Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 13 December 2012 [1]

Case C-627/10

European Commission
v

Republic of Slovenia

(Action for failure to fulfil obligations — Directive 91/440/EEC — Development of the Community's railways — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 6(3) of and Annex II to Directive 91/440 — Article 14(2) of Directive 2001/14 — Infrastructure manager — Participation by an infrastructure manager which is itself a railway undertaking in the preparation of service timetables — Traffic management — Article 6(2) to (5) of Directive 2001/14 — Absence of measures providing infrastructure managers with incentives to reduce the costs of provision of infrastructure and the level of access charges — Articles 7(3) and 8(1) of Directive 2001/14 — Cost that is directly incurred as a result of operating train services — Charges for the minimum access package and track access to service facilities — Inclusion of charges for other traffic systems — Article 11 of Directive 2001/14 — Absence of a performance scheme to encourage railway undertakings and the infrastructure manager to reduce disruption and improve the operation of infrastructure)

I – **Introduction**

1. By the present action for failure to fulfil obligations, the European Commission asks the Court to declare that the Republic of Slovenia has failed to fulfil its obligations under Article 6(3) of and Annex II to Directive 91/440/EEC, [2] as amended by Directive 2001/12/EC [3] ('Directive 91/440'), Article 14(2) of Directive 2001/14/EC, [4] and Articles 6(2) to (5), 7(3) and 11 of the same directive. [5] The Republic of Slovenia contends that the Commission's action should be dismissed.

1 — Original language: French.

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

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

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

5 — By document lodged at the Registry of the Court on 1 February 2012, the Commission informed the Court that it was withdrawing the complaint concerning the infringement of Article 30(1) of Directive 2001/14.

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

3. On 6 September 2012 I delivered my Opinions in *Commission* v *Portugal*, and in *Commission* v *Hungary*, *Commission* v *Spain, Commission* v *Austria*, and *Commission* v *Germany*. In addition to the present Opinion, I am today delivering my Opinions in *Commission* v *Poland, Commission* v *Czech Republic, Commission* v *France*, and *Commission* v *Luxembourg*. In so far as the present case concerns similar complaints to those which I have already examined in those Opinions, I will simply make reference to the relevant points of the Opinions, without reproducing in full the arguments set out therein.

II – **Legal framework**

A – *European Union law*

1. Directive 91/440

4. Under Article 6(3) of Directive 91/440:

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

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

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

'…

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

— decision-making related to infrastructure charging,

…'

6 — Case C-557/10 *Commission* v *Portugal* [2012] ECR, and Case C-528/10 *Commission* v *Greece* [2012] ECR; and Cases C-473/10 *Commission* v *Hungary*; C-473/10 *Commission* v *Spain*; C-512/10 *Commission* v *Poland*; C-545/10 *Commission* v *Czech Republic*; C-555/10 *Commission* v *Austria*; C-556/10 *Commission* v *Germany*; C-625/11 *Commission* v *France*; C-369/11 *Commission* v *Italy*; and C-412/11 *Commission* v *Luxembourg*, pending before the Court.

2. Directive 2001/14

6. Article 6(2) to (5) of Directive 2001/14 provides:

‘2. Infrastructure managers shall, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

3. Member States shall ensure that the provision set out in paragraph 2 is implemented, either through a contractual agreement between the competent authority and infrastructure manager covering a period of not less than three years which provides for State funding or through the establishment of appropriate regulatory measures with adequate powers.

4. Where a contractual agreement exists, the terms of the contract and the structure of the payments agreed to provide funding to the infrastructure manager shall be agreed in advance to cover the whole of the contract period.

5. A method for apportioning costs shall be established. Member States may require prior approval. This method should be updated from time to time to the best international practice.’

7. Under Article 7(3) of that directive:

‘Without prejudice to paragraphs 4 or 5 or to Article 8, the charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service.’

8. Article 8(1) of Directive 2001/14 provides:

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

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

9. Under Article 11(1) of that directive:

‘Infrastructure charging schemes shall through a performance scheme encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. This may include penalties for actions which disrupt the operation of the network, compensation for undertakings which suffer from disruption and bonuses that reward better than planned performance.’

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

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

B – *Slovenian law*

1. Law on rail transport

11. Article 21 of the Law on rail transport (Zakon o železniškem prometu) [7] provides:

‘1. For the purposes of the performance of the functions referred to in the present article, the government shall create a public agency for rail transport [“the Agency for Rail Transport” or “the agency”].

…

3. The agency shall perform its functions so as to ensure non-discriminatory access to the railway infrastructure, including:

— allocation of train paths;

…

— adoption of a network service timetable.’

12. Under Article 11 of that law:

‘1. Maintenance of the public railway infrastructure and management of rail transport on that infrastructure shall constitute public service obligations.

2. The manager shall discharge the public service obligations mentioned in the preceding paragraph in accordance with the public service contract.

…

4. The regulation of rail transport on the public railway infrastructure shall comprise principally:

— management of train movements;

— preparation and application of the service timetable;

…’

2. Decree on the allocation of train paths and charges for the use of the public railway infrastructure

13. Under Article 9 of the Decree of 18 April 2008 on the allocation of train paths and charges for the use of the public railway infrastructure (Uredba o dodeljevanju vlakovnih poti in uporabnini na javni železniški infrastrukturi): [8]

7 — Uradni list RS No 44/2007, law as amended (Uradni list RS No 58/2009, ‘the Law on rail transport’). With regard to the amendment made in 2010 i.e. after the expiry of the time limit prescribed in the reasoned opinion, see footnote 9 of this Opinion.

8 — Uradni list RS No 38/08, ‘the Decree of 18 April 2008’.

‘1. The agency, the manager and the applicant shall, in the procedure for establishing and allocating train paths, comply with the following time limit and principles:

…

— the manager shall prepare a draft new service timetable and new train timetables no later than five months before the new service timetable takes effect and forward them to the agency;

— in preparing the draft, the manager shall consult the interested parties and all persons wishing to make comments regarding the impact which the service timetable could have on their ability to provide rail services during the period of validity of the service timetable;

— the agency shall send the draft new service timetable to applicants which have made a request for the allocation of a train path and to other interested parties wishing to make comments regarding the impact which the service timetable could have on their ability to provide rail services during the period of validity of the service timetable and allow them a period of at least one month to send it any comments.’

14. Article 20(2) and (5) of that decree provides:

‘2. The manager shall, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges. To that end, the three-year agreement concluded between the agency and the manager shall provide for a proportion of the surpluses from the manager’s other commercial activities in accordance with the preceding paragraph not to be included in the calculation of charges, but to be left to the manager as an incentive.

…

5. The method of calculation of charges shall also take account of all data on the charging scheme and sufficient information on the price of the services referred to in Articles 23 and 24 if they are offered only by a single provider. The method shall take account not only of information on the charging scheme in force, but also of information on likely changes in charges for the following three years. Similarly, it shall take account of measures to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the operation of the infrastructure.

It may include penalties for actions which disrupt the operation of the network, compensation for railway undertakings which suffer from disruption and bonuses that reward better than planned performance.’

15. Under Article 21 of that decree:

‘1. The agency shall respect the criteria laid down by the law in setting the amount of charges.

2. In evaluating the criteria referred to in the preceding paragraph, the agency shall respect the operating costs of the specific train type, which are attested inter alia by the costs of track maintenance, infrastructure linked to train movements and rail transport management.

3. The agency shall ensure objectively equivalent and non-discriminatory charges for all railway undertakings that perform services of equivalent nature in a similar part of the market.’

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

16. On 10 May 2007, the Commission services sent a questionnaire to the Slovenian authorities in order to verify the transposition by the Republic of Slovenia of the directives in the first railway package. They replied on 11 July 2007. By letter of 21 November 2007, the Commission requested additional information from the Republic of Slovenia, which replied by letter of 16 January 2008.

17. On 26 June 2008, the Commission sent the Republic of Slovenia a letter of formal notice stating that, on the basis of the information communicated to the Commission, the first railway package had not been properly transposed into its domestic legal order as regards the independence of the essential functions of the infrastructure manager, charges made for access to the railway infrastructure, and the railway regulatory body.

18. The Republic of Slovenia replied to the letter of formal notice on 22 August 2008. It subsequently sent the Commission additional information by letters of 16 March and 8 July 2009.

19. Since it considered that the Republic of Slovenia had not taken the necessary measures to transpose properly the directives relating to the first railway package, the Commission sent that Member State a reasoned opinion on 9 October 2009.

20. By letter of 8 December 2009, the Republic of Slovenia stated that it had taken note of the infringements alleged against it in the reasoned opinion and expressed its intention to remedy them. In its reply to the reasoned opinion dated 8 March 2010, the Republic of Slovenia reiterated, in every respect, the considerations which it had set out in its letter of 8 December 2009.

21. On 29 December 2010, the Commission brought the present action for failure to fulfil obligations.

22. By order of the President of the Court of 14 June 2011, the Czech Republic and the Kingdom of Spain were granted leave to intervene in support of the forms of order sought by the Republic of Slovenia.

23. The Commission, the Republic of Slovenia, the Czech Republic and the Kingdom of Spain were represented at the hearing, which took place on 20 September 2012.

IV – **Analysis of the action for failure to fulfil obligations**

A – *The first complaint concerning the lack of independence of the infrastructure manager in the performance of essential functions*

1. Arguments of the parties

24. The Commission claims that the Republic of Slovenia has failed to fulfil its obligations under Article 6(3) of and Annex II to Directive 91/440 and Article 14(2) of Directive 2001/14 in so far as the infrastructure manager, which itself supplies railway transport services, first, contributes to the preparation of the service timetable and, second, regulates train movements and therefore participates in the function of decision-making related to the path allocation or the allocation of infrastructure capacity.

25. The Commission argues in this regard that, whilst Article 21 of the Law on rail transport entrusts the tasks of allocating train paths to the Agency for Rail Transport, the infrastructure manager, namely Slovenian Railways, is involved in decision-making related to the path allocation or the allocation of infrastructure capacity under Article 11(4) of that law.

26. The Commission also points out that Slovenian Railways continues to participate in the preparation of the service timetable because Article 9 of the Decree of 18 April 2008 provides that the infrastructure manager must prepare a draft new service timetable and consult the interested parties on it, before forwarding it to that agency, which sends the draft new service timetable to applicants and then adopts its final decision on allocation.

27. In addition, the Commission claims that the infrastructure manager is also entrusted with the regulation of train movements in so far as Article 11(4) of the Law on rail transport provides that management of train movements comes under management of rail transport on the public railway infrastructure.

28. The Republic of Slovenia contends that the Commission's claims are unfounded. It argues in particular that Article 3 of the law amending the Law on rail transport (Zakon o spremembah in dopolnitvah Zakona o železniškem prometu) [9] ('the Law of 27 December 2010') took away all the infrastructure manager's power to prepare network timetables and that that power has been fully transferred to the Agency for Rail Transport.

29. Furthermore, the Republic of Slovenia claims that management of train movements is not among the 'essential functions' listed in Annex II of Directive 91/440. The Member State argues that timetables are fixed by the Agency for Rail Transport, since the infrastructure manager, as the traffic manager, has access only to the effective monitoring of the route and, that being the case, it obtains only data which other railway undertakings are also able to obtain by consulting the network timetables.

2. Examination of the first complaint

30. The Republic of Slovenia contests the first part of the Commission's first complaint by relying on laws and regulations adopted after the expiry of the time limit prescribed in the reasoned opinion, namely the Law of 27 December 2010 and the Law on the Slovenian Railways Company. [10] At the hearing, the Member State in question explained that when the Law on rail transport was amended in 2007, the function of allocating train paths had already been transferred to an independent agency, but that the preparation of network timetables was transferred to the agency in question only upon the adoption of a supplementary decree in 2011.

31. It need only be noted in this regard that the Court has repeatedly ruled that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes. [11] It is therefore the legislation in force upon the expiry of the two month time limit prescribed by the reasoned opinion of 9 October 2009 that is crucial for the examination of the first part of the first complaint.

32. In Slovenia, the historic operator was entrusted, under the supervision of the independent body responsible for the essential functions, with allocating capacity and individual train paths, [12] consisting in the preparation of the 'draft new service timetable and new train timetables' for the Republic of Slovenia. [13]

9 — Uradni list RS No 106/2010, see footnote 7 of this Opinion.

10 — See footnote 9 of this Opinion.

11 — See, inter alia, Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 72 and the cited case-law; Case C-241/08 *Commission* v *France* [2010] ECR I-1697, paragraph 59 and the cited case-law; and Case C-50/09 *Commission* v *Ireland* [2011] ECR I-873, paragraph 102.

12 — There is also a similar situation in Case C-625/10 *Commission* v *France* (see points 22 to 47 of my Opinion).

13 — Article 9 of the Decree of 18 April 2008.

33. Under Article 6(3) of Directive 91/440, the functions listed in Annex II to the directive may only be 'entrusted to bodies or firms that do not themselves provide any rail transport services'. Annex II makes reference to 'decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths'. It is thus clear from the wording of the directive that 'the definition and the assessment of availability' are among the competences conferred on the body responsible for the essential function of allocating capacity and train paths.

34. For that reason, I do not think that it is possible for the infrastructure manager, which is independent of the railway undertakings, or indeed for an allocation body, to entrust to such an undertaking all the preparatory work before a decision is taken. Thus, the fact that Slovenian Railways acts on behalf of the Agency for Rail Transport, which retains full powers to decide on the service timetable and the allocation of individual train paths, is not enough to ensure that this system meets the requirements of EU law.

35. In fact, it is the historic operator, Slovenian Railways, which manages the railway infrastructure. Certainly, a new entity was created, namely the Agency for Rail Transport, and was entrusted with the allocation of capacity and individual train paths. However, it is clear from Article 9 of the Decree of 18 April 2008 that it is the infrastructure manager, in other words Slovenian Railways, which prepares a draft new service timetable and new train timetables and forwards them to that agency. In preparing the draft, the infrastructure manager must hold consultations with the interested parties and all persons wishing to make comments.

36. I would also point out that under Article 14(2) of Directive 2001/14, where the infrastructure manager is not independent of any railway undertaking, which is the case in Slovenia, the function of allocating infrastructure capacity is entrusted to an allocation body that is independent in its legal form, organisation and decision-making from any transport undertaking. In this regard, the Commission rightly states that Slovenian Railways continues to participate in the preparation of the service timetable and thus in the function of allocating train paths or infrastructure capacity.

37. In my view, the body responsible for the essential function of allocating capacity and train paths must control the entire allocation process. The infringement by the Member State is therefore established, as the infrastructure manager, which is a rail transport undertaking, is involved in the performance of an essential function.

38. The second part of the Commission's first complaint concerns the fact that in Slovenia the infrastructure manager, which itself supplies railway transport services, performs management of train movements.

39. I would observe at the outset that this part is essentially identical to the first complaint in *Commission* v *Hungary* (see points 49 to 70 of my Opinion). For that reason, reference should be made to the legal reasoning developed in the Opinion delivered in that case. However, the implementation of the Slovenian legislation displays differences compared with the situation in Hungary. Consequently, the examination of the substance of the complaint must take account of the specific situation in Slovenia.

40. The Republic of Slovenia claims that management of train movements is not among the 'essential functions' listed in Annex II to Directive 91/440. That is also the conclusion I reached in my Opinion in *Commission* v *Hungary*.

41. At the hearing, it seems that the Commission accepted that analysis. It states, however, that in Slovenia the allocation of train paths forms part of traffic management. In its reply, the Commission referred to the Republic of Slovenia's network plan in support of its view that, in the event of disruption of traffic, the manager alone may allocate the necessary train path. According to that

network plan, if necessary or where the infrastructure is temporarily out of use, the manager may temporarily refuse the application of the allocated train paths for as long as is necessary to restore the system. Moreover, in exceptional circumstances which result in a discrepancy with the allocated train paths, the manager has the right, in the prior consultation with the carrier, to adapt train paths in order to guarantee in the best manner possible the communications originally determined. The Republic of Slovenia has not refuted these claims.

42. However, in the application, the Commission asserted that management of train movements had to be entrusted to a body which does not itself supply railway transport services, without making any reference at all to the withdrawal or reallocation of train paths in the event of disruption of traffic.

43. My conclusion is that, in the reply, the Commission extended the subject matter of the application or, at the very least, introduced a new ground for the alleged infringement in so far as it refers to traffic management in the event of disruption of traffic. In so far as the Commission's action is based on this reasoning, it must therefore be declared inadmissible. On the other hand, the ground for the complaint concerning the traffic management procedures set out in the application must be considered to be unfounded for the reasons set out in my Opinion in *Commission* v *Hungary*.

44. Nevertheless, should the Court consider the grounds concerning the powers of the infrastructure manager in the event of disruption of traffic to be admissible, I would point out that in my Opinion in *Commission* v *Hungary*, I concluded that a manager which is not independent and is responsible for rail traffic management could be accorded the power to withdraw train paths in the event of disruption of traffic, but that their reallocation had to be regarded as being among the reserved essential functions which could be performed only by an independent manager or by an allocation body.

45. In Slovenia, unlike Hungary, the manager, which is not independent, may decide to adapt the withdrawn train paths. The second part of the complaint, if it were admissible, should therefore be considered to be well-founded in so far as it concerns the possibility for the manager, which is not independent, to decide on the reallocation of train paths in the event of disruption of traffic.

46. For those reasons, I propose that the first part of the Commission's first complaint be declared well-founded in so far as it concerns participation by the infrastructure manager, which is not independent, in the allocation of train paths. The second part of the first complaint must be declared partially unfounded and partially inadmissible in so far as it concerns traffic management by the manager. However, if this second part were to be considered admissible in its entirety, it would be well-founded in so far as it concerns the possibility for the manager, which is not independent, to decide on the reallocation of train paths in the event of disruption of traffic.

B – *The second complaint concerning the absence of an incentive scheme*

1. Arguments of the parties

47. The Commission claims that, by failing to provide a mechanism to provide the infrastructure manager with incentives to reduce the costs of provision of infrastructure and the level of access charges, the Republic of Slovenia has failed to fulfil its obligations under Article 6(2) to (5) of Directive 2001/14.

48. The Republic of Slovenia argues that Article 10 of the Law of 27 December 2010 provides that the infrastructure manager must be provided with incentives to reduce the costs of guaranteeing infrastructure and the level of charges.

2. Examination of the second complaint

49. I would note at the outset that, for the reasons set out above, the defence put forward by the Republic of Slovenia is irrelevant in so far as it is based on legislative amendments introduced by the Law of 27 December 2010, whilst the substance of the complaint must be examined on the basis of the provisions of Article 20(2) of the Decree of 18 April 2008.

50. I would also point out that the Commission's second complaint concerning the absence of incentives to reduce the costs of provision of infrastructure and the level of access charges is essentially identical to the third complaint in *Commission* v *Poland* (see points 74 to 84 of my Opinion), the second complaint in *Commission* v *Czech Republic* (see points 47 to 55 of my Opinion), the third complaint in *Commission* v *Germany* (see points 93 to 104 of my Opinion), and the second part of the second complaint in *Commission* v *France* (see points 63 to 69 of my Opinion).

51. For that reason, reference should be made to the legal reasoning developed in the Opinions delivered in those cases. However, the Slovenian legislation and its implementation have specific characteristics compared with the situation in those Member States. Consequently, the examination of the substance of the complaint must take account of the specific situation in Slovenia.

52. The Commission is right to state that Article 20(2) of the Decree of 18 April 2008 merely reproduces the wording of Article 6(2) and (3) of Directive 2001/14. Nevertheless, whilst the Slovenian legislation authorises the authorities to take the measures provided for by the European Union legislature with a view to being able to provide the infrastructure manager with incentives to reduce the costs of provision of infrastructure and the level of access charges, the fact remains that upon the expiry of the time limit prescribed in the reasoned opinion, neither a multiannual agreement nor a regulatory measure of the kind referred to in Article 6(3) of that directive had been adopted. Consequently, in the absence of the incentives provided for in Article 6(2) and (3) of the directive, there is no measure or provision transposing paragraphs 4 and 5 of that article.

53. On these grounds, the Commission's second complaint must be considered to be well-founded.

C – *The third complaint concerning the absence of a performance scheme*

1. Arguments of the parties

54. The Commission claims that, by not adopting a performance scheme encouraging railway undertakings and the infrastructure manager to reduce disruption and improve the operation of infrastructure, the Republic of Slovenia has failed to fulfil its obligations under Article 11 of Directive 2001/14.

55. The Republic of Slovenia contends that Article 11 of Directive 2001/14 was transposed into national law by the Law of 27 December 2010, which added two new paragraphs to Article 15d of the Law on rail transport, providing a legal basis for the adoption of a regulation which will allow the subsequent performance scheme to be established.

2. Examination of the third complaint

56. It must be reiterated that, for the reasons set out in point 49 of this Opinion, the defence put forward by the Republic of Slovenia is irrelevant in so far as it relates to legislative amendments introduced by the Law of 27 December 2010. The complaint should therefore be examined solely in the light of the provisions of Article 20(5) of the Decree of 18 April 2008.

57. It should be noted that the Commission's third complaint, which concerns the absence of measures encouraging the railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network by establishing a 'performance scheme', is essentially identical to the second complaint in *Commission* v *Spain* (see points 67 to 72 of my Opinion), the fourth complaint in *Commission* v *Czech Republic* (see points 90 to 93 of my Opinion), and the first part of the second complaint in *Commission* v *France* (see points 61 and 62 of my Opinion).

58. For that reason, reference should be made to the legal reasoning developed in the Opinions delivered in those cases. However, the Slovenian legislation and its implementation display differences compared with the situation in those Member States. Consequently, the examination of the substance of the complaint must take account of the specific situation in Slovenia.

59. The Commission is right to state that Article 20(5) of the Decree of 18 April 2008 reproduced the wording of Article 11 of Directive 2001/14. Nevertheless, whilst the Slovenian legislation has, since December 2009, authorised the authorities to take the measures provided for by the European Union legislature with a view to defining and establishing a performance scheme in accordance with Article 11 of that directive, the fact remains that upon the expiry of the time limit prescribed in the reasoned opinion, no specific measure or provision had been introduced to implement that authorisation.

60. On these grounds, the Commission's third complaint must be considered to be well-founded.

D – *The fourth complaint concerning the fact that the method of calculation of the charges for the minimum access package and track access to service facilities does not take account solely of the cost that is directly incurred as a result of operating the train service*

1. Arguments of the parties

61. The Commission claims that, by not providing a method of calculation that ensures that the charges imposed for the minimum access package and track access to service facilities are based solely on the costs directly incurred as a result of operating the train service, the Republic of Slovenia has failed to fulfil its obligations under Article 7(3) of Directive 2001/14.

62. The Commission also complains that the Republic of Slovenia has failed to fulfil its obligations under Article 8(1) of Directive 2001/14 by not laying down in its legislation rules on the basis of which it is possible to ascertain that each of the market segments can actually bear mark-ups in order to obtain full recovery of the costs incurred by the infrastructure manager.

63. The Republic of Slovenia contends that Article 15d(3) of the Law on rail transport was supplemented, under the Law of 27 December 2010, by a provision under which the charge for the minimum access package and track access to service facilities is set at the cost that is directly incurred as a result of operating services. In addition, the regulation on the allocation of train paths and charges for the use of the public railway infrastructure is undergoing amendment and it is proposed to insert a provision governing the way in which it should be ascertained that that a market segment can actually bear mark-ups in order to obtain full recovery of the costs incurred by the infrastructure manager.

2. Examination of the fourth complaint

64. I would note at the outset that, for the reasons set out in point 49 of this Opinion, the defence put forward by the Republic of Slovenia is irrelevant in so far as it concerns legislative amendments introduced by the Law of 27 December 2010. The same applies to the second measure relied on by the Slovenian authorities, namely the regulation on the allocation of train paths and charges for the

use of the public railway infrastructure.[14] The complaint should therefore be examined solely in the light of the provisions of Article 21(2) of the Decree of 18 April 2008.

65. I wish to point out, first of all, that I examined the interpretation of the notion of 'cost that is directly incurred as a result of operating the train service' in my Opinion in *Commission* v *Czech Republic* (see point 66 et seq. of that Opinion), which will be delivered at the same time as the present Opinion. In order to avoid repetition, I therefore refer to the analysis contained in that Opinion.[15]

66. As regards the interpretation of the notion of 'cost that is directly incurred as a result of operating the train service', in that Opinion I proposed to the Court the view that because Directive 2001/14 is imprecise and there is no precise definition of that notion or provision of European Union law setting out precisely the costs not covered by that notion, the Member States enjoy a certain economic margin of discretion in transposing and applying that notion. Nevertheless, even though it does not seem possible to define exhaustively what is and what is not covered by the notion of 'cost that is directly incurred as a result of operating the train service', the Member States may, in some cases, include costs which manifestly go beyond the limits of the notion used by Directive 2001/14. Within the framework of infringement proceedings, it must therefore be ascertained whether the legislation of the Member State permits the inclusion in the calculation of the charges for the minimum access package and track access to the railway infrastructure of items which are manifestly not directly incurred as a result of operating the train service.

67. I consider that Article 21(2) of the Decree of 18 April 2008 alone permits the Slovenian authorities to introduce a charging framework satisfying the requirements of Articles 7(3) and 8(1) of Directive 2001/14.

68. However, until the entry into force of the Law of 27 December 2010, the second paragraph of Article 15d of the Law on rail transport permitted the infrastructure access charge to be calculated by reference to a criterion entitled 'charge for transport infrastructure in other sub-systems, in particular in road transport'.[16] Although the Member State contests having used that criterion, the fact remains that its legislation permitted such costs to be included, in contravention of the relevant provisions of Directive 2001/14.

69. In my view, this appears sufficient to be able to uphold the Commission's fourth complaint, despite the confusion which has marked the exchanges between the parties in connection with that complaint.

V – **Costs**

70. Under Article 138(2) of the Rules of Procedure,[17] the parties are to bear their own costs where each party succeeds on some and fails on other heads. As both the Commission and the Republic of Slovenia have failed on several heads, I propose that each party bears its own costs.

71. In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic and the Kingdom of Spain, which were granted leave to intervene in the present case, are ordered to bear their own costs.

14 — Uredba o dodeljevanju vlakovnih poti in uporabnini na javni železniški infrastrukturi, Uradni List RS No 113/2009 of 31 December 2009.

15 — See also my Opinions in *Commission* v *Germany* (points 73 to 86) and *Commission* v *Poland* (points 92 to 102).

16 — Article 10 of the Law of 27 December 2010 repealed the second paragraph of Article 15d of the Law on railway transport and added a sentence at the end of the third paragraph of that article.

17 — Entered into force on 1 November 2012.

VI – **Conclusion**

72. In the light of the foregoing, I propose that the Court:

(1) declare that the Republic of Slovenia has failed to fulfil its obligations under

— Article 6(3) of and Annex II to Council Directive 91/440/EC of 29 July 1991 on the development of the Community's railways, as amended by Directive 2001/12, and Article 14(2) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, in so far as the infrastructure manager, which itself supplies railway transport services, contributes to the preparation of the service timetable and therefore participates in the function of decision-making related to the path allocation or the allocation of infrastructure capacity;

— Article 6(2) to (5) of Directive 2001/14, by not adopting measures providing infrastructure managers with incentives to reduce the costs of provision of infrastructure and the level of access charges;

— Article 11 of Directive 2001/14, by failing to adopt a performance scheme encouraging railway undertakings and the infrastructure manager to reduce disruption and improve the operation of infrastructure;

— Article 7(3) of Directive 2001/14, in so far as the Slovenian legislation permitted charges for transport infrastructure in other sub-systems, in particular in road transport, to be included in the calculation of the charges for the minimum access package and track access to service facilities;

(2) dismiss the action as to the remainder;

(3) order the European Commission, the Republic of Slovenia, the Czech Republic and the Kingdom of Spain to bear their own costs.