Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

28 February 2013 *

(Failure of a Member State to fulfil obligations — Transport — Development of the Community's railways — Directive 91/440/EEC — Article 6(3) and Annex II — Directive 2001/14/EC — Articles 4(2) and 14(2) — Infrastructure manager — Organisational and decision-making independence — Holding company structure — Incomplete transposition)

In Case C-555/10,

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

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

applicant,

v

Republic of Austria, represented by C. Pesendorfer and U. Zechner, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

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

intervener,

THE COURT (First Chamber),

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

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

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

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

* Language of the case: German.

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to adopt the measures necessary to ensure that the entity entrusted with the exercise of essential functions listed in Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25), as amended by Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 (OJ 2001 L 75. p. 1) ('Directive 91/440'), is independent of the undertaking providing rail transport services, the Republic of Austria has failed to fulfil its obligations under Article 6(3) of, and Annex II to, that directive and Articles 4(2) and 14(2) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2001 L 75, p. 29), as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 2001/14').

Legal context

European Union law

Directive 91/440

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

'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.'

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

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

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

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

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

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

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

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

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

– decision making related to infrastructure charging,

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

Directive 2001/14

5 Recitals 11 and 16 in the preamble to Directive 2001/14 are worded 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.’

6 Article 4(2) of Directive 2001/14 provides as follows:

‘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.’

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

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

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

Austrian law

8 Part 2 of the Federal Railways Law (Bundesbahnengesetz) (BGB1. 825/1992), as amended (BGB1. I, 95/2009), which includes Paragraphs 2 to 4, is entitled ‘ÖBB-Holding …’

9 Paragraph 2 of that law, entitled 'Constitution and formation', provides in the first subparagraph thereof as follows:

'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"), 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.'

10 Paragraph 3 of that law, entitled 'Management of shares', is worded as follows:

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

11 Paragraph 4 of that law states as follows:

'1. The object of ÖBB-Holding 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 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.'

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

13 Paragraph 25 of that law is worded as follows:

'For the purposes of carrying out the restructuring of the Austrian Federal Railways Company, ÖBB-Holding … shall be 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"), having its registered office in Vienna.'

14 Paragraph 62 of the Railways Law (Eisenbahngesetz, BGB1. 60/1957), as amended (BGB1 I, 95/2009), entitled 'Allocation body', provides as follows:

'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 if they are independent of any railway undertaking at a legal, organisational and decision-making level – which shall then be 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.

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.'

15 Paragraph 74 of the Railways Law, entitled 'Monitoring competition', is worded as follows:

'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.'

16 Paragraph 70 of the Law on Limited Liability Companies (Aktiengesetz) (BGB1. 98/1965), entitled 'Management of limited liability companies', is worded as follows:

'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.'

17 Paragraph 75 of the Law on Limited Liability Companies, entitled 'Appointment and dismissal of the board of directors', provides as follows:

'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 be 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.

3. If more than one person is appointed as a member of the board of directors, the supervisory board may appoint one of those persons as 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.'

18 Paragraph 3(4) of the statutes of ÖBB-Infrastruktur, in the version of 30 June 2010, provides as follows:

'The achievement of that object is also in the common interest of the companies in which (ÖBB Holding) 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 Railways Law – of ÖBB-Infrastruktur from any rail transport undertaking (in particular with regard to train path allocation, charging for train paths, safety certification and drawing up operating rules).'

The pre-litigation procedure and the procedure before the Court

19 In May 2007, the Commission sent a questionnaire to the Austrian authorities for the purpose of monitoring transposition by the Republic of Austria of Directives 2001/12, 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and 2001/14 (collectively, 'the first railway package'). That Member State replied by letter of 2 August 2007.

20 By letter of 27 June 2008, the Commission gave the Republic of Austria formal notice, requiring it to comply with Directives 91/440, 95/18 and 2001/14.

21 By letter of 30 September 2008, the Republic of Austria responded to that letter of formal notice.

22 On 19 March 2009, representatives of the Commission and the Austrian Government held a meeting in Brussels to examine the compatibility of the Austrian legislation and railway system with the first railway package directives. Following that meeting, on 9 June 2009 the Commission's Directorate General 'Energy and Transport' sent a letter to the Republic of Austria, to which the latter replied by letter of 16 July 2009.

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 and 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.

24 By letter of 9 December 2009, the Republic of Austria responded to the reasoned opinion and disputed the failure alleged by the Commission.

25 Not being satisfied with the Republic of Austria's reply, the Commission decided to bring the present action.

26 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.

The action

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 – of 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 the entity to which the exercise of essential functions is entrusted to be 'independent' of companies which provide rail transport services, the term 'undertaking' as used in that provision should, according to the Court's case-law, 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 listed in Annex II to that directive must be carried out by an entity that is not only separate from any rail undertaking in its legal form but also independent of such an undertaking in its organisation and decision making.

30 The Commission further maintains that, where those essential functions are performed by a company that is dependent on a railway holding company, as is the case with ÖBB-Infrastruktur, it is necessary to assess to what extent and in what circumstances the dependent company, which is moreover the rail infrastructure manager entrusted with the exercise of those essential functions, can be considered to be 'independent' of the undertaking providing rail transport services – that is, the holding company and the companies dependent on it providing services for the transport of passengers and goods – notwithstanding 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. 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, and Article 4(2) and Article 14(2) of Directive 2001/14.

32 For the purpose of examining whether Member States are able to prove that their national railway holding companies or other regulatory bodies guarantee the independence necessary for the performance of essential functions listed in Annex II to Directive 91/440, that the parent company and subsidiary cannot constitute an economic entity or act as a single undertaking and that conflicts of interest are avoided, the Commission disclosed in 2006 the criteria on the basis of which it examines the independence required by Directive 2001/14 and the measures envisaged to guarantee such independence. Those criteria are set out in Annex 5 to the working document produced by the Commission's staff accompanying the report of 3 May 2006 on the implementation of the first railway package (COM(2006) 189) ('Annex 5').

33 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 of lodging a complaint in the event of any breach of the independence requirement. The Commission is of the view that the Republic of Austria complies with neither of those provisions.

34 Secondly, the Commission considers that there should be statutory or, at the very least, contractual provisions concerning independence governing the relationship between the holding company and the entity entrusted with essential functions listed in Annex II to Directive 91/440, 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.

35 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 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 is not sufficient to exclude potential conflicts of interest between directors of the rail infrastructure manager and the holding company, given that those directors, who may be appointed and dismissed by that company, would be minded not to take decisions that were not in the economic interests of their holding company.

36 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 listed in Annex II to Directive 91/440.

37 In the Commission's view, it would be difficult to argue that the board of directors of the entity entrusted with those essential functions was independent in decision-making terms of the board of directors of the holding company, 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.

38 Fourthly, there is no provision barring members of the board of directors of the entity entrusted with essential functions listed in Annex II to Directive 91/440 and senior staff members dealing with those functions, for a reasonable number of years after leaving the entity concerned, from accepting any senior position with the holding company or other bodies under its control. In that regard, Article 15 of the Charter of Fundamental Rights of the European Union, relied on by the Republic of Austria, which establishes as a fundamental right the freedom to choose an occupation and the right to work, is nevertheless subject to the general reservation as regards lawfulness in Article 52 of that Charter. A reasonable limitation on the exercise of an occupation is therefore justified.

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

40 Sixthly, the Commission maintains that the entity entrusted with those functions must have its own personnel and be located in premises that are separate or have protected access.

41 Lastly, the Commission argues that the safeguards adopted in order to ensure that ÖBB-Infrastruktur is independent of ÖBB-Holding are not sufficient.

42 Furthermore, the Commission draws attention to the existence, in other regulated sectors, of regulatory provisions which reflect the criteria set out in Annex 5. Thus, in its reasoned opinion, it cited provisions applicable to the internal market in electricity and the internal market in natural gas under which the performance of certain functions is incompatible, for a period of time, with the holding of certain positions.

43 The Austrian Government contends that it is not necessary to ensure the 'economic independence' of the rail infrastructure manager, since the provisions of the first railway package focus on the objectives to be achieved set out in Article 6(3) of Directive 91/440 on the one hand, and the functions referred to in Article 4(2) and Article 14(2) of Directive 2001/14 on the other. Article 6(3) of Directive 91/440 requires only that an objective be achieved, that is, that the essential functions listed in Annex II to

that directive 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.

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

45 The Austrian Government submits that the criteria for the assessment of independence contained in Annex 5 do not correspond with the relevant binding provisions in the present case, laid down in Article 6(3) of, and Annex II to, Directive 91/440 and in Articles 4(2) and 14(2) of Directive 2001/14. Furthermore, 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 relied on in the present proceedings.

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

47 That Member State contends, with regard to the holding company model, that the Commission's approach is inconsistent in so far as it leads to a presumption of incompatibility; the Commission alleges that that model is legally recognised but is compatible with the directives in question only if the holding company does not possess, or does not exercise, any of the powers pertaining to such a holding.

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

Findings of the Court

49 By its single complaint, the Commission claims that the Republic of Austria failed to adopt specific measures to guarantee the independence of rail infrastructure manager ÖBB-Infrastruktur, which was entrusted with certain essential functions listed in Annex II to Directive 91/440, notwithstanding the fact that ÖBB-Infrastruktur formed part of a holding company, ÖBB-Holding, comprising rail transport undertakings.

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

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

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

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

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

55 It is not disputed that ÖBB-Infrastruktur has separate legal personality from ÖBB-Holding as well as its own bodies and resources, which are different from those of ÖBB-Holding.

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

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

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

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

members of the administrative bodies of the transmission system operator. In accordance with Article 19(4) of both those directives, the employees of the transmission system operator cannot hold any other position with any other part of the holding company within the energy sector. Article 19(7) of both Directives 2009/72 and 2009/73 provides that persons who have performed functions within the transmission system operator cannot, for a given period of time after termination of their term of office, hold a position with any other part of the vertically integrated undertaking.

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

61 Accordingly, the Court finds that the failure to transpose into Austrian law criteria such as those set out in Annex 5 cannot, of itself, lead to the conclusion that ÖBB Infrastruktur does not, as infrastructure manager, have independent decision-making powers vis-à-vis ÖBB-Holding.

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

63 The Commission has, however, failed to provide any concrete evidence to show that ÖBB-Infrastruktur is not independent of ÖBB-Holding as regards its decision-making arrangements.

64 As a consequence, the Commission has not established that it was necessary for the Republic of Austria to take positive measures in order to guarantee that the infrastructure manager entrusted with essential functions listed in Annex II to Directive 91/440 was independent in its legal form, organisation and decision-making functions of the rail undertakings.

65 In that regard, as observed by the Advocate General at points 95 and 99 of his Opinion, the requirement to establish a rule prohibiting the performance of concurrent functions and the requirement for the infrastructure manager to have its own personnel and premises do not constitute requirements that can be inferred from Article 6(3) of Directive 91/440. Similarly, the Commission has not established in what way the confidentiality clauses contained in employees' contracts were insufficient.

66 It was therefore for the Commission, in the light not only of the objectives of Directives 91/440 and 2001/14 but also all the factors pertaining to the relationship between ÖBB-Infrastruktur and ÖBB-Holding, including factors of a private nature, to prove that, in practice, ÖBB-Infrastruktur is not independent of ÖBB-Holding in terms of decision-making.

67 It follows from the foregoing considerations that the Commission's action must be dismissed.

Costs

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

69 In accordance with Article 140(1) of the Rules of Procedure, the Italian Republic is to bear its own costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs;

3. Orders the Italian Republic to bear its own costs.

[Signatures]