Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 July 2013 *

(Failure of a Member State to fulfil obligations — Transport — Directive 91/440/EEC — Development of the Community's railways — Article 10(7) — Regulatory body — Competences — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 4(1) — Charging framework — Article 6(2) — Measures intended to provide the infrastructure manager with incentives to reduce the costs of provision of infrastructure and the level of access charges — Article 7(3) — Setting charges for the minimum access package and track access to service facilities — Cost directly incurred as a result of operating the railway service — Article 11 — Performance scheme — Article 30(5) — Regulatory body — Competence — Administrative appeal against the decisions of the regulatory body)

In Case C-545/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 23 November 2010,

**European Commission**, represented by M. Šimerdová and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Czech Republic**, represented by M. Smolek, T. Müller and J. Očková, acting as Agents,

defendant,

supported by:

**Kingdom of Spain**, represented by S. Centeno Huerta, acting as Agent,

intervener,

THE COURT (First Chamber),

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

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2012,

* Language of the case: Czech.

after hearing the Opinion of the Advocate General at the sitting on 13 December 2012,

gives the following

## Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with:

— Articles 4(1), 6(2), 7(3), 11 and 30(5) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2001 L 75, p. 29), as amended by Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 164, p. 44; 'Directive 2001/14'), and

— Article 10(7) of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25, and – Corrigendum – OJ 1991 L 271, p. 70), as amended by Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 164, p. 164 and – Corrigendum – OJ 2004 L 220, p. 58; 'Directive 91/440'),

the Czech Republic has failed to fulfil its obligations under those provisions.

## Legal context

### *European Union law*

#### Directive 91/440

2 Article 10(7) of Directive 91/440 provides as follows:

'Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body established pursuant to Article 30 of Directive [2000/14], or any other body enjoying the same degree of independence shall monitor the competition in the rail services markets, including the rail freight transport market.

That body shall be set up in accordance with the rules in Article 30(1) of the said Directive. Any applicant or interested party may lodge a complaint with this body if it feels that it has been treated unjustly, has been the subject of discrimination or has been injured in any other way. On the basis of the complaint and, where appropriate, on its own initiative, the regulatory body shall decide at the earliest opportunity on appropriate measures to correct undesirable developments in these markets. In order to ensure the necessary possibility of judicial control and the requisite cooperation between national regulatory bodies, Article 30(6) and Article 31 of the said Directive shall apply in this context.'

#### Directive 2001/14

3 According to recital 11 in the preamble to Directive 2001/14:

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

4 Article 4(1) of Directive 2001/14 provides as follows:

‘Member States shall establish a charging framework while respecting the management independence laid down in Article 4 of Directive [91/440].

Subject to the said condition of management independence, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager.’

5 Under Article 6(2) and (3) of Directive 2001/14:

‘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.’

6 Article 7(3) of Directive 2001/14 provides as follows:

‘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.’

7 Article 11 of Directive 2001/14 is worded as follows:

‘1. Infrastructure charging schemes shall encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network through a performance scheme. This scheme 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.

2. The basic principles of the performance scheme shall apply throughout the network.’

8 Article 30 of Directive 2001/14 provides as follows:

‘1. Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. …

2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:

(a) the network statement;

(b) criteria contained within it;

(c) the allocation process and its result;

(d) the charging scheme;

(e) level or structure of infrastructure fees which it is, or may be, required to pay;

(f) the information provided pursuant to Article 10 of Directive [91/440].

3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiations between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.

4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.

5. The regulatory body shall be required to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.

Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision.

In the event of an appeal against a refusal to grant infrastructure capacity, or against the terms of an offer of capacity, the regulatory body shall either confirm that no modification of the infrastructure manager's decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.

6. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.'

*Czech law*

The Law on railways

9 Article 34c of Law No 266/1994 on railways (zákon č. 266/1994 Sb., o dráhách) of 14 December 1994, in the version applicable to these proceedings ('the Law on railways'), is worded as follows:

'National and regional network statement

(1) The capacity allocation body shall, after consulting the railway manager, draw up the rail network statement, no later than 12 months before the entry into force of the service timetable, and publish it in the *Transport and Charges Bulletin*.

(2) The rail network statement shall show:

…

(f) the conditions for the withdrawal of allocated but unused or partially used infrastructure capacity, including information on charging for allocated and unused transport capacity;

(g) information on charging for the allocation of infrastructure capacity and on the setting of charges for the use of infrastructure;

…’

10 Article 34g of the Law on railways provides:

‘(1) An applicant for the allocation of railway infrastructure capacity may make a request to the Office for Railways, within 15 days of publication of the rail network statement, for a review of that statement, including criteria contained within it.

(2) An applicant for the allocation of railway infrastructure capacity whose application has not been granted by the allocation body shall have the right, in accordance with the procedure referred to in Article 34e, to make a request to the Office for Railways, within 15 days of notification of the network statement referred to in Article 34e(4), for a review of the process for the allocation of railway infrastructure capacity, including its impact and the method used to set prices.

(3) If the Office for Railways finds that an incorrect procedure was followed in the preparation of the network statement, including criteria contained within it, or in the process for the allocation of railway infrastructure capacity, including its results and the method used to set prices, it shall decide to amend that statement, including criteria contained within it, or it shall decide on the allocation of that capacity, in particular the method used to set prices.’

11 Under Article 56(c) of the Law on railways, the Ministry of Transport is ‘the appellate body for administrative proceedings in matters governed by the present law, brought against decisions of the Office for Railways, the Rail Inspectorate and the municipalities’.

The Law on prices

12 Article 10(2) of Law No 526/1990 on prices (zákon č. 526/1990 Sb., o cenách) of 27 November 1990, in the version applicable to these proceedings (‘the Law on prices’), provides as follows:

‘The provisions on price regulation referred to in paragraph 1 shall be published by the Ministry of Finance in the *Official Price Bulletin* … They shall be published in the Official Journal in accordance with special legal provisions. … The decision on prices shall become valid on the date of its publication in the relevant official bulletin and shall enter into force on the date specified therein, but no earlier than the date of its publication.’

13 Under Article 10(2) of the Law on prices, the Ministry of Finance publishes a decision (Výměr) listing the items with a regulated price. The Ministry of Finance publishes that decision every year in the *Official Price Bulletin*. That decision sets the maximum price for the use of internal railway infrastructure, both national and regional, as part of the rail transport operation.

The Law on the State Transport Infrastructure Fund

14 By virtue of Article 2 of Law No 104/2000 on the State Transport Infrastructure Fund (zákon č. 104/2000 Sb. o Státním fondu dopravní infrastruktury) of 4 April 2000, in the version applicable to these proceedings (‘the Law on the State Transport Infrastructure Fund’):

‘The Fund shall allocate its revenue for the development, construction, maintenance and modernisation of roads and motorways, railways and navigable waters as follows:

…

(c) the financing of the construction, modernisation, repair and maintenance of national and regional railways,

…

(f) the granting of loans for preparatory works or projects, studies or expert reports on the construction, modernisation or repair of roads and motorways and waterways which are important to transport and the construction of national or regional railways,

…’

The Law on the competence of the Office for the Protection of Competition

15 In accordance with Article 2 of Law No 273/1996 on the competence of the Office for the Protection of Competition (zákon č. 273/1996 Sb., o působnosti Úřadu pro ochranu hospodářské soutěže) of 11 October 1996, in the version applicable to these proceedings (‘the Law on the competence of the Office for the Protection of Competition’), that body shall inter alia:

‘…

(a) create conditions for the promotion and protection of competition;

(b) monitor public procurement;

(c) exercise other competences as defined by special laws.’

The Law on the protection of competition

16 Under Article 1(1) of Law No 143/2001 on the protection of competition (zákon č. 143/2001 Sb., o ochraně hospodářské soutěže a o změně některých zákonů) of 4 April 2001, in the version applicable to these proceedings (‘the Law on the protection of competition’), the law shall:

‘… organise the protection of competition in the market for products and services … against any practice which prevents, restricts, distorts or threatens competition [through]

(a) agreements between competitors,

(b) abuse of a dominant position by competitors, or

(c) a concentration between competing undertakings.’

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

17 On 10 May 2007, the Commission sent a questionnaire to the Czech Republic in order to satisfy itself that the latter had correctly transposed Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001, amending Directive 91/440 (OJ 2001 L 75, p. 1), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001, amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and Directive 2001/14 (together ‘the first railway package’) into its domestic law. The Czech authorities replied to that questionnaire by letter of 11 July 2007.

18 On 21 November 2007, the Commission requested further clarification, which the Czech Republic provided in a letter of 21 December 2007.

19 On 27 June 2008, on the basis of the information provided by the Czech Republic, the Commission gave the Czech Republic formal notice requiring it to comply with Directives 91/440 and 2001/14 and, in particular, those provisions relating to the railway infrastructure charges and those relating to the regulatory body.

20 On 26 August 2008, the Czech Republic replied to the Commission's letter of formal notice.

21 On 9 October 2009, the Commission sent the Czech Republic a reasoned opinion in which it, first, complained that the latter had failed to fulfil its obligations under Articles 4(1), 6(2), 7(3), 11 and 30(5) of Directive 2001/14 and Article 10(7) of Directive 91/440, and, secondly, invited the Czech Republic to take the necessary measures to comply with the reasoned opinion within two months of its receipt.

22 By letter of 8 December 2009, the Czech Republic responded to the reasoned opinion, disputing the infringements alleged by the Commission.

23 In those circumstances, the Commission brought the present action.

24 By order of the President of the Court of Justice of 11 July 2011, the Italian Republic and the Kingdom of Spain were granted leave to intervene in support of the forms of order sought by the Czech Republic. By letter of 22 September 2011, lodged at the Court Registry on 30 September 2011, the Italian Republic withdrew its application to intervene.

## The action

### *First complaint: infringement of Article 4(1) of Directive 2001/14*

#### Arguments of the parties

25 The Commission claims that, by laying down a maximum amount for charges for the use of railway infrastructure, the Czech Republic infringed Article 4(1) of Directive 2001/14.

26 It argues that under that provision the right of a Member State to establish a charging framework for the use of railway infrastructure must respect the right of the infrastructure manager to determine and collect the charge.

27 However, the determination, by an annual decision of the Ministry of Finance, of a maximum charge for the use of railway infrastructure, pursuant to Article 10(2) of the Law on prices, goes beyond the charging framework and the rules which Member States are authorised to lay down under Article 4(1) of Directive 2001/14.

28 The Czech Republic contends that the alleged infringement is based on a literal and schematic interpretation by the Commission of Article 4(1) of Directive 2001/14, whereas it was necessary to adopt a purposive interpretation of that article in order to determine the scope of the obligations it contains.

29 According to the Czech Republic, the necessity of eliminating the negative effects of the monopoly position of the infrastructure manager reflects the general objective pursued by Directive 2001/14, which explains why that directive gives the Member States competence to establish a charging framework or system.

30 The Czech Republic states that, since the monopoly position held by the infrastructure manager could be shown in, inter alia, the setting of excessive charges which only the incumbent carrier could afford, the setting of a maximum amount makes it possible to achieve the objective pursued by Directive 2001/14.

31 In addition, setting of the maximum price does not mean that the infrastructure manager itself is not authorised to determine the amount of the charges.

32 The Kingdom of Spain submits, in essence, that the fixing of a maximum price does not prevent the infrastructure manager from actually laying down charges.

Findings of the Court

33 Under Article 4(1) of Directive 2001/14, Member States must establish a charging framework. They may also establish specific charging rules, while respecting the management independence of the infrastructure manager. Under that provision, it is the latter's responsibility, first, to determine the charge for use of the infrastructure and, second, to collect that charge.

34 Thus Article 4(1) establishes a division of powers between Member States and the infrastructure manager with regard to charging schemes. It is for the Member States to establish a charging framework, while the determination and collection of the charge are tasks to be performed by the infrastructure manager.

35 In order to ensure that the objective of management independence of the infrastructure manager is attained, the latter must, within the charging framework established by the Member States, be given a certain latitude in determining the amount of the charges so as to enable it to use that flexibility as a management tool (jC-483/10 *Commission* v *Spain* [2013] ECR, paragraph 49).

36 However, the setting, by an annual decision of the Ministry of Finance, of a maximum charge for the use of railway infrastructure, pursuant to Article 10(2) of the Law on prices, has the effect of restricting the infrastructure manager's freedom of action to an extent incompatible with the objectives of Directive 2001/14.

37 It must be pointed out, in particular, that in accordance with what is laid down in Article 8(2) of Directive 2001/14, the infrastructure manager must be in a position to set or to continue to set higher charges on the basis of the long-term costs of certain investment projects.

38 It must therefore be concluded that, in that regard, the Czech legislation in question is inconsistent with Article 4(1) of Directive 2001/14.

39 That conclusion cannot be called into question by the Czech Republic's argument alleging the necessity of avoiding the monopoly position held by the infrastructure manager resulting in the setting of excessive charges. Indeed, under Article 10(7) of Directive 91/440, it is for the regulatory body established under Article 30 of Directive 2000/14, or any other body enjoying the same degree of independence, to monitor free competition in the rail services markets. In the Czech Republic that task has, however, been entrusted to the Office for the Protection of Competition.

40 It follows from the foregoing considerations that, by laying down a maximum amount for charges for the use of railway infrastructure, the Czech Republic has failed to fulfil its obligations under Article 4(1) of Directive 2001/14.

*Second complaint: lack of incentives for the manager to reduce the costs of providing infrastructure and the amount of the access charges*

Arguments of the parties

41 The Commission maintains that, by failing to adopt incentives to encourage the railway infrastructure manager to reduce the costs of providing infrastructure and the amount of the access charges, the Czech Republic infringed Article 6(2) of Directive 2001/14.

42 In its opinion, the incentives system under that provision requires a direct link between the grant of financial resources and the conduct of the infrastructure manager, who must aim to reduce the costs of provision of infrastructure and the amount of the access charges.

43 In that regard, the Commission argues that the financial resources granted by the State Transport Infrastructure Fund, pursuant to the Law on the State Transport Infrastructure Fund, serve to improve the condition of the railway infrastructure, but in no way constitute incentives for the infrastructure manager to reduce the costs of providing infrastructure or the amount of the charges.

44 The Czech Republic contends that the role conferred on Member States by Article 6(2) of Directive 2001/14, namely, to provide infrastructure managers with incentives to reduce the costs of the provision of infrastructure and the amount of the access charges, is not unconditional.

45 Indeed, it is only after achieving sufficient quality and safety levels for the railway infrastructure across the entire network, or at least the greater part of the network, that Member States are required to attain the objective referred to in that provision.

46 In view of the current state of the Czech railway infrastructure, the performance of the obligation under Article 6(2) of Directive 2001/14 cannot be fully guaranteed without jeopardising the safety or the service quality of the infrastructure in question.

47 The Czech Republic claims that, in any event, the incentives referred to in Article 6(2) of Directive 2001/14 are currently created through the State Transport Infrastructure Fund. Indeed, through subsidies granted by the State, that fund meets the majority of railway maintenance costs, so that without those subsidies the amount of the charges for the use of infrastructure would be several times higher.

48 The Kingdom of Spain claims that it is not reasonable to reduce the amount of the access charges without first modernising the rail network, and thus reducing maintenance costs.

49 Spain claims, in addition, that the implementation of measures aimed at reducing costs must be carried out in pursuit of the objective referred to in Article 6(1), second paragraph, of Directive 2001/14, which states that the infrastructure manager's accounts must be balanced without any financial contribution from the State.

Findings of the Court

50 It follows from Article 6(2) of Directive 2001/14 that the infrastructure managers are, with due regard to safety and to maintaining and improving the quality of the infrastructure service, to be provided with incentives to reduce the costs of the provision of infrastructure and the amount of the access charges for use of infrastructure.

51 Article 6(3) of Directive 2001/14 provides that the requirement laid down in Article 6(2) is to be implemented, either through a multi-annual agreement between the infrastructure manager and the competent authority which provides for State funding or through the establishment of appropriate regulatory measures with adequate powers.

52 In this case, as regards the Czech Republic's argument relating to deteriorating infrastructure, suffice it to state that, while it is true that, under Article 6(2) of Directive 2001/14, Member States are required to take into account the state of that infrastructure when applying Article 6(2) and (3) of the directive, they are nevertheless also required either to ensure that multi-annual funding agreements containing incentives are concluded or to establish an appropriate regulatory framework for that purpose.

53 Indeed, as the Advocate General observed in point 54 of his Opinion, the deterioration of the infrastructure does not rule out the adoption of measures aimed at ensuring that the costs of managing the infrastructure correspond to those of an efficiently managed infrastructure, on the one hand, and do not include unnecessary costs that could be open to misuse by the infrastructure manager, on the other.

54 In that regard, it must however be pointed out that the choice of incentives to be adopted, and more particularly the specific objectives pursued by Member States through those incentives, must be compatible with safety requirements and with the quality of the infrastructure service, in accordance with the provisions of Article 6(2) of Directive 2001/14.

55 Moreover, it is clear that the State funding of the infrastructure manager, invoked by the Czech Republic, although capable of reducing the costs of the provision of infrastructure and the level of access charges, does not in itself have an incentive effect on that manager in that the funding does not entail any commitment on the part of the manager.

56 In those circumstances, it must be held that, by not adopting incentives to encourage the railway infrastructure manager to reduce the costs of providing infrastructure and the level of access charges, the Czech Republic has failed to fulfil its obligations under Article 6(2) of Directive 2001/14.

*Third complaint: misapplication of the term 'cost that is directly incurred as a result of operating the train service' within the meaning of Article 7(3) of Directive 2001/14*

Arguments of the parties

57 The Commission claims that in the Czech Republic charges for the minimum access package and track access to service facilities are not set at the costs that are directly incurred as a result of operating the train service in breach of Article 7(3) of Directive 2001/14.

58 In its opinion, the term 'cost that is directly incurred as a result of operating the train service' within the meaning of that provision refers to the 'marginal cost'. The latter term, according to the Commission, relates only to the costs generated by actual train runs, and not to fixed costs, because those costs do not vary according to the use of the railway service.

59 By contrast, the Czech Republic maintains that, since neither Directive 2001/14 nor any other provision of European Union law specifies the expenses which are or are not covered by the term 'costs that are directly incurred as a result of operating the train service', it is necessary to establish, for the purposes of determining those costs, whether there is a direct causal link between the costs concerned and the operation of the train service; that is to say, whether those expenses were actually incurred for the purposes of operating that train service. Consequently, the term covers all those expenses that are directly linked to an activity or an object, the absence or lack of which would prevent the trains from running.

60 The defendant states that in the Czech Republic the procedure by which the railway infrastructure manager sets the amount of the charges, which stems from Article 34c of the Law on railways, read in conjunction with rail network statement No 57822/10-OŘ, concerning the timetables for the period 2010/2011 ('the network statement'), and adopted by the manager pursuant to that provision, guarantees that this amount takes into consideration only those expenses directly connected with the operation of the train service. In order to determine whether a certain cost, or a category of costs, is directly incurred as a result of operating the train service, it is necessary to examine whether that cost, or that category of costs, was generated by the operation of a particular form of rail transport.

61 Relying on an opinion from the 'Community of European Railway and Infrastructure Companies' (CER) released in May 2011 on the recast of the first railway package, the Czech Republic claims, inter alia, that costs connected with scheduling, allocation of train paths, traffic management, dispatching and signalling of train runs must come under the category of costs directly incurred as a result of operating the train service.

Findings of the Court

62 Under Article 7(3) of Directive 2001/14 the charges for the minimum access package and track access to service facilities must be set at the cost that is directly incurred as a result of operating the train service, without prejudice to Article 7(4) or (5) or to Article 8 of that directive.

63 According to the Commission, the 'cost directly incurred as a result of operating the train service', within the meaning of Article 7(3) of Directive 2001/14, must be understood as the marginal cost incurred as a result of the actual operation of the train service. The Commission stated at the hearing that this cost corresponded primarily to costs connected with rail wear as a result of train movements. By contrast, the Czech Republic considers that the expenses which may be taken into account when calculating the charges are those for which it is possible to establish a direct causal link with the operation of the train service; that is to say, expenses necessary to operate that service.

64 It is clear that Directive 2001/14 does not contain any definition of the term 'cost that is directly incurred as a result of operating the train service' and that no provision of European Union law identifies the costs covered by, or those not covered by, that term.

65 Furthermore, as regards a term belonging to economics, the application of which, as pointed out by the Advocate General in point 75 of his Opinion, raises considerable practical difficulties, it must be concluded that, as European Union law now stands, Member States have a certain discretion when transposing and applying that term in national law.

66 In this case, it follows that it is necessary to verify whether the Czech legislation in question permits the inclusion in the calculation of charges levied for the minimum access package and track access to railway infrastructure of items which clearly have not been directly incurred as a result of operating the train service.

67 According to the Commission, it follows from Decree No 501/2005, setting the expenses borne by the railway manager in connection with the use, operation, modernisation and development of the railways (vyhláška č. 501/2005 Sb., o vymezení nákladů provozovatele dráhy spojených s provozováním a zajišťováním provozuschopnosti, modernizace a rozvoje železniční dopravní cesty), of 8 December 2005 ('Decree No 501/2005'), that the overhead costs are included in the calculation of the charges and that the amount of the charges in the Czech Republic is determined on the basis of a 'capacity model' used to allocate costs. The Commission considers that Member States may not calculate the costs directly incurred as a result of operating the train service in this way because those costs vary according to actual use. The Commission states that it also follows from that decree that overhead costs are included in the calculation of the charges.

68 On the other hand, the Czech Republic contends that Decree No 501/2005 concerns only the determination of expenses borne by the railway infrastructure manager before 1 July 2008, and in no circumstances does that decree form the basis for setting the amount of the charges connected with the use of that infrastructure. Thus, without disputing that overhead costs, in accordance with that decree, were included in the calculation of the costs borne by the infrastructure manager, the Czech Republic nevertheless argues that they are not taken into account in the calculation of the charges referred to in Article 7(3) of Directive 2001/14. The Czech Republic states further that the capacity model does not serve to determine directly the amount of the charges, but rather it is only one of the parameters for calculating the maximum price for the use of railway infrastructure by a given train on a specified section

69 According to the Czech Republic, the procedure for determining the amount of the charges stems from Article 34c of the Law on railways, read in conjunction with the rail network statement for 2010/2011, which adapts that amount according to the type of train, its weight and the distance covered. The method for calculating prices for the use of the transport service also takes account of specific rules and the charging framework, as defined by the regulatory authority, for costs connected with the operation of the service, expressed in train kilometres, for costs that are directly incurred as a result of operating the service and actually generated by the operation of rail transport, expressed in gross tonne-kilometres, and for additional costs directly connected with the use of the transport service.

70 In that respect, it is to be borne in mind that, according to settled case-law, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, inter alia, Case C-555/10 *Commission* v *Austria* [2013] ECR, paragraph 62, and Case C-556/10 *Commission* v *Germany* [2013] ECR, paragraph 66, and the case-law cited).

71 In this case the Czech Republic denies that Decree No 501/2005 and the capacity model form the basis for setting the charges for use of infrastructure, and that the Commission has failed to demonstrate the validity of its allegation in that regard.

72 Furthermore, the Court considers that the Czech legislation, and more particularly the network statement for 2010/2011, includes the necessary elements for the infrastructure manager to determine, and for the regulatory authority to verify, the amount of the charges in accordance with Article 7(3) of Directive 2001/14. As far as the practical application of those elements is concerned, it is clear that the Commission has not provided any specific examples showing that access charges have been set in the Czech Republic in disregard of that requirement. In accordance with the case-law cited in paragraph 70 above, the Commission may not rely on any presumptions in that regard.

73 In the light of the foregoing, the third complaint relied on by the Commission in support of its action must be declared unfounded.

*Fourth complaint: absence of a performance scheme*

Arguments of the parties

74 The Commission claims that, by failing to introduce a performance scheme that provides the railway undertakings and the infrastructure manager with incentives to minimise disruption and improve performance of the rail network, the Czech Republic has failed to fulfil its obligations under Article 11(1) and (2) of Directive 2001/14.

75 The Czech Republic contends, first, that in view of the degree of harmonisation achieved at European Union level, the Commission has not established that the performance scheme, introduced by the rail network statement which is based on Article 34c of the Law on railways, is inadequate.

76 The Czech Republic then adds that Article 51(1) to (4) and (6) to (8) of the Law on railways makes provision for the imposition of fines in the event of failure to comply with the obligations to guarantee the operation of the network or in the absence of measures taken to rectify disruptions.

77 Lastly, in its rejoinder, the Czech Republic adds that Article 34c(2)(k) of the Law on railways, as amended by Law No 134/2011 (zákon č. 134/2011 Sb., kterým se mění zákon č. 266/1994) of 3 May 2011, provides that the rail network statement must now contain 'a delimitation of the financial incentive scheme for the allocation authority and the carrier in order to minimise disruption to infrastructure and improve its permeability with a view to the negotiation of an operating agreement for the railway service [which] may include fines and compensation'.

78 The Kingdom of Spain argues that it is necessary to analyse each specific measure and to examine whether, in the charging system for the use of railway infrastructure as a whole, these measures are effective in minimising disruption and improving the operation of the railway network, which is in keeping with the objective pursued by Directive 2001/14.

Findings of the Court

79 Article 11 of Directive 2001/14 provides that charging schemes for the use of infrastructure are to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network by means of a performance scheme. That provision also states that the scheme may include penalties, compensation and bonuses.

80 It follows from this, first, that the Member States must include in infrastructure charging schemes a performance scheme the purpose of which is to encourage both railway undertakings and the infrastructure manager to improve network performance. Second, as regards the types of incentive which may be introduced by the Member States, the latter remain free to choose the specific measures that are to form part of the scheme, provided such measures constitute a coherent and transparent whole which may be described as a 'performance scheme' (*Commission* v *Spain*, paragraph 64).

81 In this case, the legislative and contractual provisions relied on by the Czech Republic cannot be regarded as constituting such a coherent and transparent whole.

82 Concerning, first, Article 34c of the Law on railways, it is clear that it does not include any provision for the inclusion of an incentive scheme in the rail network statement. As for the 2010/2011 rail network statement, it must be pointed out that under paragraph 6.4, the infrastructure manager must grant any request from a carrier relating to the introduction of a financial compensation scheme in the form of reciprocal contractual penalties, the rules for which must be defined in the contract. It follows that, even if it had been applicable at the end of the term laid down in the reasoned opinion, that compensation scheme, the application of which is left to the discretion of the contracting parties, is purely voluntary and therefore cannot be regarded as a complete and proper implementation of Article 11 of Directive 2001/14.

83 Next as regards, Article 51(1) to (4) and (6) to (8) of the Law on railways, referred to by the Czech Republic in its rejoinder, it must be pointed out that, since it is restricted to the imposition of fines, either in the event of failure to comply with the obligations to ensure the operation of the network, or

in the absence of measures taken to rectify disruptions, that article cannot be regarded as establishing a performance scheme within the infrastructure charging system for the purposes of Article 11 of Directive 2001/14.

84 Finally, since Article 2 of the Law on the State Transport Infrastructure Fund provides only for the grant of financial resources with a view to maintaining or improving the condition of the railway infrastructure, it cannot be regarded as establishing a system that creates incentives for railway undertakings and the infrastructure manager to improve network performances.

85 Furthermore, it must be recalled that, according to settled case-law, 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 the Court cannot take account of any subsequent changes (see, inter alia, Case C-528/10 *Commission* v *Greece* [2012] ECR, paragraph 26, and, to that effect, Case C-473/10 *Commission* v *Hungary* [2013] ECR, paragraph 96).

86 Therefore, as Law No 134/2011 of 3 May 2011 was adopted after the period fixed by the Commission in its reasoned opinion of 9 October 2009 had expired, that amending law cannot be taken into consideration in the Court's appraisal of the merits of this application for a declaration of failure to fulfil obligations.

87 In the light of the foregoing considerations, it must be held that, on expiry of the period set by the reasoned opinion, the Czech Republic had not put in place a performance scheme creating incentives for railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network, in accordance with Article 11 of Directive 2001/14.

88 Therefore, the fourth complaint relied on by the Commission in support of its action must be declared to be well founded.

*Fifth complaint: existence of a prior administrative appeal against the decisions of the regulatory body and that body's lack of competence to act on its own initiative*

Arguments of the parties

89 The Commission claims that the aim of Article 30(5) of Directive 2001/14 is to enable the regulatory body to make decisions in complete independence and to adopt measures quickly and efficiently to remedy any dysfunction on the market. The Commission adds that paragraph 6 of that article does not introduce the possibility of an administrative review of the regulatory body's decisions, but provides only for judicial review.

90 However, under Article 56(c) of the Law on railways, a decision of the Office for Railways, which is the regulatory body in the Czech Republic, may be challenged by an administrative appeal to the Ministry of Transport, in contravention of Article 30(5) of Directive 2001/14.

91 The Commission also argues that Article 30(5) of Directive 2001/14 must be interpreted to the effect that the regulatory body must make decisions and take action on all matters referred to in Article 30 of the directive, in particular those set out in paragraphs 2 and 3 of that article. However, it is clear from the provisions of Article 34g of the Law on railways that the Office for Railways is authorised only to examine, at the request of an applicant, the rail network statement, including criteria contained within that document, and the process for allocating railway infrastructure capacity. The Commission infers that the Office is not authorised to adopt decisions or corrective measures in all

the matters referred to in Article 30(2) and (3) of Directive 2001/14, in particular in relation to the level or structure of railway infrastructure fees which an applicant, within the meaning of Article 2(b) of that directive, is, or may be, required to pay, as provided for in Article 30(2)(e) of the directive.

92 Lastly, the Commission claims that, in the matters referred to in that provision, Article 30(3) of Directive 2001/14 requires the regulatory body to act on its own initiative, whereas Article 34g of the Law on railways provides for the Office for Railways to act only at the request of an applicant.

93 The Czech Republic contends, first of all, that Directive 2001/14 does not prevent the regulatory body's decisions being subject, prior to any judicial review, to a mandatory review by another independent body within the executive authorities.

94 In particular, it is not possible to infer from Article 30(6) of Directive 2001/14 requirements relating to the internal organisation of the administrative procedure of Member States which are free, in principle, to establish their own procedural rules.

95 Secondly, with regard to the competence of the regulatory body, the Czech Republic points out that, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. However, the Commission's reasoned opinion did not mention any provision, other than Article 30(2)(e) of Directive 2001/14, in relation to the scope of the powers of the Office for Railways which was incorrectly transposed. Consequently, the Czech Republic proposes examining only the transposition of Article 30(2)(e) of Directive 2001/14 as it is the only plea in law raised in a sufficiently precise manner, in accordance with the Court's case-law.

96 In this regard, the Czech Republic claims that the competence of the Office for Railways is, as far as Article 30(2)(e) of Directive 2001/14 is concerned, fully covered by Article 34g, read in conjunction with Article 34c(2) of the Law on railways. It is clear from those provisions that the power of the Office for Railways includes reviewing the level or structure of infrastructure fees. According to the Czech Republic, if the regulatory body has the necessary power to adopt measures under Article 30(2)(e) of Directive 2001/14, it logically follows that it also has the necessary power to initiate the review procedure on its own initiative as part of the State supervision.

97 In its reply, the Commission states that it is clear from Article 34g of the Law on railways that the competences of the Office for Railways are limited to reviewing the rail network statement and the process for the allocation of railway infrastructure capacity. It adds that, under that provision, the review is to be carried out on the basis of a complaint by an applicant lodged within 15 days from publication of the rail network statement or notification of the opinion referred to in Article 34e(4) of the Law on railways. In the Commission's view, it follows that the competences of the Office for Railways do not correspond to the competences that a regulatory body must assume by virtue of Article 30(5) of Directive 2001/14.

98 In its rejoinder, the Czech Republic submits that the Commission's complaints, other than that relating to the competence of the regulatory body in relation to the level of charges, must be declared inadmissible. It argues that, in its application, the Commission defined the subject matter of the complaint in the same way as in the reasoned opinion, in that it addressed only the scope of the competence of the Office for Railways in relation to the level of charges. By contrast, in its reply the Commission introduced five new complaints relating to the transposition of Article 30(5) of Directive 2001/14, which did not appear in either the reasoned opinion or the application initiating proceedings, in breach of the Czech Republic's right to a fair hearing.

Findings of the Court

– The first part of the fifth complaint

99 By the first part of the fifth complaint, the Commission claims that under Article 56 of the Law on railways decisions of the Office for Railways are challenged before the Ministry of Transport. Such a prior administrative appeal is contrary to Article 30(5) of Directive 2001/14.

100 The Czech Republic contends, on the other hand, that Directive 2001/14, interpreted in the light of the principle of the procedural autonomy of Member States, does not prevent the regulatory body's decisions being subject, prior to any judicial review, to a mandatory review by another administrative body.

101 In that regard, it is clear, first, that Article 30 of Directive 2001/14 neither provides for nor expressly excludes the possibility of Member States initiating a prior administrative review.

102 It must be pointed out next that Article 30(1) of that directive imposes on Member States the obligation to establish a regulatory body which may be the ministry responsible for transport.

103 Finally, in accordance with Article 30(6), the decisions adopted by the regulatory body under Article 30(5) must be subject to judicial review.

104 It follows from the general scheme of the above provisions that Article 30 of Directive 2001/14 must be interpreted as meaning that the administrative decisions adopted by the regulatory body can only be subject to judicial review.

105 Therefore the first part of the fifth complaint must be considered to be well founded.

– The second part of the fifth complaint

106 By the second part of the fifth complaint, the Commission complains that the Czech Republic failed to confer on the Office for Railways all the competences which a regulatory body must possess in accordance with Article 30(5) of Directive 2001/14.

107 In the opinion of the Czech Republic, the Commission's complaints, other than that relating to the competence of the regulatory body in relation to the level of charges, must be declared inadmissible.

108 In that regard, it should be borne in mind that it follows from Article 120(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that the application initiating proceedings must state the subject matter of the dispute and a summary of the pleas in law, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see, inter alia, Case C-165/08 *Commission* v *Poland* [2009] ECR I-6843, paragraph 42, and Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 26).

109 The Court has also held that, in an action brought under Article 258 TFEU, the application must set out the complaints coherently and with precision, so that the Member State and the Court can know exactly the full extent of the alleged infringement of Community law, a condition which must be

satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (see, in particular, *Commission* v *Poland*, paragraph 43).

110 In this case, as regards the competences of the regulatory body, the Commission claimed in its application that Article 30(5) of Directive 2001/14 must be interpreted as meaning that that body must be capable of making decisions and taking action on all matters referred to in that article, in particular those listed in paragraphs 2 and 3.

111 However, it is clear that, as regards that allegation, the Commission referred only to the competence mentioned in Article 30(2)(e) concerning the level or structure of infrastructure fees and the alleged inability of the Office for Railways to act on its own initiative.

112 Consequently, the second part of the fifth complaint is admissible only in so far as the alleged failure to fulfil obligations under Article 30(5) of Directive 2001/14 concerns the competence referred to in paragraph (2)(e) of that article and the regulatory body's capacity to act on its own initiative.

113 As regards, first, the capacity of the regulatory body to act on its own initiative, the Commission claims that Article 34g of the Law on railways provides that the Office for Railways is to act only at the request of an applicant, whereas Article 30(3) of Directive 2001/14 requires the regulatory body to be able to act on its own initiative. In that respect, the Commission relies on an interpretation of Article 34g of the Law on railways to the effect that the right of action which paragraph 3 affords the Office for Railways, like the procedures laid down in paragraphs 1 and 2 of that article, is subject to an application's being submitted to that end by an applicant within the meaning of Article 2(b) of Directive 2001/14.

114 That interpretation of Article 34g of the Law on railways is, however, contested by the Czech Republic. It maintains that State supervision in the area of railways is exercised on the basis of Article 58(2) of the Law on railways, under which the regulatory body must verify 'whether the obligations of the railway owner, the railway manager and the carrier, as laid down by the Law, are observed and fulfilled as part of the operation of the railways and rail transport'.

115 According to the Czech Republic, that provision, read in conjunction with Law No 552/1991 on State supervision (zákon č. 552/1991 Sb., o státní kontrole) of 6 December 1991, in the version applicable to these proceedings, which confers on those bodies competent to exercise State supervision the power to carry out checks and, on the basis of those checks, to initiate infringement proceedings, to take corrective action or to impose fines for the administrative infringements thus found, entitles the regulatory body to take the decisions referred to in Article 34g(3) of the Law on railways on its own initiative.

116 In that regard, it should be borne in mind that the Court has consistently held that, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, inter alia, *Commission* v *Austria*, paragraph 62, and *Commission* v *Germany*, paragraph 66).

117 In this case, the Commission's interpretation of Article 34g(3) of the Law on railways is disputed by the Czech Republic which refers to provisions of more general application supporting a contrary interpretation.

118 The Commission has not shown that the Czech Republic's interpretation of national legislation was erroneous. Therefore, it must be held that the Commission has not succeeded in substantiating its allegation that the Office for Railways does not have the capacity to act on its own initiative.

119 Secondly, concerning the competence referred to in Article 30(2)(e) of Directive 2001/14, it must be recalled that the Czech Republic maintains, on the one hand, that under Article 34g(1) and (3) of the Law on railways, read in conjunction with Article 34c(2) of that law, the Office for Railways is authorised, in reviewing the criteria set out in the rail network statement, to review information on the charge for the allocation of capacity and the determination of the charge for the use of railway infrastructure. On the other, the review of the specific level of the infrastructure fee that a particular transport undertaking is required to pay is based on Article 34g(2) and (3) of that law. Under those provisions, the Office for Railways is authorised to review the process for the allocation of railway infrastructure capacity, an essential element of which, according to the express provisions of the law, is the determination of the specific level of the infrastructure access charge.

120 The Czech Republic adds that the criteria for the rail network statement are laid down in Article 34c(2) of the Law on railways. Those criteria include information on the price for the allocation of railway infrastructure capacity and on the setting of the amount of the charges for use of railway infrastructure.

121 As the Czech Republic rightly maintains, the information on the price and charges is merely another way of describing the level of infrastructure fees which are or may be charged. Similarly, the methods used to set prices under Article 34g of the Law on railways, the review of which is the responsibility of the regulatory body, include the structure of the infrastructure fees.

122 Thus, because the regulatory body has the power to take decisions on the amendment of the rail network statement, including criteria contained within it, and on the allocation of railway infrastructure capacity, in particular the methods used to set prices, the national provisions relied on by the Czech Republic do not prima facie appear to be inadequate having regard to the requirements of Article 30(2)(e) of Directive2001/14.

123 According to the case-law referred to in paragraph 70 above, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission's responsibility to place before the Court the information necessary to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions.

124 In this case it must, however, be held that the Commission has not succeeded in substantiating its allegation with regard to the competences of the regulatory authority concerning the level or the structure of the infrastructure charges.

125 Furthermore, it must be pointed out that the Commission's allegation relating to the time limit of 15 days, as provided for under Article 34g of the Law on railways, for lodging a complaint was raised for the first time in its reply. Since the subject matter of the proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision, those proceedings must be based on the same grounds and pleas as the reasoned opinion, so that if a complaint was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, to that effect, inter alia Case C-305/03 *Commission* v *United Kingdom* [2006] ECR I-1213, paragraph 22 and the case-law cited). The complaint must therefore be rejected as inadmissible.

126 Having regard to the above considerations, it must be held that, by providing that the decisions of the regulatory body must be subject to a prior administrative appeal, the Czech Republic has failed to fulfil its obligations under Article 30(5) of Directive 2001/14.

*Sixth complaint: absence of the body referred to in Article 10(7) of Directive 91/440*

Arguments of the parties

127 The Commission claims that the Czech Republic has failed to fulfil its obligations under Article 10(7) of Directive 91/440, because there does not exist in the Czech Republic a body such as that referred to in that provision exercising the functions laid down therein.

128 According to the Commission, it follows from the first subparagraph of Article 10(7) of Directive 91/440 that the task of monitoring competition in the rail services markets may be allocated to either the regulatory body established pursuant to Article 30 of Directive 2001/14 or any other body enjoying the same degree of independence. In either case, the body in question is required to satisfy the requirements under the second subparagraph of Article 10(7) of Directive 91/440; that is to say, it must have been set up in accordance with the rules in Article 30(1) of Directive 2001/14 to deal with complaints from applicants and, on the basis of a complaint or on its own initiative, to decide on appropriate measures to correct undesirable developments on these markets.

129 In this regard, the Commission states that in the Czech Republic competition in the rail services markets is monitored by the Office for the Protection of Competition whose competence is defined by the Law on the competences of the Office for the Protection of Competition.

130 However, under that legislation, the Office's competence is limited to matters directly linked to competition in the rail services market. The Commission infers that the Office does not exercise all the functions that it should exercise pursuant to the second subparagraph of Article 10(7) of Directive 91/440, and therefore cannot be regarded as a body performing the functions set out in that provision. The Commission claims in particular that the Office for the Protection of Competition cannot hear any complaints from applicants who consider that they have been unfairly treated, discriminated against or are in any other way aggrieved, nor can it, on the basis of a complaint or on its own initiative, decide on the appropriate measures to correct undesirable developments in the rail services market.

131 The Czech Republic contends that that plea in law must be declared inadmissible. The Commission raised the complaint alleging an infringement of Article 10(7) of Directive 91/440 only at the stage of the application, and it therefore deprived that Member State of the opportunity to respond properly to those criticisms in the phase before the action was brought.

Findings of the Court

132 It should be borne in mind at the outset that the subject matter of an action brought under Article 258 TFEU is circumscribed by the pre-litigation procedure laid down in that provision. Consequently, the Commission's reasoned opinion and its application must be based on the same complaints (see Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 33).

133 In this case it must be pointed out that, in its reasoned opinion, the Commission alleged that the Czech Republic had failed to fulfil its obligations under Article 10(7) of Directive 91/440 in that Directives 91/440 and 2001/14 do not permit the comptences referred to in that provision and those in Article 30 of Directive 2001/14 to be divided between different bodies. The Commission also criticised the Czech Republic for the fact that the Office for the Protection of Competition does not have the competences set out in Article 30 of Directive 2001/14, such as review of the network statement drawn up by the railway infrastructure manager, or charging, but is competent only with regard to standard infringements in competition matters.

134 In its application the Commission criticises the Czech Republic for not giving the Office for the Protection of Competition the necessary powers to exercise the functions set out in Article 10(7), second subparagraph, of Directive 91/440.

135 Consequently, the Commission's sixth complaint must be declared inadmissible since it was not raised during the pre-litigation procedure.

136 Having regard to all the foregoing considerations it must be held, first, that, by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Article 4(1), 6(2), 11 and 30(5) of Directive 2001/14, the Czech Republic has failed to fulfil its obligations under those provisions and, second, that the remainder of the Commission's application must be dismissed.

**Costs**

137 Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, they are to be ordered to bear their own costs. Since the Commission and the Czech Republic have each been successful in one or more pleas, they must be ordered to bear their own costs.

138 Pursuant to Article 140(1) of those Rules, which provides that Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of Spain is to be ordered to bear its own costs.

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

1. **Declares that, by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Articles 4(1), 6(2), 11 and 30(5) 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, as amended by Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004, the Czech Republic has failed to fulfil its obligations under those provisions;**

2. **Dismisses the remainder of the action;**

3. **Orders the Commission, the Czech Republic and the Kingdom of Spain to bear their own costs.**

[Signatures]