Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 28 March 2019[1]

Case C-210/18

WESTbahn Management GmbH
v
ÖBB-Infrastruktur AG

(Request for a preliminary ruling
from the Schienen-Control Kommission (Railway Supervisory Commission, Austria))

(Preliminary ruling procedure — Transport — Single European railway area — Directive 2012/34/EU — Passenger stations, their buildings and other facilities — Railway infrastructure — Inclusion of passenger platforms — Access charge — Limitation of the effects of the judgment)

1. Do platforms form part of passenger railway stations? The seemingly obvious answer ceases to be so when a provision of EU law (Directive 2012/34/EU)[2] creates some confusion in the definition of railway infrastructure, on the one hand, and service facilities, on the other.

2. Directive 2012/34 classifies passenger stations and freight terminals as railway service facilities. However, it includes in the 'list of railway infrastructure items' 'passenger and goods platforms, including in passenger stations and freight terminals'.

3. The charges which railway undertakings have to pay to use passenger platforms will be calculated differently depending on which of those two categories the latter fall into. This is the issue confronting the Schienen-Control Kommission (Railway Supervisory Commission, Austria) ('the Railway Supervisory Commission'), which is responsible for settling disputes in the form of administrative appeals that arise in this field.[3]

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

3 The Court has accepted that this Commission may be regarded as a body entitled to make references for preliminary rulings (judgment of 22 November 2012, *Westbahn Management*, C-136/11, EU:C:2012:740, paragraphs 26 to 31). I have some reservations about that classification, which, for similar reasons, could be applied to practically all sectoral regulatory bodies.

I. Legal framework

A. EU law. Directive 2012/34

4. Article 3 ('Definitions') states:

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

(1) "railway undertaking" means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only;

(2) "infrastructure administrator" means any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms;

(3) "railway infrastructure" means the items listed in Annex I;

…

(11) "service facility" means the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more services referred to in points 2 to 4 of Annex II;

(12) "operator of service facility" means any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II;

…'

5. In accordance with Article 13 ('Conditions of access to services'):

'1. Infrastructure managers shall supply to all railway undertakings, in a non-discriminatory manner, the minimum access package laid down in point 1 of Annex II.

2. Operators of service facilities shall supply in a non-discriminatory manner to all railway undertakings access, including track access, to the facilities referred to in point 2 of Annex II, and to the services supplied in these facilities.

…

4. Requests by railway undertakings for access to, and supply of services in the service facility referred to in point 2 of Annex II shall be answered within a reasonable time set by the regulatory body referred to in Article 55. Such requests may only be refused if there are viable alternatives allowing them to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions. …

…'

6. Article 31 ('Principles of charging') provides:

'1. Charges for the use of railway infrastructure and of service facilities shall be paid to the infrastructure manager and to the operator of service facility respectively and used to fund their business.

…

3. Without prejudice to paragraph 4 or 5 of this Article or to Article 32, the charges for the minimum access package and for access to infrastructure connecting service facilities shall be set at the cost that is directly incurred as a result of operating the train service.

…

7. The charge imposed for track access within service facilities referred to in point 2 of Annex II, and the supply of services in such facilities, shall not exceed the cost of providing it, plus a reasonable profit.'

7. Annex I ('List of railway infrastructure items') reads:

'Railway infrastructure consists of the following items, provided they form part of the permanent way, including sidings, but excluding lines situated within railway repair shops, depots or locomotive sheds, and private branch lines or sidings:

– Ground area,

– Track and track bed, in particular embankments, cuttings, drainage channels and trenches, masonry trenches, culverts, lining walls, planting for protecting side slopes, etc.; passenger and goods platforms, including in passenger stations and freight terminals; four-foot way and walkways; enclosure walls, hedges, fencing; fire protection strips; apparatus for heating points; crossings etc.; snow protection screens,

…

– Access way for passenger and goods, including access by road and access for passengers arriving or departing on foot;

…

– Buildings used by the infrastructure department, including a proportion of installations for the collection of transport charges.'

8. Annex II ('Services to be supplied to the railway undertakings (referred to in Article 13')) states:

'1. The minimum access package shall comprise:

(a) handling of requests for railway infrastructure capacity;

(b) the right to use the capacity which is granted;

(c) use of the railway infrastructure, including track points and junctions;

…

2. Access, including track access, shall be given to the following service facilities, when they exist, and to the services supplied in these facilities:

   (a) passenger stations, their buildings and other facilities, including travel information display and suitable location for ticketing services;

…'

B. National law. Eisenbahngesetz (Law on railways)

9. Paragraph 10a of the Eisenbahngesetz ('the Law on railways') refers directly to Annex I to Directive 2012/34 for the purposes of defining railway infrastructure.

10. Paragraph 58 refers to minimum services, including the use of railway infrastructure, in terms identical to those of point 1(c) of Annex II to Directive 2012/34.

11. Paragraph 58b, which deals with access to service facilities and the provision of services, states that operators of service facilities must supply access to their facilities in a non-discriminatory manner, using wording equivalent to that contained in point 2 of Annex II to Directive 2012/34.

12. As regards the costs of operating the railway service and charges for services, paragraphs 67 and 69b(1) reproduce the criteria laid down in Article 13(3) and (7) respectively of Directive 2012/34.

II. Facts of the dispute and reference for a preliminary ruling

13. ÖBB-Infrastruktur AG ('ÖBB') is the Austrian railway infrastructure manager, within the meaning of Article 3(2) of Directive 2012/34, and operates service facilities.[4]

14. WESTbahn Management GmbH ('Westbahn') is one of the railway undertakings (as defined in Article 3(1) of Directive 2012/34) that provide passenger transport services by rail. To that end, it uses ÖBB's train paths and stops at its stations, and pays ÖBB the corresponding charges.

15. Westbahn took the view that the station fees charged by ÖBB were excessive and therefore brought a complaint before the Schienen-Control Kommission (Railway Supervisory Commission) the regulatory body set up in accordance with Article 55 of Directive 2012/34.

16. The issue is confined to determining whether, for the purposes of calculating those charges, passenger platforms are to be regarded: (a) as forming part of the 'minimum access package' referred to in point 1 of Annex II to Directive 2012/34, or (b) as a service facility within the meaning of point 2(a) of Annex II to that directive.

17. The Railway Supervisory Commission's uncertainty arises from the fact that Directive 2012/34 amended the 'minimum access package':

– Until then, it was common ground that the use of passenger platforms came under the heading of the use of stations.

4 'Infrastructure manager' and 'operator of service facility' are defined in Article 3(2) and (12) of Directive 2012/34. Although, in principle, their functions are considered to be separate, the third subparagraph of Article 13(3) of that directive allows the infrastructure manager to be the service facility operator, too. This is the situation in Austria, where ÖBB performs both roles.

– However, point 1 of Annex II to Directive 2012/34, in defining the 'minimum access package' which infrastructure managers are to supply to all railway undertakings, introduced a new item, under letter (c), that is to say, 'use of the railway infrastructure'.

– In addition, Annex I to Directive 2012/34 incorporates into the 'list of railway infrastructure items' 'passenger and goods platforms, including in passenger stations and freight terminals'.

18. Settlement of the dispute hangs on how the access charges which railway undertakings have to pay are to be calculated.

– If passenger platforms were classified as service facilities, the charging formula for the provision of services, laid down in Article 31(7) of Directive 2012/34 (cost of providing the service plus a reasonable profit), would apply.

– If, on the other hand, they were regarded as forming part of the railway infrastructure included in the 'minimum access package', the charging formula laid down in Article 31(3) of Directive 2012/34 (cost directly incurred as a result of operating the train service) would apply.

19. The referring body is also uncertain whether the minimum access package covers only passenger platforms at 'passenger stations' or also includes passenger platforms at mere station halts, which make up most of the 1 069 railway stations in Austria. It takes the view that, if passenger platforms at passenger stations are already included in that package, platforms at station halts, which also permit the boarding and disembarkation of passengers, should certainly be included.

20. The Railway Supervisory Commission submits that the recitals of Directive 2012/34 do not contain any indication that there has been a change in the principles of charging and do not support the inference that passenger platforms now form part of the minimum access package. For this to be the case, there would have to be a substantial change in the principles of charging, since many of the costs associated with the use of stations would be excluded from the calculation of charges. It stands to reason, therefore, in its opinion, that passenger platforms should not be included in the minimum access package but should come under the heading of passenger stations, that is to say under the category of service facilities.

21. It was in those circumstances that the Railway Supervisory Commission referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is paragraph 2(a) of Annex II to Directive [2012/34] to be interpreted as meaning that the notion of "passenger stations, their buildings and other facilities" referred to therein covers the railway infrastructure "passenger … platforms" listed in the second indent of Annex I to that directive?

(2) If Question 1 is answered in the negative:

Is paragraph 1(c) of Annex II to Directive [2012/34] to be interpreted as including the use of passenger platforms provided for in the second indent of Annex I to that directive within the notion of "use of the railway infrastructure" referred to therein?'

III. Procedure before the Court of Justice

22. The order for reference was lodged at the Court Registry on 23 March 2018.

23. Written observations have been submitted by ÖBB, Westbahn, the Polish and French Governments and the Commission. All the foregoing parties, except for the Polish Government, attended the hearing held on 17 January 2019.

IV. Assessment

A. Issues

24. I share the view of most of those taking part in the preliminary ruling proceedings that a single answer can be given to the two questions referred by the Railway Supervisory Commission.

25. In order to determine the issues raised in these proceedings, it is important to recall that the services to be provided to railway undertakings in accordance with Annex II to Directive 2012/34 include:

– Those comprising the minimum access package referred to in point 1.

– Those provided for in points 2, 3 and 4, which is to say facilities-related services, additional services and ancillary services, respectively.

26. Article 13 of Directive 2012/34 deals with the conditions under which railway undertakings may access the various services.

– The minimum access package is to be supplied by infrastructure managers in a non-discriminatory manner (paragraph 1).

– As regards service facilities, the operators of those facilities are to supply 'access, including track access, to the facilities referred to in point 2 of Annex II, and to the services supplied in those facilities' (paragraph 2).[5]

27. Directive 2012/34 provides for the payment of charges for the use both of railway infrastructure and of service facilities. Those charges are paid to the infrastructure manager and to the operator of service facility respectively and are used to fund their business (Article 31(1))[6] in accordance with the following criteria:

– For the minimum access package, the 'charges … shall be set at the cost that is directly incurred as a result of operating the train service' (first paragraph of Article 31(3) of Directive 2012/34).

– For service facilities, the charge is not to exceed the cost of providing the service, *plus a reasonable profit* (Article 31(7) of that directive).

28. As I have already said, if passenger platforms were a service facility, the charge which the railway undertaking would have to pay the operator of that facility could include an element of reasonable profit accruing to that operator. If, conversely, platforms were part of the minimum access package, the amount of the charge would be confined to the cost directly incurred as a result of operating the train service.

5 It is worth noting that there are discrepancies in the different language versions of the Directive which affect some of the key concepts in this case (Article 13(2) and Article 31(7) of, and point 2 of Annex II to Directive 2012/34). Some languages (French, Italian and German) talk of 'access to the tracks', while others (English, Spanish and Portuguese) refer to 'access by rail'. It is perhaps for this reason that ÖBB, acting on the basis of the German version, has approached the concept of 'track access' from the point of view of users, taking the latter to be the subjects of the 'access' rather than the railway undertakings, which are, in reality, the recipients of the services. In any event, those linguistic discrepancies stop short, in my opinion, of being substantial. The object of such access is to ensure that railway undertakings can connect to (the other) service facilities from the rail network and that the rail network can be accessed from the service facilities. In the remainder of this Opinion, therefore, when I use the term 'access' in relation to railway undertakings, I shall do so in the sense of 'communication, by entry or departure, between services facilities and the rail network'.

6 Given its dual function, ÖBB charges both fees.

29. Passenger stations, their buildings and other facilities are listed as service facilities in point 2 of Annex II to Directive 2012/34, in particular under letter (a) thereof.

30. Although the directive does not define the meaning to be given to 'passenger platforms', the usual construction of that term as being spaces provided to enable persons to board and disembark from trains supports the conclusion that they can be found both within stations and outside them (station halts).[7]

31. Intuitively, the image of a train station is indissociable from its platforms. The answer to the first question referred for a preliminary ruling would therefore have to be in the affirmative. The apparent clarity of that answer is obscured, however, as I indicated at the start of this Opinion, by a reading of point 1 of Annex II to Directive 2012/34, which includes 'use of the railway infrastructure' in the minimum access package.

B. Passenger platforms as (part of) railway infrastructure

1. The interpretation of Annexes I and II to Directive 2012/34

32. Directive 2012/34, despite including the term 'railway infrastructure' in the 'definitions' contained in Article 3 thereof, prefers to specify the items that make up that infrastructure and identifies these by reference to Annex I. Among those items, it expressly mentions 'passenger platforms'.

33. It is therefore undeniable that, according to Directive 2012/34, passenger platforms form part of railway infrastructure and, as such, are included in the minimum access package. This was an explicit decision on the part of the EU legislature, which thereby amended the previous legal framework.

34. Under Directive 2001/14/EC,[8] after all, which preceded Directive 2012/34, use of the railway infrastructure was not included in the minimum access package, with the result that the distinction between that package and service facilities, defined in Annex II, was not dependent on a listing of the items comprising railway infrastructure.

35. Taking the foregoing as their premiss, ÖBB and the French and Polish Governments submit that, if the EU legislature had intended to amend the previous regime, it would have done so expressly and would have given reasons for its decision in the recitals of the new directive. The inclusion of passenger platforms within the concept of railway infrastructure would be a significant innovation by comparison with the previous legislation.

7 The order for reference distinguishes 'passenger platforms in passenger stations' from 'passenger platforms at mere station halts' (paragraph 23). A juxtaposition of the notions of train station and station halt shows that what they have in common is the platform. A station, as well as usually having a number of platforms, consists not only of sidings and other ancillary facilities for the marshalling and maintenance of trains, but also spaces for passenger amenities and areas for the management of goods. A station halt, on the other hand, is, in essence, a platform with varying degrees of accommodation to make it easier for passengers to wait for trains. I think, therefore, that, since point 2(a) of Annex II refers to stations, we must focus our attention on platforms that are located within such stations, without prejudice to any allusion to station halts.

8 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).

36. I do not find that line of argument to be conclusive, however. The text of Article 2 of Directive 91/440/EEC[9] shows that that directive specifies its scope by reference to the 'management of railway infrastructure'. In order to define railway infrastructure, the third indent of Article 3 referred to Annex I.A to Regulation (EEC) No 2598/70.[10] That annex, the wording of which is almost identical to that of Annex I to Directive 2012/34, mentions passenger platforms and goods platforms in the list that it contains.

37. A comparison of the two texts shows that one of the sentences which have been added relates specifically to passenger and goods platforms, in respect of which Annex I to Directive 2012/34 added the phrase 'including in passenger stations and freight terminals'.

38. It is inconceivable that that addition was not intentional,[11] particularly when point 2(a) of Annex II to Directive 2012/34 includes passenger stations in service facilities, and platforms are the reason for the existence of a station so far as passenger access to trains is concerned. From that point of view, the only inference that can be drawn is that the legislature wished passenger platforms, including those situated in stations, to form part of railway infrastructure.[12]

39. The legislature later corroborated its view, inasmuch as the amendments introduced by Directive (EU) 2016/2370[13] did not affect the wording of Annex I to Directive 2012/34.

40. The Commission gives a convincing explanation of why this approach was chosen. The distinction between the minimum access package (which guarantees the provision of services without which the transport operation could not take pace) and access to service facilities not only has an economic consequence, as reflected in the different formulae for determining the applicable charge, but also gives rise to different rules in relation to the right of access. In the case of minimum services, access is mandatory, whereas, in the case of service facilities, it can be refused if there are viable alternatives.

41. After all, Directive 2012/34 guarantees access both to railway infrastructure and to service facilities. The extent of the right of access is not the same, however. Thus, so far as concerns railway infrastructure, the rules are very rigid and railway undertakings cannot be denied access. To this effect, recital 65 of Directive 2012/34 expresses the desirability of defining 'those components of the infrastructure service which are *essential* to enable an operator to provide a service and which should be provided in return for minimum access charges'.[14]

42. The procedure which Directive 2012/34 lays down for the distribution of infrastructure capacity between railway undertakings shows that the objective is to ensure that those undertakings can access the capacity allocated.

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

10 Regulation of the Commission of 18 December 1970 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Council Regulation (EEC) No 1108/70 of 4 June 1970 (OJ, English Special Edition 1970 (III). p. 899). This was a provision that supplemented Regulation (EEC) No 1108/70 of 4 June 1970 introducing an accounting system for expenditure on infrastructure in respect of transport by rail, road and inland waterway (OJ English Special Edition 1970 (II), p. 363).

11 It would have been ideal, it is true, if the author of Directive 2012/34 had reflected his intentions in the preamble to that provision, but the fact that none of the recitals makes such a reference does not sanction a deviation from the only explanation that is consistent with the provisions of that directive, its context and the objective it pursues.

12 I do not think there are any inconsistencies in this regard between platforms in stations and those at station halts: that provision applies to *all* platforms, as the phrase 'including in passenger stations' further points up.

13 Directive of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ 2016 L 352, p. 1).

14 Emphasis added.

43. As I said in my Opinion in *SJ*,[15] railway infrastructures have limited capacity[16] and this is emphasised by recital 58 of Directive 2012/34 when it states that 'the charging and capacity-allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and, ultimately, the scarcity of capacity'.

44. The process which Directive 2012/34 sets out for the allocation of infrastructure capacity seeks to ensure that railway undertakings actually have the capacity granted and are entitled to use it, as provided for in Article 13(1) in conjunction with point 1(b) of Annex II.

45. The requirements in connection with service facilities, on the other hand, are more flexible. Article 13(4) of Directive 2012/34 provides that requests for access by railway undertakings may 'be refused if there are viable alternatives allowing them to operate the freight or passenger services concerned on the same or alternative routes under economically acceptable conditions'.

46. The legislature would therefore have wanted to ensure that platforms would be available at all times, as part of the minimum access package, by including them in the *essential* items referred to in Annex I to Directive 2012/34.

47. It is logical that this should be the case inasmuch as a train cannot conceivably be used operationally without a guarantee that passengers can board and disembark the train via platforms. The foregoing provides certainty that railway undertakings will be able to use platforms, whether situated in a station or at mere station halts, for the provision of their services.

48. What is more, it is readily apparent that most Member States do in fact allocate passenger platforms to railway infrastructure.[17] The lack of any explanation in the recitals of Directive 2012/34 does not therefore seem to have got in the way of a proper understanding of its operative provisions.

49. In short, the EU legislature's intention is not only clearly set out in Directive 2012/34 but is also justified from a material point of view by the need to ensure that railway undertakings have access to platforms in any circumstances.

2. The arguments against that interpretation

50. In support of the opposite proposition to that which I have just set out (which is endorsed by the Commission and Westbahn), ÖBB and the French and Polish Governments put forward a number of arguments, with one of which I have already dealt (to the effect that there is no specific recital in Directive 2012/34 which gives reasons for the change of legal regime).

51. In summary, those arguments refer either to the physical separation between railway infrastructure and service facilities (as a criterion for defining the powers to be exercised by the infrastructure manager, on the one hand, and the operators of service facilities, on the other) or to the financial repercussions.

15 C-388/17, EU:C:2018:738, point 52 et seq.

16 Recital 71 of Directive 2012/34 classifies railway infrastructure as a natural monopoly.

17 This was the finding reached by the Independent Regulators' Group — Rail (a group of railway regulatory authorities, cooperation between which is promoted by Article 57 of Directive 2012/34) when studying the levying of charges for the use of service facilities in various countries in Europe. See 'An overview of charging practices for access to service facilities and rail-related services in the IRG-Rail member states' (IRG-Rail (17) 6), report of 27 November 2017, p. 14. The countries covered were Austria, Belgium, Bulgaria, Croatia, Finland, France, Germany, Greece, Hungary, Italia, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. The content of that report was discussed at the hearing.

52. At the outset, I would say that the submissions made by ÖBB and the French and Polish Governments support what I consider to be a *contra legem* interpretation of Directive 2012/34.[18] Based primarily on the (undeniable) practical difficulties involved in classifying platforms as forming part of railway infrastructure, their position is, more than anything, a criticism of the legislative decision set out in Directive 2012/34.

(a) Physical delimitation of spaces

53. Platforms (infrastructure the use of which is dealt with in point 1 of Annex II in conjunction with Annex I to Directive 2012/34) and passenger stations (service facilities according to point 2 of the aforementioned Annex II) have to be physically connected, of course. There will be a place (or, rather, a line) where the operation of the railway service facility ends and use of the infrastructure begins. The material distribution of the power over the different spaces, which Directive 2012/34 splits between infrastructure managers and operators of service facilities, will vary by reference to that factor.

54. It is important to recognise that the practical problems identified by ÖBB and the French and Polish Governments, with respect to the delimitation of those spaces, are not insignificant. Pinpointing the *border* between those spaces can be less than easy, particularly in certain more complex situations.[19] Those difficulties, however, must not be allowed to blur the rule laid down by the legislature, which is to say that platforms are, by definition, a part of railway infrastructure.

55. Although the charging implications form the subject of the next section, it is important to make the point here that the first subparagraph of Article 31(3) of Directive 2012/34 refers to the 'charges for the minimum access package and for access to infrastructure connecting facilities'. It thus has in mind infrastructure involving *transit* to service facilities, for which the manager of that infrastructure is responsible.

56. ÖBB argues that there are no *combinations* of railway infrastructure components and service facilities. In its view, if platforms were to form part of the minimum access package, the division of functions between the manager of the former (infrastructure) and the operator of the latter (service facilities) would be obscured. It is for the latter, moreover, to grant access to those facilities, 'including track access'. In its opinion, the provision directly applicable to platforms is point 2 of Annex II, which deals with service facilities, including stations.[20]

57. ÖBB's proposition is anchored in an understanding of infrastructure that takes into account only the railway lines and the elements essential to their construction. That understanding, which was sustainable up until the legislative change expressed in Annex I to Directive 2012/34, is no longer tenable, since the concept of railway infrastructure has been extended in the manner set out above.

58. In fact, ÖBB has to concede that railway lines are *part* of a passenger station, in the usual sense of that term, without for that matter being treated as service facilities. Since the entry into force of Directive 2012/34, a similar line of reasoning has been applicable to platforms.

18 At the hearing, the French Government asked the Court to give a 'remote interpretation of the text' of the Directive.

19 ÖBB mentioned, for example, among a number of such situations, the subways which, in some passenger stations, provide access to platforms.

20 That explanation does not take sufficient account of the fact that Annex I refers by name to passenger platforms, including in stations, in the list of railway infrastructure items.

59. A look at the list of service facilities contained in point 2 of Annex II to Directive 2012/34 shows that most of them are in spaces remote from the rail transit route.[21] Conversely, in stations, main lines and sidings are part and parcel of the station itself, with the result that, in those places, the railway infrastructure is interconnected with the service facility and there is no need to provide independent access because this is provided by the very railway lines that comprise the railway infrastructure itself.

60. There is, therefore, nothing to stop the infrastructure manager's power from being extended beyond the railway lines that pass through the station to include passenger platforms. The latter perform the function of 'infrastructure connecting service facilities' referred to in Article 31(3) of Directive 2012/34.

61. The detailed strategies for identifying the interconnections between the platform and the various service facility items will depend on the particular circumstances presented by the configuration of each station. In the absence of a standard that defines in greater detail one set of spaces as distinct from another, the infrastructure manager and the station operator will have to reach agreement or approach the railway regulator in order to have their differences of opinion resolved.

(b) Financial repercussions

62. Those who oppose the classification of passenger platforms as forming part of the railway infrastructure that is covered by the minimum access package emphasise the financial repercussions of that measure, given that the charge for using that infrastructure cannot exceed the cost directly incurred [as a result of operating the train service] (marginal cost principle).[22]

63. In actual fact, that argument has no bearing on the interpretation of the provisions of Directive 2012/34 with which the reference for a preliminary ruling is strictly concerned. If it is the case, as the Railway Supervisory Commission recognises, that, 'in accordance with the definition provided by EU law, passenger platforms form part of railway infrastructure',[23] that premiss must serve as the basis for determining the relevant consequences with respect to the charge payable for using that infrastructure.

64. Accordingly, that charge will have to be calculated on the basis of the items listed in Annex I, account being taken of the provisions of Article 29 et seq. of Directive 2012/34 and, as from its entry into force, Implementing Regulation (EU) 2015/909.[24] That regulation sets the charges for minimum access and access to infrastructure connecting service facilities as provided for in Article 31(3) of Directive 2012/34 by reference to the costs directly incurred as a result of operating the train service.

65. The inclusion of platforms in railway infrastructure means that they cannot be taken into account for the purposes of calculating the charge for using service facilities. Consequently, their use cannot be charged for by reference to the *reasonable profit* factor. The fact that this is the case may in some circumstances lead to a reduction in revenue for facility operators who have up until now assumed responsibility for platforms in the mistaken belief that the latter are a service facility.

21 Such as freight terminals, storage sidings, maintenance facilities, technical facilities or refuelling facilities.

22 Page 10 of the document 'Updated review of charging practices for the minimum access package in Europe', drafted by IRG-Rail (IRG-Rail (18) 10), highlights how, in most countries, minimum access charges are calculated on the basis of the marginal costs incurred by the infrastructure manager in connection with the use of that infrastructure.

23 Order for reference, Heading IV (Explanations concerning the questions for a preliminary ruling), paragraph 6, *in fine*.

24 Commission Implementing Regulation of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service (OJ 2015 L 148, p. 17).

66. That consequence, I would say again, does not preclude the [foregoing] interpretation of Annexes I and II to Directive 2012/34. What is more, the impossibility of levying the service facility charge for station platforms will be mitigated by the transfer of responsibility for platforms (their construction and maintenance), from which the station operator is released.

67. In its written observations, the Polish Government maintains that excluding passenger platforms from service facilities runs counter to the objectives of Directive 2012/34, one of which is to ensure that rail transport is efficient and competitive with other modes of transport (recital 5). That objective, it goes on to say, is supplemented by the option available to operators of service facilities to include within their charges a reasonable profit component. The profit thus obtained can be used to improve facilities on passenger platforms themselves, which are the place where passengers must be afforded the highest level of comfort and safety, a duty the discharge of which amounts ultimately to offering them a better service.

68. This argument, along with others like it, might highlight an unintended effect of the current legislation but it is not sufficient to support an interpretation of that legislation that is contrary to its wording, still less a claim that it is invalid (which nobody has maintained, for that matter). It stems, moreover, from a debatable premiss, which is to say that the quality inherent in greater investment can only come from higher charges.

69. There is, of course, nothing to show that the criterion adopted by Directive 2012/34 inevitably leads to a situation where an inadequate railway infrastructure stands alongside impeccable service facilities as a result of the differences in the way the two are charged for. In any event, it should be recalled that Articles 8 and 32 of Directive 2012/34 provide for mechanisms to enable Member States to adopt economic support measures for the benefit of infrastructure managers.

C. The temporal limitation of the effects of the judgment

70. ÖBB proposes that, if the Court accepts that Directive 2012/34 includes passenger platforms in railway infrastructure, the judgment should not begin to produce its effects until it is published.

71. In support of its request, it cites the economic repercussions and its good faith, inasmuch as it did not anticipate that Directive 2012/34 would entail any substantial amendment to the regime under Directive 2001/14. It submits that the conduct of other Member States and the Commission, which has not challenged the Austrian legislation, strengthens its claim.

72. According to the settled case-law of the Court of Justice, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied. [25]

73. By way of exception to that rule, the Court may, in application of the principle of legal certainty inherent in the legal order of the European Union, restrict for the persons concerned the opportunity of relying on a provision which it has already interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties.

25 Judgment of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108, paragraph 40 and the case-law cited).

74. The Court has used that exception where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with European Union law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may have even contributed. [26]

75. It is my view that, in this case, none of those conditions is met:

– Even though the legislature's decision to include platforms within the framework of railway infrastructure was not accompanied by an explanation in the recitals of Directive 2012/34, the purport of that provision is clear and it has not given rise to uncertainty in most Member States. [27]

– ÖBB has not quantified, even approximately, the economic impact which the incorporation of station platforms into railway infrastructure would have. What is more, in its written observations, [28] it refers to the possible 'compensation for financial damage' that would have to be paid for by the Member States. However, none of the Member States (including Austria, which has not taken part in the preliminary ruling proceedings) has endorsed ÖBB's claim with respect to the temporal effects of the judgment.

V. Conclusion

76. In the light of the foregoing, I propose that the Court answer the Schienen-Control Kommission (Railway Supervisory Commission, Austria) as follows:

Annex I and points 1(c) and 2(a) of Annex II to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area must be interpreted as meaning that passenger platforms situated in stations form part of the railway infrastructure the use of which is included within the 'minimum access package' available to all railway undertakings.

26 Judgments of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108, paragraphs 42 and 43); of 3 June 2010, *Kalinchev* (C-2/09, EU:C:2010:312, paragraphs 50 and 51); and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraphs 59 and 60).

27 I refer to the document cited in footnote 17.

28 Paragraph 54. At the hearing, ÖBB did not refer to the limitation of the temporal effects of the judgment.