Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 September 2021 *

(Failure of a Member State to fulfil obligations – Internal markets for electricity and natural gas – Directive 2009/72/EC – Article 2(21) – Article 19(3), (5) and (8) – Article 37(1)(a) and (6)(a) and (b) – Directive 2009/73/EC – Article 2(20) – Article 19(3), (5) and (8) – Article 41(1)(a) and (6)(a) and (b) – Concept of a 'vertically integrated undertaking' – Effective unbundling of networks from the activities of production and supply of electricity and natural gas – Independent transmission operator – Independence of the staff and the management of the transmission system operator – Transitional periods – Shares held in the capital of the vertically integrated undertaking – National regulatory authorities – Independence – Exclusive powers – Article 45 TFEU – Freedom of movement for workers – Charter of Fundamental Rights of the European Union – Article 15 – Right to engage in work and to pursue an occupation – Article 17 – Right to property – Article 52(1) – Restrictions – Principle of democracy)

In Case C-718/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 16 November 2018,

European Commission, represented by M. Noll-Ehlers and O. Beynet, acting as Agents,

applicant,

v

Federal Republic of Germany, represented initially by J. Möller and T. Henze, acting as Agents, and subsequently by J. Möller and S. Eisenberg, acting as Agents,

defendant,

supported by:

Kingdom of Sweden, represented initially by C. Meyer-Seitz, A. Falk, H. Shev, J. Lundberg and H. Eklinder, acting as Agents, and subsequently by C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

intervener,

THE COURT (Fourth Chamber),

* Language of the case: German.

composed of M. Vilaras, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fourth Chamber, N. Piçarra (Rapporteur), D. Šváby and S. Rodin, Judges,

Advocate General: G. Pitruzzella,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 15 October 2020,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2021,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to transpose correctly:

– Article 2(21) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55), and Article 2(20) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94);

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

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

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

the Federal Republic of Germany has failed to fulfil its obligations under those directives.

Legal framework

European Union law

Directive 2009/72

2 Recitals 1, 4, 9, 11, 12, 16, 24, 25, 33, 34 and 36 of Directive 2009/72 state:

‘(1) The internal market in electricity, which has been progressively implemented throughout the [European Union] since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.

…

(4) However, at present, there are obstacles to the sale of electricity on equal terms, without discrimination or disadvantage in the [Union]. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.

…

(9) Without effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.

…

(11) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. … Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a generation or supply undertaking. Within those limits, a generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

(12) Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.

…

(16) The setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.

…

(24) Fully effective separation of network activities from supply and generation activities should apply throughout the [Union] to both [Union] and non-[Union] undertakings. To ensure that network activities and supply and generation activities throughout the [Union] remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. …

(25) The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States. Electricity can reach the citizens of the Union only through the network. Functioning electricity markets and, in particular, the networks and other assets associated with electricity supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore only be allowed to control a transmission system or a transmission system operator if they comply with the requirements of effective separation that apply inside the [Union]. …

…

(33) Directive 2003/54/EC [of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37)] introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.

(34) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional law of the Member States. …

…

(36) National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s), or on the basis of a proposal agreed between those operator(s) and the users of the network. In carrying out those tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures.'

3 Article 2 of Directive 2009/72, entitled 'Definitions', states in points 21 and 35:

'For the purposes of this Directive, the following definitions apply:

…

21. "vertically integrated undertaking" means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity;

…

35. "electricity undertaking" means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.'

4 Article 9 of Directive 2009/72, entitled 'Unbundling of transmission systems and transmission system operators', provides, in paragraphs 1 and 8:

'1. Member States shall ensure that from 3 March 2012:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or persons are entitled neither:
   (i) directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
   (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;

(c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

…

8. Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

(a) designate an independent system operator in accordance with Article 13; or

(b) comply with the provisions of Chapter V [, entitled "Independent transmission operator"].'

5 Article 19 of Directive 2009/72, entitled 'Independence of the staff and the management of the transmission system operator', provides, in paragraphs 3, 5 and 8:

'3. No professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph.

…

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

…

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

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

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

6 Article 35 of Directive 2009/72, entitled 'Designation and independence of regulatory authorities', states, in paragraphs 4 and 5:

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

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

(b) ensures that its staff and the persons responsible for its management:
(i) act independently from any market interest; and

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

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

(a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; …

…'

7 Article 37 of Directive 2009/72, entitled 'Duties and powers of the regulatory authority', provides, in paragraphs 1, 6, 8, 10 and 17:

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

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

…

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

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

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

…

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

…

10. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs or

methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final transmission and distribution tariffs or methodologies deviate from those provisional tariffs or methodologies.

…

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.'

8 Directive 2009/72 was repealed with effect from 1 January 2021 by Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125). However, it remains applicable to the case at issue *ratione temporis*.

Directive 2009/73

9 With respect to the natural gas sector, recitals 1, 4, 6, 8, 9, 13, 21, 22, 29, 30 and 32 of Directive 2009/73 correspond, *mutatis mutandis*, to the abovementioned recitals of Directive 2009/72.

10 With respect to the natural gas sector, Article 2(1) and (20), Article 9(1) and (8), Article 19(3), (5) and (8), Article 39(4) and (5) and Article 41(1)(a), (6)(a) and (b), (8), (10) and (17) of Directive 2009/73 correspond, *mutatis mutandis*, to the abovementioned provisions of Directive 2009/72.

German law

11 Under Paragraph 3(38) of the Energiewirtschaftsgesetz (Energy Industry Act) of 7 July 2005 (BGBl. I, pp. 1970 and 3621), as amended by Paragraph 2(6) of the Law of 20 July 2017 (BGBl. I, p. 2808, 2018 I p. 472) ('the EnWG'), a 'vertically integrated energy supply undertaking' is defined as 'an undertaking operating in the European Union in the electricity or gas sector, or a group of electricity or gas undertakings that are connected with one another, within the meaning of Article 3(2) of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), where the undertaking or group in question performs in the European Union, in the electricity sector, at least one of the functions of transmission or distribution and at least one of the functions of generation or sale of electricity or, in the natural gas sector, at least one of the functions of transmission, distribution, operation of a [liquefied natural gas (LNG)] plant or storage and at the same time one of the functions of extraction or sale of natural gas'.

12 Under Paragraph 10c of the EnWG, headed 'Independence of the staff and the management of the independent transmission system operator':

'…

2. The majority of the persons responsible for the management of the transmission system operator may not, during a period of three years prior to their appointment, be employed in or

have maintained commercial relationships with a company in the vertically integrated undertaking or controlling shareholder therein that, in the energy sector, performs one of the functions of generation, distribution, supply or purchase of electricity or, in the natural gas sector, one of the functions of extraction, distribution, supply, purchase or storage of natural gas or that performs commercial, technical or maintenance tasks in connection with such functions. The remaining persons responsible for the management of the independent transmission system operator may not, during a period of at least six months prior to their appointment, perform managerial tasks or tasks similar to those performed within the independent transmission system operator for a company within the vertically integrated undertaking or controlling shareholder therein that, in the electricity sector, performs one of the functions of generation, distribution, supply or purchase of electricity or, in the natural gas sector, one of the functions of extraction, distribution, supply, purchase or storage of natural gas or that performs commercial, technical or maintenance tasks in connection with such functions, management tasks or tasks comparable to those performed by the independent transmission system operator. The first and second sentences hereof shall not apply to appointments which became effective before 3 March 2012.

…

4. The independent transmission system operator and the vertically integrated energy supply company shall ensure that the persons responsible for management and the other employees of the independent transmission system operator do not, after 3 March 2012, acquire any shares in the capital of the vertically integrated energy supply company or any part thereof unless they are shares in the independent transmission system operator. Persons responsible for management shall, by no later than 31 March 2016, dispose of any shares in the vertically integrated energy supply company or any part thereof acquired up to 3 March 2012. The independent transmission system operator shall ensure that the remuneration of members of its management does not depend on the economic performance, and in particular the operating profit, of the vertically integrated energy supply undertaking or any of its subsidiaries, excluding the independent transmission system operator.

…

6. The first sentence of subparagraph 2, and subparagraphs 3 and 5 apply *mutatis mutandis* to all persons who report directly to senior management and are responsible for the operation, maintenance or development of the network.'

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

'The Federal Government is empowered, by means of regulation and with the consent of the Bundesrat [(Federal Council, Germany)], to:

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

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

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

Pre-litigation procedure

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

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

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

17 Taking the view that the legal provisions adopted by the Federal Republic of Germany were still not in conformity with Directives 2009/72 and 2009/73, the Commission brought the present action.

The action

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

The first complaint, alleging infringement of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73

Arguments of the parties

19 By this complaint, the Commission claims that the Federal Republic of Germany has failed to transpose correctly into national law the concept of a 'vertically integrated undertaking' ('VIU') within the meaning of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73, since the definition of that concept under Paragraph 3(38) of the EnWG encompasses only undertakings which operate in the European Union.

20 According to the Commission, by restricting the territorial scope of the concept of a 'VIU', the EnWG is contrary to the wording of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 and to the purpose of the rules laid down in those directives governing the effective unbundling of electricity and natural gas transmission systems from the activities of electricity or gas production and supply.

21 If the EU legislature had intended to restrict the definition of the concept of a 'VIU' to activities carried on within the European Union, it would have stated so expressly as it did in other provisions in Directives 2009/72 and 2009/73. That interpretation is confirmed by recital 24 of Directive 2009/72 and recital 21 of Directive 2009/73, which refer to the general principle that non-EU undertakings are subject to EU law when they carry on activities in the European Union.

22 In addition, the conflicts of interest between transmission system operators and producers or suppliers which the abovementioned unbundling rules are intended to prevent, by providing that operators are to be certified only if they operate their networks in an independent and non-discriminatory manner, may arise both when the activities falling within the definition of a 'VIU' are carried on inside the European Union and when they are carried on outside it.

23 The Commission also points out that the inclusion of activities carried on outside the European Union within the scope of the concept of a 'VIU' does not imply that non-EU undertakings become subjects of the rights and obligations arising from EU law and does not broaden the powers of the European Union. According to the Commission, the transmission system operators subject to the rules on effective unbundling are already operating within the European Union. The inclusion of activities carried on outside the European Union in the definition of a 'VIU' makes it possible to evaluate the effects of those activities in the European Union. There is no principle of competition law or international law that precludes an interpretation of this kind.

24 The Federal Republic of Germany claims, first, on the basis of the Court's case-law (judgments of 25 May 1985, *Commission* v *Germany*, 29/84, EU:C:1985:229, paragraph 9, and of 30 June 2016, *Commission* v *Poland*, C-648/13, EU:C:2016:49, paragraph 73), that there is no mandatory requirement for Member States to transpose directives literally, provided that the legal substance is preserved. The Federal Republic of Germany argues that the definition of a 'VIU' as laid down in Paragraph 3(38) of the EnWG is not inconsistent with the wording of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73. Those provisions, in fact, give no indication as to territorial scope and, when they are transposed into the national laws of the Member States, clarification is therefore required.

25 Secondly, the Federal Republic of Germany argues that the spirit and purpose of the rules on effective unbundling laid down under those directives do not require the activities carried on outside the European Union by energy production or supply undertakings to be taken into account in the definition of a 'VIU'. Such activities would not have qualified effects on the efficient and non-discriminatory operation of electricity and natural gas transmission systems in the European Union, since a conflict of interest between the operators of those systems and the parts of undertakings that carry on activities in related competing sectors would exist only if those parts of undertakings wished to use the systems to transport the energy that they produce or supply. Although it follows from the Court's case-law (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 40 et seq.) that the application of EU law is justified under the qualified effects test where the relevant conduct produces an immediate and substantial effect in the European Union, that criterion is sufficiently taken into consideration by the definition in Paragraph 3(38) of the EnWG.

26 Thirdly, broadening the definition of a 'VIU' so as to encompass activities carried on outside the European Union by third-country undertakings would lead to an extension of the European Union's regulatory power, contrary to international law. Such third-country undertakings would in fact acquire rights and become subject to obligations without operating on the territory of the European Union.

27 Fourthly, the Federal Republic of Germany argues that an interpretation of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 as meaning that the concept of a 'VIU' covers activities outside the European Union carried on by third-country undertakings is contrary to the obligation to interpret acts of secondary legislation in accordance with primary EU law. Those directives, being based on Article 47(2) and Articles 55 and 95 of the EC Treaty (now Article 53(2) and Articles 62 and 114 TFEU respectively), must seek to facilitate the exercise of freedom of establishment and the provision of services, and to harmonise the rules of the Member States concerning the establishment and functioning of the internal market. However, those provisions of primary law cannot be considered an adequate legal basis for the adoption of provisions which apply to the economic activities of undertakings operating in a third country.

28 In addition, since the activities that third-country undertakings carry on outside the European Union do not have any effect on the internal market, there is no need to impose on those undertakings restrictions on the free movement of capital within the meaning of Article 63 TFEU, or to restrict the freedom of those undertakings and those who work for them to conduct a business, enshrined in Article 15(1) and Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the right to property under Article 17(1) of the Charter, which are recognised in Directives 2009/72 and 2009/73, for the purposes of achieving the goal of ensuring the efficient and non-discriminatory operation of transmission systems within the European Union.

Findings of the Court

29 Since the Federal Republic of Germany argues that the definition of a 'VIU' in Paragraph 3(38) of the EnWG is not inconsistent with the definition set out in Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73, but rather clarifies the latter, it is necessary to examine the merits of that Member State's interpretation of that definition, in the light not only of the wording of Articles 2(21) and 2(20) of those directives, but also the context in which those provisions occur and the objectives pursued by the rules of which they are part (see, to that effect, judgment of 12 October 2017, *Kamin and Grill Shop*, C-289/16, EU:C:2017:758, paragraph 22 and the case-law cited).

30 It should be recalled, in that regard, that, under Article 2(21) of Directive 2009/72, a VIU is defined as 'an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity'. Article 2(20) of Directive 2009/73 defines, in similar terms, a VIU in the field of natural gas.

31 First, it must be noted that neither Article 2(21) of Directive 2009/72 nor Article 2(20) of Directive 2009/73 make any reference to the law of the Member States in defining the term 'VIU' for the purposes of those directives.

32 Accordingly, the concept of a 'VIU' is an autonomous concept of EU law which must be given an autonomous and uniform interpretation throughout the European Union, having regard to the need for the uniform application of EU law, imposed by the principle of equality. The scope of that concept cannot therefore be determined by reference to known concepts in the law of the Member States or to classifications made at national level (see, by analogy, judgment of 9 July 2020, *RL (Directive on late payment)*, C-199/19, EU:C:2020:548, paragraph 27 and the case-law cited).

33 Furthermore, since the wording of Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 does not contain any reference to the territory in which a VIU carries on activities or the place where it has its registered office, it follows that the provisions do not impose any express territorial restriction concerning the concept of a 'VIU', which would amount to limiting that concept solely to activities carried on within the European Union.

34 Secondly, as regards the context in which the concept of a 'VIU' occurs, it must be noted that, as is apparent in particular from Article 9(1) and (8) of Directives 2009/72 and 2009/73, read in the light of recital 9 of Directive 2009/72 and recital 6 of Directive 2009/73, the concept forms part of the provisions of those directives designed to ensure the 'effective unbundling' of, on the one hand, transmission systems and, on the other hand, the activities of electricity or gas production and supply.

35 Thirdly, as regards the objectives of the relevant legislation, it should be noted that Directives 2009/72 and 2009/73 seek to implement an internal market for electricity and natural gas in which the guarantee of non-discriminatory network access is a fundamental element. It follows from recital 9 of Directive 2009/72 and recital 6 of Directive 2009/73 that, without the effective unbundling mentioned in the preceding paragraph of this judgment, there is a risk of discrimination as regards that access. The elimination of that risk, as can be noted in particular from recitals 11, 12 and 16 of Directive 2009/72 and recitals 8, 9 and 13 of Directive 2009/73, requires the removal of any conflict of interest between, on the one hand, energy producers and suppliers and, on the other hand, transmission system operators.

36 The effective unbundling requirements imposed by Directives 2009/72 and 2009/73 are therefore intended to ensure the complete and effective independence of transmission system operators from activities of generation and supply (see, to that effect, judgment of 26 October 2017, *Balgarska energiyna borsa*, C-347/16, EU:C:2017:816, paragraph 34). As can be seen from recital 24 of Directive 2009/72 and recital 21 of Directive 2009/73, those effective unbundling requirements apply throughout the European Union to both EU and non-EU undertakings.

37 It cannot be ruled out that there may be conflicts of interest between a transmission system operator located in the European Union and electricity or natural gas producers or suppliers carrying on activities in those fields outside the European Union. As the Advocate General observed in point 44 of his Opinion, in a situation where natural gas or electricity produced outside the European Union by an undertaking is transported within the European Union through a transmission system that is owned by the same undertaking, there is an obvious risk of discriminatory conduct in the operation of that network, capable of affecting the transportation of the energy products of competitors.

38 It follows, as the Advocate General also observed in point 45 of his Opinion, that the restrictive interpretation of the concept of a 'VIU', advocated by the Federal Republic of Germany, jeopardises the effectiveness of the provisions of Directives 2009/72 and 2009/73 relating to

effective unbundling, since it allows a VIU that produces or supplies natural gas or electricity outside the European Union to circumvent those provisions. Thus, such a restrictive interpretation is not in line with the objectives pursued by those provisions since it is liable to exclude from the scope of that concept situations of potential conflict of interests, such as those referred to in the preceding paragraph of this judgment, on account of the restriction of the scope of that concept solely to activities carried on within the European Union.

39 It follows that it is necessary to adopt a broad interpretation of the concept of a 'VIU' such that the concept may encompass, where appropriate, activities carried on outside the territory of the European Union. The limitation of that concept to activities carried on within the European Union therefore unjustifiably restricts its scope.

40 Contrary to the arguments put forward by the Federal Republic of Germany, that finding does not imply an extension of the European Union's regulatory power beyond the internal market that would be contrary to the obligation to interpret secondary legislation in accordance with primary law, in this case Article 53(2) and Articles 62 and 114 TFEU, and international law.

41 It should be noted, in that regard, that Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 do not regulate a market outside the European Union, but merely set out a definition of the concept of a 'VIU', which ensures the effective application of those directives by preventing the circumvention of certain requirements which are necessary to ensure effective unbundling and, therefore, to improve the conditions for the functioning of the internal markets for electricity and natural gas.

42 The Court has already had occasion to point out that an EU measure adopted on the basis of Article 95 of the EC Treaty (now Article 114 TFEU) may incorporate provisions whose purpose is to ensure that requirements aimed at improving the conditions for the functioning of the internal market are not circumvented (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 131 and the case-law cited).

43 Furthermore, a VIU which produces or supplies natural gas or electricity outside the European Union may have a conflict of interest, such as those referred to in paragraph 37 above, since discriminatory conduct in the internal EU market may occur even where a VIU produces outside the European Union. In those circumstances, the jurisdiction of the Court to apply its rules to such conduct is not therefore precluded by international law (see, to that effect, judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 18).

44 Consequently, the Commission's first complaint in support of its action must be upheld and it must be held that, by failing to transpose correctly Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73, the Federal Republic of Germany has failed to fulfil its obligations under those directives.

The second complaint, alleging infringement of Article 19(3) and (8) of Directives 2009/72 and 2009/73

Arguments of the parties

45 By this complaint, the Commission criticises the Federal Republic of Germany for having failed to transpose correctly the rules on transitional periods contained in Article 19(3) and (8) of Directives 2009/72 and 2009/73. In the Commission's view, those provisions apply to all posts held or duties carried out, assets held or business relations maintained, directly or indirectly, in, to or with the VIU, parts thereof, or major shareholders other than the transmission system operator. Paragraph 10c(2) and (6) of the EnWG limits the application of the provisions of the two directives to those parts of the VIU which carry on their activities in the energy sector.

46 The Commission claims that a VIU in the form of a group of companies comprises all the legal entities in the group, irrespective of the economic sector in which those entities carry on their activities. That approach also corresponds to the concept of an 'undertaking' used in competition law, in particular in Article 101 and Article 102 TFEU.

47 Furthermore, the limitation period applied by Paragraph 10c(2) in conjunction with Paragraph 10c(6) of the EnWG is contrary to the objectives of the rules on effective unbundling laid down in Directives 2009/72 and 2009/73. In accordance with the independent transmission operator model, an independent transmission operator may remain a part of a VIU only if certain rigorous conditions relating to organisation, management and investment – which ensure its effective independence from the VIU as a whole – are satisfied.

48 The exclusion of parts of the VIU that do not operate directly in the energy sector from the scope of the rules on transitional periods makes it possible to circumvent the rules on effective unbundling. The parts of the VIU which are not active in the energy sector could also be affected by the interests of the VIU in the production and supply of electricity and natural gas. It is precisely in order to avoid that risk and to ensure that transport and distribution are independent from the interests of generation and supply in the field of energy that the EU legislature decided to include the VIU as a whole – including the parts whose operations are outside the energy sector – within the scope of Article 19(3) and (8) of Directives 2009/72 and 2009/73, and not to limit the scope of those provisions to only the parts of the VIU carrying on those activities.

49 The Federal Republic of Germany submits that the provisions on transitional periods in the EnWG have the same scope as the relevant directives which they transposed. Pursuant to Article 2(21) of Directive 2009/72, a VIU is made up of different electricity undertakings, within the meaning of Article 2(35) of Directive 2009/72, and not undertakings operating in other sectors of the economy. The same applies for the natural gas sector pursuant to Article 2(1) and (20) of Directive 2009/73. As such, employees falling under Article 19(3) of Directives 2009/72 and 2009/73 are those who have exercised an activity in the electricity or natural gas sector for the VIU before being appointed by the transmission system operator.

50 Furthermore, according to the Federal Republic of Germany, the reference to the energy sector in Paragraph 10c(2) of the EnWG is consistent with the scope, spirit and purpose of the transposed directives. It is necessary, but also sufficient, to ensure that the independent transmission system operator – which may be set up in accordance with Article 9(8) of Directives 2009/72 and 2009/73 where, on 3 September 2009, that system belongs to a VIU – is independent only in relation to the

energy sectors of that VIU. Thus, in order to prevent conflicts of interest in the context of the independent transmission operator model, it is sufficient to suspend temporarily the transfer of staff between the various parts of undertakings active in those sectors.

51 The restrictions that the rules on transitional periods impose on the freedom of movement for workers, enshrined in Article 45 TFEU, where the relevant parts of undertakings of the VIU are located in several Member States, and the fundamental right to pursue a freely chosen occupation, enshrined in Article 15(1) of the Charter, where the parts are confined to a single Member State, would, moreover, be justified only if Article 19(3) and (8) of Directives 2009/72 and 2009/73 were to apply exclusively to transfers of staff.

Findings of the Court

52 According to Article 19(3) of Directives 2009/72 and 2009/73, 'no professional position or responsibility, interest or business relationship, directly or indirectly, with the [VIU] or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph'. In accordance with Article 19(8), Article 19(3) shall apply 'to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator'.

53 There is therefore no indication in the wording of Article 19(3) and (8) of Directives 2009/72 and 2009/73 that those transitional periods are restricted to the staff of those parts of the VIU which carry on their activities in the electricity or natural gas sectors.

54 The objective of those rules also calls for them to be interpreted as excluding such a restriction. As the Advocate General observed in points 61 and 62 of his Opinion, the objective of those rules is to ensure 'effective unbundling', allowing for complete and effective independence of the transmission system operator from the VIU, so as to eliminate conflicts between, on the one hand, interests relating to the generation and production of electricity and natural gas and, on the other hand, the operation of the transmission system. That unbundling is necessary to ensure the functioning of the internal energy market, set out in Article 194(1) TFEU, and the security of energy supply.

55 As has been pointed out in paragraph 35 above, 'effective unbundling' is intended to allow non-discriminatory network access, which constitutes a fundamental element of a functioning internal energy market. Furthermore, it is apparent from recital 25 of Directive 2009/72 and recital 22 of Directive 2009/73 that the security of energy supply is intrinsically linked to the effective functioning of the internal energy market.

56 It follows that the 'transitional periods' laid down in Article 19(3) and (8) of Directives 2009/72 and 2009/73 are applicable to persons responsible for the management and/or members of the administrative bodies of the transmission system operator who, before being appointed, exercised an activity in the VIU, or in an undertaking which is the majority shareholder in one of the VIU undertakings, even if those activities were not carried on in the energy sector of the VIU or in an undertaking which is the majority shareholder in one of the VIU undertakings operating in the energy sector.

57 It cannot be ruled out that a person responsible for the management and/or a member of the administrative bodies of the transmission system operator who, before being appointed, exercised an activity in the VIU outside the energy sector might have been influenced by the fact that the undertaking was active in the fields of production or supply of electricity and natural gas.

58 It is true that the definitions of 'VIU' given in Article 2(21) of Directive 2009/72 and Article 2(20) of Directive 2009/73 refer respectively to 'electricity undertakings' and 'natural gas undertakings', within the meaning, respectively, of points 35 and 1 of those articles. However, as the Advocate General observed in point 64 of his Opinion, those definitions do not support the conclusion that the concept of a 'VIU' should exclude the component parts thereof that do not operate in those sectors, with the result that such component parts are excluded from the scope of the provisions of Directives 2009/72 and 2009/73 relating to effective separation, within the meaning of Article 9(8) of those directives. A restrictive interpretation of that sort would not only call into question the objective of ensuring effective unbundling, but would also give rise to an artificial compartmentalisation of the undertaking that does not accord with economic reality.

59 Furthermore, although the interpretation of the rules on transitional periods in paragraph 56 above may, as the Federal Republic of Germany claims, give rise to a restriction on the freedom of movement for workers enshrined in Article 45 TFEU and to a restriction on the exercise of the fundamental right to pursue a freely chosen occupation under Article 15(1) of the Charter, it should be noted that those freedoms are not absolute and may be restricted under certain conditions.

60 The prohibition on restrictions on freedom of movement for workers applies not only to national measures, but also to measures adopted by the European Union institutions (see, by analogy, judgment of 8 December 2020, *Poland* v *Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 87 and the case-law cited).

61 However, the coordination measures adopted by the EU legislature, on the basis of Article 53 TFEU, read together with Article 62 TFEU, must not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom (judgment of 8 December 2020, *Poland* v *Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 53 and the case-law cited).

62 Thus, a measure restricting freedom of movement for workers cannot be accepted unless it pursues one of the legitimate aims listed in the TFEU or is justified by overriding reasons in the public interest. It is also necessary, in such a case, that the measure be capable of ensuring the achievement of the objective in question and not go beyond what is necessary to attain that objective (see, to that effect, judgment of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)*, C-710/18, EU:C:2020:299, paragraph 34 and the case-law cited).

63 Furthermore, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to pursue a freely chosen profession, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to those objectives, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to that effect, judgment of 6 September 2012, *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 54 and the case-law cited).

64 In the present case, as has been pointed out in paragraphs 54 and 55 above, the rules on transitional periods laid down in Article 19(3) and (8) of Directives 2009/72 and 2009/73 pursue the public interest objective of ensuring 'effective unbundling'.

65 Those rules are appropriate for achieving that objective, since, by setting periods during which persons who will be appointed to positions of responsibility or managerial positions within the transmission system operator cannot hold any professional position or responsibility, interest or business relationship, directly or indirectly, with the VIU or any part of it or its controlling shareholders other than the transmission system operator, allowing access to information which those persons could obtain in a managerial position in the VIU, they ensure the independence of the operator from electricity or gas production or supply interests.

66 Moreover, those rules do not go beyond what is necessary to attain the objective pursued. The restrictions on the freedom of movement for workers guaranteed by Article 45 TFEU and the right to pursue a freely chosen profession guaranteed in Article 15(1) of the Charter, which result from all the specific rules relating to that operator, including rules on transitional periods, and function to ensure the operator's independence, are limited in time such that they only produce effects for a clearly circumscribed period.

67 In this context, the exclusion from the scope *ratione personae* of Article 19(3) and (8) of Directives 2009/72 and 2009/73 of persons who have held a professional position, interest or business relationship in or with a VIU outside its energy sectors, resulting from Paragraph 10c(2) of the EnWG, is contrary to those provisions.

68 Accordingly, the Commission's second complaint in support of its action must be upheld and it must be held that, by failing to transpose correctly Article 19(3) and (8) of Directives 2009/72 and 2009/73, the Federal Republic of Germany has failed to fulfil its obligations under those directives.

The third complaint, alleging infringement of Article 19(5) of Directives 2009/72 and 2009/73

Arguments of the parties

69 By this complaint, the Commission criticises the Federal Republic of Germany for having failed to transpose adequately Article 19(5) of Directives 2009/72 and 2009/73, in that the obligation to dispose of any shares held in the capital of the VIU that were acquired up to 3 March 2012, laid down in Paragraph 10c(4) of the EnWG, applies only to shares held by the management of the independent transmission system operator and not those held by its employees. According to the Commission, even though the employees of a transmission system operator may not be able to take managerial decisions, they are still in a position to influence the activities of their employer, justifying the requirement to dispose of any shares held in the capital of the VIU up to 3 March 2012.

70 An obligation of that kind does not, according to the Commission, undermine employees' rights to property, given that it is merely of future application, and so any dividends already distributed will not be affected. Moreover, any such shareholdings will be disposed of only with the consent of their holder and in return for reasonable payment. The holder would retain the possibility to remain in possession of his or her shareholding, subject to the condition that he or she gives up his or her position in the transmission system operator.

71 The Federal Republic of Germany points out that the first sentence of Paragraph 10c(4) of the EnWG prohibits both the persons responsible for the management of the transmission system operator and other employees from acquiring shares in the capital of the VIU or any part thereof after 3 March 2012, whereas the second sentence of Article 10c(4) provides that only persons responsible for management must, by 31 March 2016 at the latest, dispose of the shares that they held in the capital of the VIU up to 3 March 2012.

72 That distinction is justified by the fact that, prior to the entry into force of the enhanced independence requirements for the independent transmission system operator on 3 March 2012, shareholdings in the VIU were usually an integral part of the constitution of assets or individual retirement savings of employees.

73 An obligation on employees to sell such holdings constitutes a disproportionate restriction on their property rights, safeguarded by the Grundgesetz (Basic Law; 'the GG'), since they cannot exert significant influence over the management of the system. Management staff are to be treated differently due to the importance of their position. Those staff members have a decisive strategic influence on the transmission operator, entailing a particular risk of conflicts of interests.

74 Moreover, since Directives 2009/72 and 2009/73 do not specify the procedure for shares in the capital of the VIU that employees of the transmission system operator acquired before the deadline, it is for Member States to adopt the appropriate transitional provisions.

Findings of the Court

75 According to Article 19(5) of Directive 2009/72 and of Directive 2009/73, 'the persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the [VIU] other than the transmission system operator. Their remuneration shall not depend on activities or results of the [VIU] other than those of the transmission system operator'.

76 It is clear from the wording of that provision that both managers and employees of the transmission system operator are prohibited from holding any interest or receiving any financial benefits, directly or indirectly, from any part of the VIU other than the transmission system operator.

77 That interpretation is supported by the objectives pursued by the legislation of which that provision is a part. As the Advocate General observed in point 77 of his Opinion, in cases where – to ensure effective unbundling of, on the one hand, transmission systems and, on the other hand, the activities of generation and supply of electricity and natural gas – Article 9(8) of Directives 2009/72 and 2009/73 introduce the requirement to have an independent transmission system operator, the obligation to ensure the complete and effective independence of that operator within the VIU justifies a finding that Article 19(5) of Directive 2009/72 and of Directive 2009/73 should be interpreted to mean that the prohibition against holding shares as laid down in those provisions includes an obligation for employees to dispose of their shareholdings. Even if employees do not participate in the everyday management of the transmission system operator, it cannot be ruled out that they may be in a position to influence the activities of their employer or, consequently, that conflicts of interests could arise if they hold shares in the VIU or in parts of it.

78 In the present case, although the German legislation at issue requires the disposal of holdings in the capital of the VIU acquired up to 3 March 2012, it restricts that obligation solely to the management of the independent transmission system operator. Since the Federal Republic of Germany claims that that limitation ensures protection of the employees' right to property as regards their shareholding in the VIU under the GG, it must be borne in mind that their right to property is also protected by Article 17(1) of the Charter.

79 Nevertheless, the interpretation of Article 19(5) of Directive 2009/72 and of Directive 2009/73 set out in paragraphs 76 and 77 above is consistent with the right to property as enshrined in Article 17(1) of the Charter. The right to property is not absolute and its exercise may be subject to limitations justified by objectives of general interest pursued by the European Union, provided that those restrictions genuinely meet objectives of general interest under Article 52(1) of the Charter and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited).

80 The obligation at issue is intended to meet the general interest objective, referred to in paragraph 54 above, of ensuring effective unbundling of, on the one hand, transmission systems and, on the other hand, generation and supply activities, which is necessary to ensure the functioning of the internal energy market and the security of energy supply.

81 Furthermore, the prohibitions laid down in Article 19(5) of Directive 2009/72 and of Directive 2009/73 do not constitute such a disproportionate and intolerable interference with the right to property that the very substance of that right would be affected. Those provisions provide simply that persons other than the transmission system operator who hold an interest in or receive any financial benefit from the VIU may not acquire or maintain managerial positions within the transmission system operator or become a member of its administrative bodies or one of its employees.

82 Accordingly, those who hold an interest in another part of the VIU must decide whether to maintain their ownership of that right, or to waive it, so that they can perform functions within the transmission system operator. Furthermore, those provisions do not preclude the sale of those shares at market price or their exchange for holdings in the capital of the transmission system operator.

83 Therefore, in the light of the public-interest objective referred to in paragraphs 54 and 80 above, the obligation at issue does not constitute an excessive and intolerable interference capable of impairing the very substance of the right to property of those employees, guaranteed by Article 17(1) of the Charter.

84 In the light of the foregoing considerations, the Commission's third complaint in support of its action must be upheld. It must therefore be held that, by failing to transpose correctly Article 19(5) of Directives 2009/72 and 2009/73, the Federal Republic of Germany has failed to fulfil its obligations under those directives.

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

Arguments of the parties

85 By this complaint, the Commission complains that the Federal Republic of Germany has failed to transpose correctly Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73, in so far as the first sentence of Paragraph 24 of the EnWG confers on the Federal Government powers to fix transmission and distribution tariffs, and to determine the conditions for balancing services, even though, according to those provisions of the directives, such powers lie exclusively with national regulatory authorities ('NRAs').

86 The Commission submits that the regulations adopted by the Federal Government under the first sentence of Paragraph 24 of the EnWG constitute detailed sets of instructions addressed to the NRA on the exercise of its regulatory powers. Those regulations establish the procedure and methods for determining network tariffs, setting out details such as the method of amortisation and indexation, and contain detailed rules on the conditions for network access.

87 However, the stipulation of such detailed rules prevents the NRA from exercising its own discretion, depriving it of powers which Directives 2009/72 and 2009/73 assign to it exclusively. EU law establishes clear principles with regard to network tariffs, namely those set out in Article 37(10) of Directive 2009/72 and, in the natural gas sector, in Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (OJ 2017 L 72, p. 29). In addition, as regards the conditions for grid connections and the conditions of access, various European network codes exist with detailed provisions concerning, inter alia, load points, producers and high-voltage units.

88 While acknowledging that the NRA's tasks must, in accordance with German law, be defined and laid down in legal provisions, the Commission complains that the German legislature has provided that the conditions under which the NRA can perform those tasks are determined by government regulations, instead of recognising the NRA's exclusive powers to carry out the tasks defined in Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72, and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

89 In that context, the Commission states that Article 35(4) of Directive 2009/72 and Article 39(4) of Directive 2009/73 have strengthened the independence of NRAs vis-à-vis the previous EU legislation.

90 In addition, according to the Commission, even if the principles laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), regarding the delegation of powers to EU agencies were also applicable to NRAs, in the present case, EU law itself has sufficiently established the criteria and conditions which, in accordance with the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18, paragraphs 41 to 54), must delineate the power conferred on NRAs and limit their margin of discretion such that the exercise of that power may be subject to judicial review.

91 The Federal Republic of Germany, supported by the Kingdom of Sweden, submits, as a preliminary point, that, under Article 194(2) TFEU, the Member States remain competent to determine the conditions for exploiting their energy resources. In view, especially, of its objective

to phase out the production of nuclear energy by 2022, the Federal Republic of Germany would need 'substantially to extend' electricity and natural gas transmission networks, while ensuring that the associated costs do not exceed an amount considered acceptable to consumers.

92 In that context, Paragraph 24 of the EnWG authorises the Federal Government 'to exercise regulatory powers, with the [consent] of the Bundesrat, in accordance with Paragraph 80(1) of the GG'. Although the NRA has a 'considerable margin of discretion', the principle of legality and the reservation of statutory powers, corollaries of the rule of law, require that the exercise of that authority's administrative power be 'structured in advance' so as to ensure, in accordance with the requirements of the GG, that the chain of democratic legitimacy is not broken.

93 Furthermore, the Federal Republic of Germany submits that the first sentence of Paragraph 24 of the EnWG is compatible with the provisions of Directives 2009/72 and 2009/73 on the tasks of the NRA. The wording of those provisions does not permit the inference that the NRA must be competent to fix transmission or distribution tariffs and the methods of calculating those tariffs. An interpretation to the contrary would be contrary to the spirit, the objectives and the drafting history of those directives.

94 In accordance with the principle of the procedural autonomy of the Member States, they have the discretion to transpose provisions of Directives 2009/72 and 2009/73 on the powers of NRAs. In the case of the Federal Republic of Germany, the calculation methodologies are determined in general and abstract terms by the legislature and the regulatory authorities, with the NRA having the power to supplement and, to an extent, modify those methodologies, and adopt concrete decisions on the basis of those calculation methodologies. In the absence of sufficiently precise substantive requirements regarding the definition of methodologies for network access and fixing of tariffs, and in order to ensure the correct transposition of the directives, the Member States are required to draw up their own criteria within which to frame the regulatory powers of NRAs.

95 That view is not contradicted by the judgment of 29 October 2009, *Commission* v *Belgium* (C-474/08, not published, EU:C:2009:681), since, in the present case, the regulations adopted on the basis of Paragraph 24 of the EnWG in the present case are substantive laws, not instructions given by the government in its capacity as an executive authority of a higher level than the NRA. When the Federal Government adopts regulations on that basis, 'it does not act as a branch of the executive but performs a legislative function' with the consent of the Bundesrat. Those regulations therefore do not threaten the independence of the NRA, since the NRA is not subject to instructions from the government or other authorities.

96 Lastly, the Federal Republic of Germany submits that the principles established in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), are also applicable where the EU legislature entrusts powers to independent national authorities. According to those principles, the conferral of powers on those authorities is possible only if the EU legislature has first adopted sufficiently precise provisions on the tasks and powers of such authorities. Where the legislature has not adopted such provisions, it is for the Member States to adopt them. That requirement also arises from democratic principles and the rule of law, which form part of the fundamental political and constitutional structures of the Federal Republic of Germany, which, in accordance with Article 4(2) TEU, the European Union must respect.

97 In its rejoinder, the Federal Republic of Germany criticises the Commission for an inadmissible extension of the subject matter of the dispute, in that it included an additional complaint in its rejoinder concerning breach of the NRA's independence, or amended the initial complaint.

Findings of the Court

– *Admissibility*

98 It must first be recalled that it is not permissible for a party to alter the very subject matter of the case during the proceedings, and that the merits of an action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, inter alia, judgment of 11 November 2010, *Commission* v *Portugal*, C-543/08, EU:C:2010:669, paragraph 20 and the case-law cited).

99 Furthermore, by virtue of the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union and Article 120(c) of the Court's Rules of Procedure, the Commission must, in any application made under Article 258 TFEU, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (judgment of 16 July 2015, *Commission* v *Bulgaria*, C-145/14, not published, EU:C:2015:502, paragraph 28 and the case-law cited).

100 By its fourth complaint, the Commission complains that the Federal Republic of Germany has failed to transpose correctly Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73, in so far as the first sentence of Paragraph 24 of the EnWG confers on the Federal Government powers which, according to those provisions, should lie exclusively with the NRA.

101 As the Advocate General observed in point 100 of his Opinion, both the attribution to a body other than the NRA of power to intervene in areas falling within the competence of the NRA and the imposition upon the NRA of provisions adopted by other bodies delineating in detail the exercise of competences reserved to it are liable to limit the NRA's ability to adopt decisions falling within its sphere of competence independently and without any external influence.

102 It follows that the fourth complaint concerns questions which are closely linked, in so far as the conferral on an entity other than the NRA of powers reserved to the NRA is, according to the Commission, capable of constituting an infringement of the independence of that authority, since, in accordance with Article 35 of Directive 2009/72 and Article 39 of Directive 2009/73, those powers must be exercised autonomously. Therefore, the arguments put forward by the Commission concerning the independence of NRAs cannot be regarded as a new complaint, different from that raised initially, or as an amendment to the initial complaint. Therefore, those arguments are admissible.

– *Substance*

103 Article 37(1) of Directive 2009/72 and Article 41(1) of Directive 2009/73 confer on NRAs various powers, including, in particular, in point (a) of each of those provisions, the power to fix or approve, in accordance with transparent criteria, transmission and distribution tariffs, or their methodologies.

104 In addition, Article 37(6)(a) and (b) of Directive 2009/72 and Article 41(6)(a) and (b) of Directive 2009/73 confer on NRAs, in particular, the power to fix or approve at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks, including the applicable tariffs, as well as the conditions for the provision of balancing services.

105 The expression 'at least' in the wording of those provisions, read in the light of recital 36 of Directive 2009/72 and recital 32 of Directive 2009/73, indicates that the determination of the methodologies for calculating or establishing the terms and conditions for connection and access to national networks, including the applicable tariffs, forms part of the powers directly reserved to NRAs by those directives.

106 In that regard, the Court has already held, when interpreting Article 23(2) of Directive 2003/54, which contained provisions similar to those referred to in paragraph 104 above, that the allocation to an authority other than the NRA of the power to determine important elements in the setting of tariffs, such as the profit margin, did not comply with those provisions, in so far as that allocation reduced the scope of the powers conferred on the NRA by that directive (see, by analogy, judgment of 29 October 2009, *Commission* v *Belgium*, C-474/08, not published, EU:C:2009:681, paragraphs 29 and 30).

107 Furthermore, Article 35(4)(a) and (5)(a) of Directive 2009/72 and Article 39(4)(a) and (5)(a) of Directive 2009/73 specify that NRAs shall exercise their powers independently of any public entity or political body.

108 With regard to the concept of 'independence', which is not defined by either Directive 2009/72 or Directive 2009/73, the Court has already held that, as regards public bodies, the term refers in its usual meaning to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or external influence (see, to that effect, judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraphs 32 and 33).

109 The Court has stated that independence in decision-making implies that, within the sphere of the regulatory duties and powers referred to in Article 37 of Directive 2009/72, NRAs take their own decisions autonomously and solely in the public interest, so as to ensure compliance with the objectives pursued by that directive, without being subject to external instructions from other public or private entities (judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraph 54).

110 It is true that, under Article 35(4)(b)(ii) of Directive 2009/72 and Article 39(4)(b)(ii) of Directive 2009/73, the requirement for independence referred to therein is without prejudice to general guidelines laid down by the government. However, it is clear from the wording of those provisions that such general guidelines do not concern the tasks or regulatory powers referred to, respectively, in Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73.

111 It should be noted in that context that those directives also seek, in accordance with recital 33 of Directive 2009/72 and recital 29 of Directive 2009/73, to strengthen the independence of NRAs as compared to the regime provided for under the previous rules.

112 As the Advocate General observed in point 112 of his Opinion, the complete independence of NRAs from economic actors and public entities, be they administrative bodies or political bodies (and in the latter case, be they the holders of executive power or of legislative power) is

instrumental in ensuring that the decisions taken by the NRAs are truly impartial and non-discriminatory, while the possibility of undertakings and economic interests connected with the government, the majority or political power being treated more favourably is excluded. Furthermore, the strict separation of NRAs from political power enables them to coordinate their actions on a long-term basis, which is necessary to meet the objectives of Directives 2009/72 and 2009/73.

113 It follows that an interpretation of Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and of Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73 as meaning that it is possible for a national government to fix or approve the methodologies for calculating rates for access to the network and the balancing services to be used by NRAs would counteract the objectives pursued by those directives.

114 In the present case, the first sentence of Paragraph 24 of the EnWG confers on the Federal Government, with the consent of the Bundesrat, the power not only to lay down the conditions for access to the network, including the provision of balancing services, and to establish the methodologies used for determining such conditions and the methodologies for fixing the tariffs for network access, but also the power to decide in which cases and under which framework the NRA may define those conditions or methodologies or approve them at the request of the system operator, and in which specific cases of network use and under which conditions the NRA may, in individual cases, authorise or withhold authorisation for individual tariffs for network access.

115 The first sentence of Paragraph 24 of the EnWG thus confers directly on the Federal Government certain powers reserved exclusively to the NRA, as well as the power to authorise the NRA to exercise those powers, contrary to the provisions of Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

116 As the Advocate General pointed out in point 106 of his Opinion, the independence conferred on the NRA by Directives 2009/72 and 2009/73 in the context of the tasks and powers conferred on it, exclusively, by Article 37 of the former and Article 41 of the latter, cannot be limited by acts such as, in the present case, regulations adopted by the Federal Government, with the consent of the Bundesrat, under Paragraph 24 of the EnWG.

117 That assessment cannot be invalidated by any of the arguments put forward by the Federal Republic of Germany.

118 First, as regards the principle of the Member States' procedural autonomy, it follows from Article 288 TFEU that the Member States are required, when transposing a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain (judgment of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 29 and the case-law cited).

119 It follows that while the Member States enjoy autonomy as regards the organisation and the structuring of their NRAs, that autonomy must nevertheless be exercised in accordance with the objectives and obligations laid down in Directives 2009/72 and 2009/73 (see, to that effect,

judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraph 38 and the case-law cited), which seeks to ensure that, in the exercise of the powers reserved to NRAs, those authorities take their own decisions autonomously.

120 Secondly, as regards the alleged lack of precision of the substantive provisions of the relevant directives regarding the definition of methodologies for network access and fixing of tariffs, it is apparent from Article 37(1) of Directive 2009/72 and Article 41(1) of Directive 2009/73 that transmission and distribution tariffs or calculation methodologies must be fixed in accordance with transparent criteria. In accordance with paragraph 6(a) of those two articles, those tariffs and calculation methodologies, and the conditions for connection and access to national networks, must be fixed in accordance with the need for the necessary investments to be made in the networks to ensure their viability. It is also apparent from paragraph 10 of those provisions that such tariffs and calculation methodologies must be proportionate and applied in a non-discriminatory manner.

121 In addition, as regards the provision of balancing services, Article 37(6)(b) of Directive 2009/72 and Article 41(6)(b) of Directive 2009/73 establish that those services must be performed in the most economic manner possible, must provide appropriate incentives for network users to balance their energy input and off-takes, and must be provided in a fair and non-discriminatory manner and based on objective criteria. Finally, in accordance with paragraph 8 of those articles, in fixing or approving the tariffs or methodologies and the balancing services, NRAs must ensure that transmission and distribution system operators are granted appropriate incentives, in the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

122 The criteria laid down in Directives 2009/72 and 2009/73 are specified in other legislative measures, namely Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15) and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36), which are applicable to cross-border exchanges (see, to that effect, judgment of 3 December 2020, *Commission* v *Belgium (Electricity and natural gas markets)*, C-767/19, EU:C:2020:984, paragraph 112). Those regulations are supplemented by various network codes established by means of Commission regulations.

123 In the light of an equally detailed legislative framework at EU level, from which it is apparent, as the Advocate General observed in point 118 of his Opinion, that tariffs and calculation methods for domestic and cross-border exchanges must be fixed on the basis of uniform criteria, the Federal Republic of Germany's argument that, for the purposes of transposing Directives 2009/72 and 2009/73, it is necessary to draw up national criteria for the calculation of tariffs, cannot therefore succeed.

124 Thirdly, as regards the argument that the legislation adopted under Paragraph 24 of the EnWG is a legislative proposal, which is necessary in order to ensure democratic legitimacy, it must be recalled that Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU (judgment of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paragraph 63 and the case-law cited).

125 That principle is fully reflected in the legislative procedure in which Directives 2009/72 and 2009/73 were adopted. As one of the principles common to the Member States, it must be taken into consideration when interpreting those directives and, in particular, the specific provisions at issue (see, by analogy, judgment of 9 March 2010, *Commission* v *Germany*, C-518/07, EU:C:2010:125, paragraph 41).

126 The Court has already held that the principle of democracy does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government, which often exercise regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. Conferring on NRAs a status independent of the general administration does not in itself deprive those authorities of their democratic legitimacy, in so far as they are not shielded from all parliamentary influence (see, to that effect, judgment of 9 March 2010, *Commission* v *Germany*, C-518/07, EU:C:2010:125, paragraphs 42, 43 and 46).

127 However, Directives 2009/72 and 2009/73 do not preclude the appointment of directors of NRAs by parliament or government (see, to that effect, judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraphs 36 to 39). Nor do they preclude, as is apparent from recital 34 of Directive 2009/72 and recital 30 of Directive 2009/73, those authorities being subject to parliamentary scrutiny in accordance with the constitutional law of the Member States.

128 Furthermore, Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73 require Member States to establish appropriate mechanisms at the national level under which a party affected by a decision of an NRA can bring proceedings before a body independent of the parties involved and of any government. Such a requirement is a corollary of the principle of effective judicial protection, which is a general principle of European Union law and one which is enshrined in Article 47 of the Charter (judgment of 16 July 2020, *Commission* v *Hungary (Charges for access to electricity and natural gas transmission networks)*, C-771/18, EU:C:2020:584, paragraph 61 and the case-law cited).

129 In those circumstances, the Federal Republic of Germany cannot rely on the principle of democracy, which is guaranteed throughout the European Union, to attribute to an authority other than an NRA powers for which the NRA has exclusive responsibility by virtue of Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

130 Furthermore, even though the regulations adopted by the Federal Government under Paragraph 24 of the EnWG are 'substantive laws', it should be noted, as the Advocate General observed in point 124 of his Opinion, that the powers attributed exclusively to NRAs by Directives 2009/72 and 2009/73, and their independence, must be ensured in relation to any political body, and so not only the government, but also in relation to the national legislature, which can and must establish such powers in legislative acts but cannot, however, take powers away from NRAs and attribute them to other public bodies.

131 Fourthly, as regards the argument based on the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), without it being necessary to rule on whether that case-law is applicable in a case such as the present one, which relates to national authorities designated by Member States pursuant to a directive, it must be noted, as the Advocate General observed in point 134 of his Opinion, that the interpretation of Article 37 of Directive 2009/72 and Article 41 of Directive 2009/73 found in paragraphs 105 and 113 above is, in any event, in line with that

case-law. According to that case-law, it is not permissible to delegate to administrative bodies a margin of discretion which may, according to the use which is made of it, make it possible to take political decisions in the true sense, by substituting the choices of the delegator by those of the delegatee, and thus bring about an 'actual transfer of responsibility'. However, a delegation of clearly defined executive powers, the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, is permitted (see, to that effect, judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraphs 41, 42 and 54).

132 The powers reserved to NRAs are executive powers that are based on the technical and specialist assessment of factual realities. Moreover, as is apparent from paragraphs 120 to 123 above, in the exercise of those powers, NRAs are subject to principles and rules established by an equally detailed legislative framework at EU level, which limit their discretion and prevent them from making political choices.

133 In the light of the foregoing considerations, the Commission's fourth complaint in support of its action must be upheld and it must be held that, by failing to transpose correctly Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73, the Federal Republic of Germany has failed to fulfil its obligations under those directives.

Costs

134 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings.

135 Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

136 In accordance with Article 140(1) of those rules, under which Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of Sweden must be ordered to bear its own costs.

On those grounds, the Court (Fourth Chamber):

1. Declares that, by failing to transpose correctly:

- **Article 2(21) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, and Article 2(20) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC,**

- **Article 19(3) and (8) of Directives 2009/72 and 2009/73,**

- **Article 19(5) of Directives 2009/72 and 2009/73,**

- **Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73,**

the Federal Republic of Germany has failed to fulfil its obligations under those directives;

2. Orders the Federal Republic of Germany to pay the costs;

3. Orders the Kingdom of Sweden to bear its own costs.

[Signatures]