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 — Directive 2001/14/EC — Allocation of railway infrastructure capacity — Article 6(3) and Annex II to Directive 91/440 — Article 14(2) of Directive 2001/14 — Infrastructure manager — Participation in the preparation of the service timetable — Traffic management — Article 6(2) to (5) of Directive 2001/14 — Failure to provide incentives for infrastructure managers to reduce the costs of provision of infrastructure and the level of access charges — Articles 7(3) and 8(1) of Directive 2001/14 — Cost that is directly incurred as a result of operating the train service — Article 11 of Directive 2001/14 — Performance scheme)

In Case C-627/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 29 December 2010,

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

applicant,

v

Republic of Slovenia, represented by N. Pintar Gosenca, A. Vran and J. Kampoš, acting as Agents,

defendant,

supported by:

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

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

interveners,

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,

* Language of the case: Slovenian.

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

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

gives the following

Judgment

1 By its action, the European Commission asks the Court for a declaration that, by failing to take the measures necessary to comply with:

— Article 6(3) of and Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25, and the corrigendum OJ 1991 L 305, p. 22), as amended by Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 220, p. 58) ('Directive 91/440'), and Article 14(2) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (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');

— Articles 6(2) to (5), 7(3), 8(1) and 11 of Directive 2001/14, and

— Article 30(1) of Directive 2001/14,

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

Legal context

European Union law

Directive 91/440

2 Article 6(3) of Directive 91/440 reads as follows:

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

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

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

— preparation and decision making related to the licensing of railway undertakings including granting of individual licenses,

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

— decision making related to infrastructure charging,

— monitoring observance of public service obligations required in the provision of certain services.'

Directive 2001/14

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

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

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

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

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

5 Under Article 7(3) of Directive 2001/14:

'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.'

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

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

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

7 Article 11(1) of that directive is worded as follows:

'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.'

8 Article 14(1) and (2) of Directive 2001/14 provides:

‘1. Member States may establish a framework for the allocation of infrastructure capacity while respecting the management independence laid down in Article 4 of Directive 91/440/EEC. Specific capacity-allocation rules shall be laid down. The infrastructure manager shall perform the capacity-allocation processes. In particular, the infrastructure manager shall ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.

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

Slovenian law

Law on rail transport

9 The Law on rail transport (zakon o železniškem prometu) of 26 April 2007 (Uradni List RS No 44/2007), in the version applicable to the present dispute (Uradni List RS No 58/2009, the ‘Law on rail transport’), provides in Article 21:

‘1. For the purposes of the performance of the functions referred to in the present article, the Government shall create a public agency for rail transport, [‘the Railway Agency’]).

…

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

— allocation of train paths;

…

— adoption of a network service timetable.’

10 Under Article 11 of that law:

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

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

…

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

— management of train movements;

— preparation and application of the service timetable;

– …’

Decree of 10 April 2008

11 The Decree on the allocation of train paths and charges for the use of the public railway infrastructure (uredba o dodeljevanju vlakovnih poti in uporabnini na javni železniški infrastrukturi) of 10 April 2008 (Uradni List RS No 38/08 ('Decree of 10 April 2008'), provides in Article 9:

'1. The [Railway] Agency, the manager and the applicant shall, in the procedure for establishing and allocating train paths, observe the following time-limits and principles:

…

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

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

— the [Railway] Agency shall send the draft new service timetable to applicants that have requested the allocation of a train path and to other interested parties wishing to make comments regarding the impact which the service timetable could have on their ability to provide rail services during the period of validity of the service timetable and allow them a period of at least one month to send it any comments.'

12 Article 20(2) and (5) of the Decree of 10 April 2008 states:

'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. To that end, the three-year agreement concluded between the [Railway] Agency and the manager shall provide for a proportion of the surpluses from the manager's other commercial activities in accordance with the preceding paragraph not to be included in the calculation of charges, but to be left to the manager as an incentive.

…

5.

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

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.'

13 Article 21 of that decree provides:

'(1) The [Railway] Agency shall respect the criteria laid down by the Law in setting the amount of charges.

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

(3) The Agency shall ensure objectively equivalent and non-discriminatory charges for all rail undertakings that perform services of equivalent nature in a similar part of the market.'

Pre-litigation procedure

14 On 10 May 2007, the Commission sent a questionnaire to the Republic of Slovenia to check that that Member State had correctly implemented 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 national law. The Slovenian authorities replied to that questionnaire by letter of 11 July 2007.

15 On 21 November 2007, the Commission requested additional information that the Republic of Slovenia provided in a letter of 16 January 2008.

16 On 26 June 2008, the Commission, on the basis of the information communicated by the Republic of Slovenia, sent that Member State a letter of formal notice calling on it to comply with the provisions of the directives of the first railway package. The main irregularities mentioned concerned the lack of independence of the infrastructure manager, the tarification of access to the railway infrastructure and the railway regulatory body.

17 On 22 August 2008, the Republic of Slovenia replied to the Commission's letter of formal notice. That Member State subsequently sent additional information to the Commission by letters of 16 March and 8 July 2009.

18 On 9 October 2009, the Commission sent the Republic of Slovenia a reasoned opinion in which it complained that the latter had failed to transpose into national law the directives on the first railway package and it called on that Member State to take all the measures necessary to comply with that reasoned opinion within six months of its reception.

19 By letter of 8 December 2009, the Republic of Slovenia stated that it had taken note of the infringements alleged against it in the reasoned opinion and expressed its intention of remedying them.

20 The Republic of Slovenia reiterated in every respect the considerations which it had set out in its letter of 8 December 2009, stating that the legislation and regulations intended to remedy the infringements alleged would be adopted soon.

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

Procedure before the Court

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

23 By document lodged at the Registry of the Court on 1 February 2012, the Commission informed the Court that, following a letter of 10 February 2011, in which the Republic of Slovenia informed it of the measure transposing its obligations under Article 30(1) of Directive 2001/14 into national law, it was withdrawing its complaint in the action based on an infringement of that provision.

The action

The first complaint, concerning the independence of the body exercising the essential functions listed in Annex II to Directive 91/440

Arguments of the parties

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

25 The Commission argues in that regard that, although Article 21 of the Law on rail transport entrusts the tasks of allocating train paths to the Railway Agency, the infrastructure manager, namely, Slovenian Railways, is involved in decision-making related to the path allocation or the allocation of infrastructure capacity in so far as, in accordance with Article 11(4) of that law, the preparation and application of the service timetable fall within its powers.

26 The Commission also observes that Slovenian Railways continues to participate in the preparation of the service timetable because Article 9 of the Decree of 10 April 2008 provides that the infrastructure manager must prepare a draft new service timetable and consult the interested parties on it, before forwarding it to the Railway Agency which sends the draft new service timetable to applicants and then adopts its final decision on allocation.

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

28 The Republic of Slovenia contends that the Commission's claims are unfounded. It argues, in particular, that Article 3 of the Law amending the Law on rail transport (zakon o spremembah in dopolnitvah zakona o železniškem prometu, Uradni List RS No 106/2010) of 16 December 2010 (the 'Law of 16 December 2010'), took away all the infrastructure manager's power to prepare network timetables and that that power has been entirely transferred to the Railway Agency.

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

Findings of the Court

30 By the first part of its first plea, the Commission submits that the Republic of Slovenia has failed to fulfil its obligations under Article 6(3) of Directive 91/440, read in conjunction with Annex II thereto, and Article 14(2) of Directive 2001/14 in so far as the infrastructure manager, which also provides rail transport services, participates in the preparation of the service timetable and, therefore, in the function of allocating train paths or infrastructure capacity.

31 In that connection, it must be found, first of all, that, the Law of 16 December 2010, which the Republic of Slovenia claims withdrew all powers from the infrastructure manager for the preparation of the network timetable and transferred those powers in full to the Railway Agency, was adopted after the expiry of the period prescribed by the Commission, in its reasoned opinion of 9 October 2009, for that Member State to take the measures necessary to comply with it.

32 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 obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-206/10 *Commission* v *Germany* [2011] ECR I-3573, paragraph 25 and the case-law cited).

33 Therefore, the Law of 16 December 2010 may not be taken into consideration in the examination by the Court of the merits of the present action for failure to fulfil obligations.

34 Next, it must be recalled that Directive 91/440 instigated the liberalisation of rail transport, aiming to ensure equitable and non-discriminatory access to infrastructure by rail undertakings. For the purpose of ensuring such access, the first subparagraph of Article 6(3) thereof established the principle that the body responsible for essential functions listed in Annex II to the directive should be independent (jCase C-473/10 *Commission* v *Hungary* [2013] ECR, paragraph 44).

35 Under Annex II, decision-making related to path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, is an essential function within the meaning of Article 6(3). Consequently, a railway undertaking cannot be entrusted with the defining or assessing of availability for the purpose of adopting decisions on the allocation of train paths.

36 In the present case, Article 9 of the Decree of 10 April 2008 allocates power to the infrastructure manager, that is to say, Slovenian Railways, to prepare the draft new service timetable and the new train timetables. It is also clear from that provision that, in preparing the draft, the infrastructure manager must hold consultations with the interested parties and all persons wishing to make comments about the effect the service timetable might have on their ability to provide rail services during the period of validity of the train timetable.

37 It is true that Slovenian Railways acts under the supervision of the Railway Agency which alone has powers to adopt the service timetable and to attribute individual train paths. However, having regard to the wording of Annex II to Directive 91/440, which expressly includes ‘the definition and assessment of availability’ in the essential functions, a railway undertaking cannot be entrusted with all the preparatory work for the adoption of decisions concerning the essential functions.

38 Finally, it is clear from Article 14(2) of Directive 2001/14 that, if the infrastructure manager is not independent of the railway undertakings, as is the case in Slovenia, the task of allocating infrastructure capacity must be entrusted to an allocating body independent in its legal form, organisation and decision-making from any railway undertakings.

39 As the Commission rightly argues, Slovenian Railways continues to participate in the preparation of the service timetable and, therefore, in the allocation of train paths or infrastructure capacity.

40 It follows from the foregoing considerations that the first part of the Commission's first plea must be regarded as well founded.

41 By the second part of its first plea, the Commission alleges that the Republic of Slovenia failed to fulfil its obligations under Article 6(3) of Directive 91/440 read in conjunction with Annex II thereto and Article 14(2) of Directive 2001/14, in so far as the infrastructure manager is entrusted with regulating the movement of trains under Article 11(4) of the Law on rail transport.

42 In its reply, the Commission also argues that, in the event of disruption of traffic, the infrastructure manager is entrusted with the task of re-allocating train paths. In that connection, the Commission referred to the Republic of Slovenia's 2011 network programme as follows: 'if necessary or where the infrastructure is temporarily out of use, the infrastructure manager may temporarily refuse its application for as long as is necessary to restore the system'. That programme also provides that 'in exceptional circumstances which result in a discrepancy with the allocated train paths, the manager has the right, in the prior consultation with the carrier, to adapt train paths in order to guarantee in the best manner possible the communications originally determined'.

43 In that connection, it must be recalled, first of all, that traffic management cannot be regarded as an essential function that must be entrusted to an independent entity (*Commission* v *Hungary*, paragraph 55). As is clear from Article 6(3), second paragraph, of Directive 91/440, the responsibility for managing the infrastructure, with the exception of the essential functions, may be assigned to railway undertakings. Traffic management may therefore be assigned to an infrastructure manager which is also a railway undertaking, as is the case in Slovenia.

44 Second, as regards the Commission's argument that, in Slovenia, the infrastructure manager is entrusted with the re-allocation of train paths in the event of disruption of traffic, it must be borne in mind that it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 20 and the case-law cited).

45 It should also be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union and 120(c) of the latter's Rules of Procedure, in any application made under Article 258 TFEU, the Commission must indicate the specific complaints on which the Court is called upon to rule (Case C-132/09 *Commission* v *Belgium* [2010] ECR I-8695, paragraph 36 and the case-law cited).

46 Those heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (*Commission* v *Belgium*, paragraph 37 and case-law cited).

47 In the present case, it must be observed that, in its originating application, the Commission submitted that the management of train movements must be entrusted to a body which is not itself the provider of rail transport services, without however referring, as it did in its reply, to the re-allocation of train paths in the event of disruption of traffic.

48 Consequently, it must be held that the Commission has extended the subject-matter of that application, in so far as it refers to the re-allocation of train paths in the event of disruption of traffic.

49 In so far as it is based on that reasoning, the second part of the Commission's first plea must therefore be dismissed as inadmissible.

50 Having regard to the foregoing considerations, on the one hand the first part of the Commission's first complaint must be regarded as well founded and, on the other, the second part of that complaint must be declared to be in part unfounded and in part inadmissible.

The second and third complaints alleging the failure to provide incentives to the manager to reduce the costs of the provision of infrastructure and the level of access charges, and the absence of a performance scheme respectively

Arguments of the parties

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

52 Second, it submits that, by failing to adopt a performance scheme encouraging the railway undertakings and the infrastructure manager to reduce disruption and improve the performance of infrastructure, that Member State has failed to fulfil its obligations under Article 11 of Directive 2001/14.

53 The Republic of Slovenia contends, as regards the complaint relating to Article 6(2) to (5) of Directive 2001/14, that according to Article 10 of the Law of 16 December 2010 the infrastructure manager is provided with incentives with respect to safety requirements, maintenance and improvement of the quality of the infrastructure services, to minimise disruption and improve the performance of the infrastructure and reduce the costs of guaranteeing infrastructure and the level of access charges.

54 That Member State adds that the restructuring of Slovenian Railways, transforming that company into three subsidiaries dealing with passenger transport, freight and managing the infrastructure, respectively, will enable the manager of the railway infrastructure to have much greater commercial freedom, so that the conditions required to ensure the effectiveness of the incentive scheme are fulfilled.

55 As regards the plea alleging the inadequate transposition of Article 11 of Directive 2001/14, the Republic of Slovenia contends that the Law of 16 December 2010 added two new subparagraphs in Article 15(d) of the Law on rail transport which provide a legal basis for the adoption of a regulatory measure which will enable the subsequent performance scheme to be established.

Findings of the Court

56 It is to be borne in mind that, according to settled case-law, as referred to in paragraph 32 above, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court may not take account of any subsequent changes.

57 In the present case, it must be stated that the arguments relied on by the Republic of Slovenia are based solely on amendments made to national law after the period prescribed in the Commission's reasoned opinion.

58 In those circumstances it must be held that the second and third complaints put forward by the Commission in support of its action are well founded.

The fourth complaint, relating to the calculation of the charge for minimum access to the rail infrastructure

Arguments of the parties

59 The Commission argues that, by failing to provide a method of calculation for the charges imposed for the minimum access package and track access to service facilities based on the costs directly incurred as a result of operating the service, the Republic of Slovenia has failed to fulfil its obligations under Article 7(3) of Directive 2001/14.

60 The Commission also alleges that the Republic of Slovenia has failed to adopt rules on the basis of which it would be possible to ascertain whether each market segment can actually bear mark-ups in order to obtain full recovery of the costs incurred by the infrastructure manager, in violation of its obligations under Article 8(1) of that directive.

61 The Republic of Slovenia contends that the Law of 16 December 2010 inserted into Article 15(d)(3) of the Law on rail transport a provision under which the charge for the minimum access package and track access to service facilities is equal to the costs directly attributable to the operation of the rail services.

62 That Member State adds that, under the regulation on the allocation of train paths and access charges for the use of the public rail infrastructure (uredba o dodeljevanju vlakovnih poti in uporabnini na javni železniški infrastrukturi) of 24 December 2009 (Uradni List RS No 113/09), the level of charges is determined on the basis of operating costs for the specific train type, which are demonstrated, in particular, by track maintenance costs as well as those relating to the movement of trains and traffic management.

63 Finally, the Republic of Slovenia contends that that regulation is being amended and that a new provision is to be inserted concerning the way in which the issue as to whether a market segment can actually bear mark-ups is to be verified in order to recover all the costs incurred by the infrastructure manager.

Findings of the Court

64 According to settled case-law, as recalled in paragraph 32 of the present judgment, the existence of a failure to fulfil obligations must be determined by reference to the situation obtaining 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.

65 In the present case, the Republic of Slovenia relies in support of its arguments on the legislative and regulatory amendments made after the expiry of the period prescribed in the reasoned opinion sent to that Member State by the Commission on 9 October 2009 and, therefore, such arguments cannot be accepted.

66 Moreover, it must be recalled that, according to Article 7(3) of Directive 2001/14, without prejudice to paragraphs 4 or 5 or to Article 8, the charges for the minimum access package and track access to service facilities must be set at the costs directly incurred as a result of operating the train service.

67 In that connection, Article 21(2) of the Decree of 10 April 2008, in so far as it provides that the level of charges is to calculated on the basis of costs directly incurred as a result of operating the train service, must be regarded as satisfying the requirements of Article 7(3) of Directive 2001/14.

68 Nevertheless, it is not disputed that Article 15 of the Law on rail transport provided, before the entry into force of the Law of 16 December 2010, that the calculation of the charge for access to the infrastructure must take account of the 'charges for transport infrastructure in other sub-systems, in particular road transport'. Such a criterion has no direct relationship to the operation of the rail service.

69 Therefore, it must be held that the first part of the Commission's fourth head of claim alleging an infringement of Article 7(3) of Directive 2001/14 is well founded.

70 Finally, as regards the second part of the fourth complaint, alleging infringement of Article 8(1) of Directive 2001/14, it must be recalled that that provision states that, where the market is able to bear it, mark-ups may be levied by the Member States in order to obtain full recovery of the costs incurred by the infrastructure manager. However, the Member States are not required, under that provision, to lay down in their national legislation the detailed rules in accordance with which the infrastructure manager must determine the capacity of market segments to bear any increase in costs and the circumstances in which it is required to do so (Case C-556/10 *Commission* v *Germany* [2013] ECR, paragraph 89).

71 In the present case, it is common ground that, on the expiry of the period allowed by the Commission for the Republic of Slovenia in its reasoned opinion of 9 October 2009, no provision of Slovenian law provided that, in order to obtain full recovery of the costs incurred by the infrastructure manager, it was necessary to verify whether each of the market segments can actually bear mark-ups.

72 Therefore, the second part of the Commission's fourth complaint, alleging infringement of Article 8(1) of Directive 2001/14, must be regarded as well founded.

73 Having regard to all the foregoing considerations, it must be held, on the one hand, that, by failing to take the measures necessary to comply with:

— Article 6(3) of and Annex II to Directive 91/440, and Article 14(2) of Directive 2001/14, and

— Articles 6(2) to (5), 7(3), 8(1) and 11 of Directive 23001/14,

the Republic of Slovenia has failed to fulfil its obligations under those provisions and, on the other, that the remainder of the Commission's action must be dismissed.

Costs

74 Under the first sentence of Article 138(3), the parties are to bear their own costs where each party succeeds on some and fails on other heads. Since the Commission and the Republic of Slovenia have succeeded on some and failed on other heads, they must be ordered to bear their own costs.

75 In accordance with Article 140(1) of the Rules of Procedure, which provides that the Member States which intervened in the proceedings are to bear their own costs, the Czech Republic and the Kingdom of Spain must be ordered to bear their own costs.

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

1. Declares that, by failing to take the measures necessary to comply with:

— Article 6(3) of and Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, as amended by Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004, and Article 14(2) of Directive

2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004, and

— **Articles 6(2) to (5), 7(3), 8(1) and 11 of Directive 2001/14, as amended by Directive 2004/49,**

— **the Republic of Slovenia has failed to fulfil its obligations under those provisions;**

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

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

[Signatures]