is inherent in the concept of decision-making independence. However, that principle, which the European Union legislature did not set out in the rail directives, can be expressed with varying degrees of abstraction and is enshrined in different ways in the various legislations.

94. In the context of a holding company structure the provisions of company law influence the specific application of the principle of incompatibility; a concurrent function in the system of Member State A may prove to have no real consequences, even though it may be regarded as being incompatible with the decision-making independence of a subsidiary in the system of Member State B. For that reason, the absence of a rule to that effect cannot automatically be considered to be an infringement by the Member State.

21 — The Commission refers to Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 134, and Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 6 and 13 to 18.

22 — Directive No 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) and Directive No 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, pp. 55 and 94).

23 — In that regard, I refer to the Commission's fourth complaint in Case C-556/10 *Commission* v *Germany*, in which the Commission proposes a broad interpretation of Article 30(4) of Directive 2001/14 and Article 7(10) of Directive 91/440.

95. In any event the measure prohibiting concurrent functions, called for by the Commission, does not cover all situations in which the independence of essential functions might be in doubt owing to incompatibilities. Take, for example, a situation in which three brothers are members of boards of directors, the eldest being on the board of the holding company and the two younger brothers on those of the subsidiaries responsible for infrastructure management and rail services, respectively. It is not possible to infer from Article 6(3) of Directive 91/440 an obligation to lay down in advance a rule prohibiting concurrent functions, even though particular situations of specific concurrent functions could in my view easily be regarded as an incorrect application of that provision.

96. The same reasoning applies with regard to the requirement that members of the board of directors of the entity entrusted with essential functions, senior staff members and personnel responsible for performing essential functions, should, for a reasonable number of years after leaving the entity concerned, be barred from accepting any senior position with the holding company or other bodies under its control.

97. A rule to that effect was laid down in Article 19(3) of Directives 2009/72 and 2009/73, providing that persons responsible for the management and members of the administrative bodies must have had no business relationship with the integrated undertaking for a period of three years before their appointment. Article 19(7) provides that after termination of their term of office such persons must have no business relationship with the integrated undertaking for a period of four years. Lastly, Article 19(4) provides that during their period of employment employees of the transmission system operator must occupy no other professional position in any other part of the energy sector holding company.

98. Such detailed rules are not included in the rail directives concerned and cannot be inferred from them by means of interpretation.

99. As regards the requirement that the infrastructure manager must have its own personnel and premises, I conclude that Austria meets this in practice and that no obligation to lay down a specific rule to that effect can be inferred from Article 6(3) of Directive 94/440. As regards communications between the personnel of the infrastructure manager and the personnel of other undertakings in the group, I support Austria's contention that the Commission has not established in what way the confidentiality clauses contained in employees' contracts were insufficient.

100. Lastly, the complaint relating to computer security was discontinued by the Commission in its reply, so no discussion on this point is necessary.

101. I therefore conclude that the action alleging incomplete transposition of the directive cannot succeed. As regards application of the directive, the holding company model is not without problems, as I have already pointed out in my Opinion in *Westbahn Management*.[24] However, in the context of the present case, the Commission does not allege that Austria failed to apply the directive correctly and provides no compelling evidence of this.

VI – **Costs**

102. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

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

24 — See my Opinion in Case C-136/11 *Westbahn Management*, point 47 et seq.

104. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Italian Republic, which has sought leave to intervene in this case, is to bear its own costs.

VII – **Conclusion**

105. In view of the foregoing considerations, I propose that the Court should:

(1) dismiss the action;

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

(3) order the Italian Republic to bear its own costs.