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Commission loses grip on Germany

By Isabelle Smets | Friday 01 March 2013

The European Commission has suffered a significant blow from the EU Court of Justice (ECJ), which confirmed, on 28 February, the position taken by its advocate-general last September: that the way the German railways are organised, with a holding company that integrates the powerful Deutsche Bahn and network manager DB Netz, is completely legal (Case C-556/10). The Commission, which considers that the German model does not guarantee the independence of the infrastructure manager from Deutsche Bahn, has therefore lost its grip on this country.

Also on 28 February, the court found that Austria, whose railway network is also organised around a holding structure, is in line with EU law (Case C-555/10). However, Spain (C-483/10) and Hungary (C-557/10) were found not to have complied with EU legislation.

Under EU law, holding companies are not forbidden, but the Commission considers that they should only be allowed if measures have been adopted to guarantee the organisational and decision making independence of infrastructure managers. Germany and Austria have failed to adopt such measures, the Commission says. However, the ECJ has rejected this complaint: it considers that legal requirements regarding the independence of infrastructure managers have been met in both countries. While the two infrastructure managers are both part of a holding, they have separate legal personalities, as well as their own bodies and resources, which are different from their respective holding societies, the court pointed out. The court also noted that additional measures alluded to by the Commission (that there should be no link between management boards, staff and different companies) as indicators of independence do not feature in Community legislation, and member states therefore cannot be required to adopt such measures.

A BAD BLOW

Politically speaking, this is a bad blow for the Commission, primarily with regard to the current debate on the fourth EU railway package, which aims to toughen up requirements on the independence of infrastructure managers and transport operators, and which even forbids new holding companies. Transport Commissioner Siim Kallas reacted to the ECJ's judgement by emphasising that it does not contradict the Commission's proposals, adding that the executive respects the court's interpretation of current law, but nonetheless "the Commission remains convinced that a more effective separation between an infrastructure manager and other rail operations is essential to ensure non-discriminatory access for all operators to the rail tracks, and thus to stimulate growth in the rail sector. This approach will not change".

Nonetheless, those who are opposed to separation requirements will no doubt make the most of this judgement - and may even exaggerate thecourt's interpreation.

However, the Commission may console itself with the fact that the court found against Spain, recognising that the infrastructure manager should remain independent in order to determine the

amount of fees that should be paid for access to the rail network. Under Spanish legislation, this right is reserved for the state, and Spanish law also allows for the state to set priorities for the division of train paths - in case of conflicting demands. The court, however, says it is up to the infrastructure manager to do this.

Feelings at the Commission regarding the judgement in the Hungarian case are likely be more reserved. While Hungary has been condemned on certain matters: not having defined conditions to guarantee the financial equilibrium of infrastructure managers, and not adopting incentivising measures to reduce the cost of exploiting infrastructures, or guaranteeing that fees are equal to the cost of exploiting the service, the court has recognised the right to grant responsibility for traffic management to rail companies (the historic transport operators MÁV and GySEV) and not to an independent body. Traffic management, it says, does not mean adopting decisions on the allocation of train paths (which should be done by the infrastructure manager), but rather implementing and executing such decisions. This can be done by rail companies.

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CER: Court judgements shed “new light” on fourth rail package

By Isabelle Smets | Friday 01 March 2013

The Community of European Railway and Infrastructure Companies (CER) welcomed the EU Court of Justice’s 28 February judgements, which found that railway holding structures in Germany and Austria (see *Europolitics*4597) are indeed compatible with EU law. These judgements, according to the CER, “will shed new light on the debate in the framework of the current adoption of the fourth railway package”.

This is exactly what the European Commission feared: that those who are against enhanced separation between infrastructure managers and transport operators would use these judgements to claim that the current situation is acceptable, and that there is no way to go further within the fourth package.

Transport Commissioner Siim Kallas also said that these judgements only concern current legislation, and therefore do not contradict the fourth package; on the contrary, they show the importance of rapidly adopting new measures. Since the court says that the German and Austrian structures are in line with current Community law, and since the Commission is convinced that the German and Austrian systems do not allow infrastructure managers to be truly independent, the law must therefore be changed.

The CER, which represents historic rail companies such as SNCF and Deutsche Bahn, is opposed to legislation that reinforces separation requirements between infrastructure managers and rail

companies. When the Commission presented the fourth package, the CER said that current legislation already contains sufficient guarantees. The new judgements are “an important signal in relation to the forurth railway package,” said CER’s Executive Director Libor Lochman.