Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

28 February 2013 *

(Failure of a Member State to fulfil obligations — Development of the Community's railways — Allocation of railway infrastructure capacity — Levying of charges for the use of railway infrastructure — Directives 91/440/EEC and 2001/14/EC — Incomplete transposition)

In Case C-473/10,

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

European Commission, represented by H. Støvlbæk, B. Simon and A. Sipos, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hungary, represented by M. Fehér, G. Koós and K. Szíjjártó, acting as Agents,

defendant,

supported by:

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

Republic of Poland, represented by M. Szpunar, B. Majczyna and M. Laszuk, acting as Agents,

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: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 May 2012,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

* Language of the case: Hungarian.

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to bring into force all the laws, regulations and administrative provisions 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), as amended by Council Directive 2006/103/EC of 20 November 2006 (OJ 2006 L 363, p. 344) ('Directive 91/440'), and

— Articles 4(2), 14(2), 6(1) and (2), 7(3), 8(1) and 11 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 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 2001/14'),

Hungary has failed to fulfil its obligations under those provisions.

Legal context

European Union law

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

— 'preparation and decision-making related to the licensing of railway undertakings including granting of individual licences;

— 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.'

4 Recitals 11, 15 and 20 in the preamble to Directive 2001/14 are worded as follows:

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

…

(15) It is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption and improve performance of the network.

…

(20) It is desirable to grant some degree of flexibility to infrastructure managers to enable a more efficient use to be made of the infrastructure network.'

5 Article 4(1) and (2) of Directive 2001/14 provides as follows:

'1. Member States shall establish a charging framework while respecting the management independence laid down in Article 4 of Directive 91/440/EEC.

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.

2. Where the infrastructure manager, in its legal form, organisation or decision-making functions, is not independent of any railway undertaking, the functions, described in this chapter, other than collecting the charges, shall be performed by a charging body that is independent in its legal form, organisation and decision-making from any railway undertaking.'

6 Article 6(1), first subparagraph, and Article 6(2) of Directive 2001/14 are worded as follows:

'1. Member States shall lay down conditions, including where appropriate advance payments, to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other.

…

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.'

7 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.'

8 Article 8(1) of Directive 2001/14 is worded as follows:

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

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

9 Article 14(2) of Directive 2001/14 is worded as follows:

'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.'

Hungarian law

10 In 2004, a body was established under Law XCV of 1993 on the Railways that was independent of any railway undertaking, namely the Vasúti Pályakapacitás-elosztó Szervezet Kft. ('the VPE').

11 Under Article 62 of Law CLXXXIII of 2005 on rail transport (2005 évi CLXXXIII törveny a vasúti közlekedésröl, *Magyar Közlöny* 2005/172) ('the Law on rail transport'), the functions of train path allocation and the establishment of charges are to be performed by the VPE.

12 Article 28(1) of the Law on rail transport is worded as follows:

'On behalf of the State, the Minister shall, with the agreement of the Minister responsible for the budget, undertake by contractual agreement to fund all expenditure recognised as justified that is incurred in the management of the network by the railway undertaking responsible for the management of the national rail network and its appurtenances and the regional railways and their appurtenances which are not covered by the network access charge or by that undertaking's other operations. The terms of that contractual agreement must be such as to provide an incentive for the network manager to reduce its management costs and network access charges without thereby jeopardising transport safety or the quality of the service.'

13 Article 31(2)(b) of that law states that 'in the interests of rail traffic safety … where a dangerous situation arises, until it is resolved, the infrastructure manager shall have the right to close the tracks or sections of track threatened by the danger and to withdraw train paths allocated on the sections concerned and, where such closure affects a level crossing, shall inform the administration responsible for the route concerned'.

14 Article 55(8) of the Law on rail transport is worded as follows:

'Where it is anticipated that network access charged will not cover all the justified costs and expenditure of the manager of freely accessible infrastructure, the charge for the service described in Article 54(1) and (3) to (5) may be subject to an overall mark-up in an amount not exceeding that required to cover all justified costs and expenditure, which shall take into account productivity increases achieved by railway undertakings, the requirement for efficient use of infrastructure, competitiveness in international rail transit and the principle of transparency and equal treatment.'

15 Regulation No 83/2007 (X.6) GKM-PM concerns the framework for the charging scheme for access to railway infrastructure and the basic rules for setting the charge for access to infrastructure (*Magyar Közlöny* 2007/134).

16 Article 23(1) of Regulation No 101/2007 (XX.22) GKM laying down detailed rules for access to railway infrastructure (*Magyar Közlöny* 2007/181) provides as follows:

'Where an infrastructure manager has withdrawn a train path under Article 31(2)(b) of the [Law on rail transport], the body responsible for allocating capacity shall, at the request of the operator concerned, offer that operator another train path from the capacity available.'

17 The VPE publishes network operating rules (Hálózati Üzletszabályzat) each year. Point 4.3(9) of the 2009-2010 Network Operating Rules is worded as follows:

'[The VPE] shall inform the operators concerned, infrastructure managers and the railway management body of its decisions allocating infrastructure capacity.'

18 Point 4.8.1 of the 2009-2010 Network Operating Rules, entitled 'Guidelines for restoring normal operation', provides as follows:

'(a) In the event of a departure from the normal schedule and timetable, the governing body of the infrastructure manager shall take appropriate steps to end the disturbance and to restore operation in accordance with the schedule and timetable. …

(b) Operators granted access to the railway network must have available at all times a contact person authorised to take decisions or their own governing body, which the governing body of the infrastructure manager shall be required to notify in the event of disruption or danger, and their needs shall be taken into account when normal operating conditions are being restored.

(c) *Force majeure* and other extraordinary unforeseeable circumstances:

— The infrastructure manager shall be required, in the event of disruption to rail traffic caused by technical failure or accident, to do everything in its power to restore normal operating conditions. To that end, it must draw up a contingency plan, which shall include a list of the bodies to be notified in the event of a serious accident or serious disturbance to rail traffic.

— At the request of the network manager, the commercial rail undertaking shall be required, in exchange for payment, to make available what are deemed to be the most appropriate resources to bring about prompt restoration of normal operating conditions.

— The infrastructure manager may, in the event of danger rendering the rail network temporarily unusable and providing it notifies all parties concerned, withdraw allocated train paths for the period of time needed to restore the situation to normal. At the request of the operator concerned, [the VPE] shall offer it, for that period, another train path from the capacity available.'

The pre-litigation procedure and the procedure before the Court

19 By letter of 26 January 2008, the Commission gave Hungary formal notice to submit its observations regarding its alleged failure to fulfil its obligations under Article 6(3) of, and Annex II to, Directive 91/440 and Articles 4(2) and 14(2), 3, 6(1) and (2) to (5), 7(3), 8, 11 and 30(3) of Directive 2001/14.

20 By letter of 22 August 2008, Hungary responded to the letter of formal notice. Hungary's letter was supplemented by further correspondence, including a letter of 10 June 2009.

21 By letter of 8 October 2009, the Commission sent to Hungary a reasoned opinion stating that it had failed to fulfil its obligations under Article 6(3) of, and Annex II to, Directive 91/440 and Articles 4(2), 14(2), 6(1) and (2), 7(3), 8(1) and 11 of Directive 2001/14. The Commission requested Hungary to take the measures necessary to comply with the reasoned opinion within two months of its notification.

22 By letter of 16 December 2009, Hungary responded to the reasoned opinion, disputing the failure alleged by the Commission.

23 Not being satisfied with Hungary's response, the Commission decided to bring the present action, which is based on five complaints.

24 By order of the President of the Court of 15 February 2011, the Czech Republic, the Republic of Latvia and the Republic of Poland were granted leave to intervene in support of the form of order sought by Hungary. By order of the President of the Court of 4 April 2011, the Italian Republic was granted leave to intervene in support of that form of order, pursuant to Article 93(7) of the Court's Rules of Procedure in the version applicable at the time when the order was made. The Italian Republic and the Republic of Latvia did not submit any written observations or participate in the oral procedure.

25 By document lodged at the Court Registry on 6 June 2012, the Commission stated that it was withdrawing its fifth complaint, alleging breach of Article 11(1) of Directive 2001/14, concerning the establishment of a rail network performance scheme.

The action

The first complaint, concerning the independence of the function of allocating train paths

Arguments of the parties

26 The Commission maintains that, under Article 6(3) of Directive 91/440, a railway undertaking cannot take a decision concerning the allocation of train paths, since the allocation of train paths is one of the fundamental functions determining equitable and non-discriminatory access to infrastructure listed in Annex II to the directive, to which the requirement for independence is applicable. Infrastructure capacity must therefore be allocated by an independent allocation body.

27 According to the Commission, traffic management covers train path allocation and should therefore be carried out in Hungary by the VPE, which is a body independent of any railway undertaking, not by the MÁV Zrt ('the MÁV') or the GySEV Zrt. ('the GySEV'), which are railway undertakings and also infrastructure managers.

28 The Commission submits, first, that the traffic manager has to be apprised of capacity allocation decisions that have been taken in order to be able to perform its traffic management tasks. If, in Hungary, the infrastructure managers – the MÁV and the GySEV – are kept informed, under the Network Operating Rules, of any capacity allocation decision concerning their competitors, then they essentially become a party to the capacity allocation process.

29 The Commission also considers that a railway undertaking engaged in traffic management thereby derives a competitive advantage since, in order to be able to carry out the tasks pertaining to such management, the undertaking concerned must necessarily have detailed knowledge of the services provided by railway undertakings and the volumes and times of the services. It is contrary to Article 6(3) of Directive 91/440 and Article 14(2) of Directive 2001/14 for any railway undertaking to be able to acquire knowledge, through the activity of traffic management, of the use its competitors make of infrastructure or, in certain circumstances, to take decisions concerning the allocation of train paths or infrastructure capacity.

30 Second, according to the Commission, traffic management entails, in the event of disruption to the service or danger, the traffic manager taking the steps necessary to restore normal operating conditions. In such cases, that manager has no choice but to depart from the timetable previously scheduled and reallocate available train paths and network capacity. In Hungary, it is the two infrastructure managers which must take steps to deal with the disruption, taking into account the needs of the railway undertakings.

31 The Commission does not deny that, under normal circumstances, the traffic manager simply implements decisions taken by the VPE, ensures that trains run according to the timetable and has no influence over decision-making regarding the allocation of network capacity or train paths. However, the fact that the traffic manager takes steps locally to restore normal operating conditions in the event of danger or disruption means, in the Commission's view, that it takes decisions concerning the allocation of train paths and enjoys decision-making freedom in that regard. Thus, withdrawal of a path is an action constituting a fundamental function relating to path allocation within the meaning of Annex II to Directive 91/440.

32 As regards the relationship between traffic management and infrastructure management, the Commission claims that the independence requirement attaching to path allocation also applies where paths are allocated in the context of traffic management. The latter encompasses numerous tasks clearly unrelated to path allocation, such as the construction and maintenance of tracks and other investment projects, which may be undertaken by railway undertakings.

33 Hungary contends that, under Article 6(3) of Directive 91/440, essential functions are the activities expressly listed in Annex II to the directive. The second subparagraph of Article 6(3) provides a non-exhaustive list of functions which, while they may be activities for the purpose of Annex II or are related to such activities, may also be carried out by railway undertakings.

34 Hungarian legislation does not allow the infrastructure manager to reallocate train paths, even in the event of danger or disruption. It is solely for the VPE, as an independent body, to allocate train paths and infrastructure capacity.

35 First, the essential task of the traffic manager is to implement the VPE's decisions concerning the allocation of capacity and train paths. The traffic manager has no decision-making powers in this area and has no control over train paths or capacity allocated. With its 24-hour emergency service, the VPE is in a position to receive and deal with requests for train paths at any time of day.

36 Second, nor does the traffic manager have the power to allocate capacity in the event of danger or disruption to the service. In such cases, the traffic manager is in a position to take steps immediately to restore normal operating conditions and adopt measures to ensure as swiftly as possible the use of the maximum number of train paths and maximum capacity from the paths and capacity allocated by the VPE. However, where train paths cannot be returned to service despite the measures taken, the infrastructure manager may withdraw a path. Hungary states that it is possible to withdraw train paths only where a section of track has become temporarily unusable and normal operation is in any event impossible because a dangerous situation has arisen. It is not therefore a case of a discretionary decision to prohibit use of a track but of a temporary closure of a section of track for safety reasons, during which the VPE will endeavour to make another path available to the railway undertaking concerned.

37 According to Hungary, restoring rail traffic to normal operation, which entails technical and rail safety measures, on the one hand, and the reallocation of train paths, which is the responsibility of the VPE, on the other, are two different activities.

38 It follows, according to Hungary, that the traffic manager has no influence over the allocation of train paths, since that takes place before such decisions come into operation. The infrastructure manager is under an obligation to enter into a contractual agreement in respect of the path allocated with the operator which has been granted rights of access and to ensure that that operator's train can run on that path, failing which the infrastructure manager may be subject to the legal consequences set out in the agreement. Consequently, acquiring knowledge of capacity allocation decisions after such decisions have been adopted is not the same as taking a decision regarding path allocation and the infrastructure manager is not able to derive any competitive advantage from such knowledge.

39 Hungary is of the view that traffic management is more akin to infrastructure management, so that it is unrealistic to make a distinction between the two activities, such a distinction being inconsistent with sound traffic management. The close relationship between traffic management and infrastructure management is, moreover, referred to in Directive 91/440, the second indent of Article 3 of which provides that operating the control and safety systems may form part of the infrastructure manager's tasks.

40 The Republic of Poland endorses Hungary's argument that any intervention by the traffic manager in the event of disruption to the service or danger does not involve reallocation of train paths. It is a matter of adopting an ad hoc response, for which only the entity providing day-to-day management of the rail service is prepared.

41 The Republic of Poland also notes that Article 6(3) of Directive 91/440 requires attainment only of the objective of equitable and non-discriminatory access to infrastructure. Recital 11 in the preamble to Directive 2001/14 refers to that objective. According to that Member State, the Commission has not adduced any factual or legal argument to show that Hungary has failed to attain that objective.

Findings of the Court

42 By its first complaint, the Commission criticises Hungarian legislation in essence for entrusting the task of traffic management to the two management infrastructure companies, namely the MÁV and the GySEV, which are also railway undertakings, and not the VPE, which is an independent body, because, in its view, traffic management covers, to an extent, train path allocation.

43 The Commission and Hungary do not agree as to whether traffic management, in particular in the event of disruption to the service and danger, entails decisions pertaining to the allocation of paths and, if so, whether such management tasks should be entrusted solely to an independent body.

44 It should 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) of Directive 91/440 established the principle that the body responsible for essential functions listed in Annex II to the directive should be independent.

45 Annex II to Directive 91/440 defines essential functions for the purpose of Article 6(3) thereof as preparation and decision-making related to the licensing of railway undertakings, decision-making related to path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, decision-making related to infrastructure charging and monitoring observance of public service obligations required in the provision of certain services.

46 It is clear that, while Annex II lists as an essential function to be entrusted to an independent body decision-making related to path allocation, it does not make any mention of traffic management. If the European Union legislature had intended traffic management to be regarded as an essential function, it would have indicated this expressly by including it in that annex.

47 It should also be noted that the objective of ensuring equal and non-discriminatory conditions of access for all railway undertakings is referred to in recital 11 in the preamble to Directive 2001/14. According to that recital, the charging and capacity allocation schemes should permit equal and non-discriminatory access for all undertakings and attempt as far as possible to meet the needs of all users and traffic types in a fair and non-discriminatory manner.

48 The pursuit of that objective finds its expression in the principle that the function of capacity allocation must be entrusted to an independent body, set out in Article 14(2) of Directive 2001/14. According to that provision, where the infrastructure manager is not independent of any railway undertaking, the functions referred to in Article 14(1) and described in Chapter III of the directive, entitled 'Allocation of infrastructure capacity', are to be performed by an allocation body that is independent of any railway undertaking.

49 Among the tasks described in Chapter III to be entrusted to an independent body, reference should be made in particular to the performance of capacity allocation processes, cooperation with a view to efficient allocation of infrastructure capacity which crosses more than one network, planning a working timetable once per calendar year, the ad hoc allocation of individual train paths and the coordination of requested paths to ensure the best possible matching of all requirements. Consequently, activities of an administrative nature concerning essentially the planning and establishment of the working timetable and the ad hoc allocation of individual train paths are to be regarded as forming part of the essential function of capacity allocation for the purposes of Directives 91/440 and 2001/14.

50 Article 2(l) of Directive 2001/14 defines a 'train path' as the infrastructure capacity needed to run a train between two places over a given time-period. The allocation of a train path to a railway undertaking by its inclusion in the working timetable or by means of an ad hoc decision under Article 23 of the directive constitutes, for that undertaking, the right to use specific infrastructure capacity. That interpretation is supported by the first subparagraph of Article 13(2) of the directive, which refers to 'the right to use specific infrastructure capacity in the form of a train path'.

51 It follows that traffic management does not, prima facie, entail taking decisions relating to the allocation of train paths, since, for a railway undertaking, such decisions take the form of the grant of the right to use railway infrastructure capacity, as reflected in the working timetable or in individual ad hoc decisions.

52 On the other hand, under Article 2(h) of Directive 2001/14, infrastructure management may also include the management of infrastructure control and safety systems.

53 It should be added that, while no definition is given in Directives 91/440 or 2001/14 of traffic management, point 1 of Annex II to the latter directive gives some guidance in that regard. That provision sets out the components of the minimum access package to which railway undertakings are entitled. These include, at point 1(d), train control including signalling, regulation, dispatching and the communication and provision of information on train movement and, at point 1(e), all other information required to implement or operate the service for which capacity has been granted.

54 It follows that traffic management includes activities forming part of infrastructure management and consists not in the adoption of decisions concerning the allocation of train paths but in implementing or carrying out such decisions. As the Advocate General observed at point 59 of his Opinion, traffic management is an activity intended to ensure the actual, safe exercise of rights to use network capacity in the form of train paths.

55 It is apparent from the foregoing considerations that traffic management cannot be regarded as an essential function that must be entrusted to an independent entity. As is clear from the second subparagraph of Article 6(3) of Directive 91/440, responsibility for infrastructure management outside essential functions may be entrusted to railway undertakings. Traffic management may therefore be assigned to an infrastructure manager which is also a railway undertaking, as is the case in Hungary.

56 That finding is not undermined by the Commission's argument that, in the event of disruption to the service or danger, the adoption of measures necessary for restoring normal operating conditions, including the withdrawal of train paths, is a matter of train path allocation.

57 Article 29 of Directive 2001/14 provides for the adoption of the measures necessary to address a situation in which train movements have been disrupted as a result of technical failure or accident and, where absolutely necessary, an emergency on account of a breakdown making the infrastructure temporarily unusable.

58 It should be noted, first, that while that provision is in Chapter III of Directive 2001/14, which concerns capacity allocation, it did not appear in the Commission's original proposal for a directive and was inserted in Common Position (EC) No 28/2000 of 28 March 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2000 C 178, p. 28).

59 Second, it is clear that that provision concerns specific measures which must be taken when train movements have been disrupted in order to restore, for safety reasons, normal operating conditions, which is not the case with the other provisions in Chapter III, which relate to the establishment of the working timetable and the ad hoc allocation of individual train paths. Measures adopted under Article 29 of Directive 2001/14 cannot therefore be regarded as directly concerning the essential function of allocating capacity or train paths for the purpose of Article 14(2) of the directive, a function which must be entrusted to an independent allocation body. Rather, Article 29 deals with ad hoc measures which must be adopted in an emergency to deal with a specific situation and ensure that rights to capacity in the form of train paths may in fact be exercised by the operator holding such rights, in accordance with the working timetable.

60 Therefore, the adoption of such measures forms part of traffic management and is not subject to any independence requirement; such a function may accordingly be entrusted to an infrastructure manager that is also a railway undertaking.

61 That conclusion is supported, first, by the wording of Article 2(h) of Directive 2001/14, which provides that the infrastructure manager may be responsible for the management of infrastructure control and safety systems. Second, that conclusion is consistent with the objectives pursued by that directive. Indeed, recitals 15 and 20 in the preamble to the directive state that the infrastructure manager should be provided with incentives to minimise disruption and improve performance of the rail network and granted some degree of flexibility to enable more efficient use to be made of the infrastructure network.

62 In the present case, in Hungary the allocation of rights to specific capacity in the form of train paths is an essential function for which the VPE has sole responsibility. Under the Hungarian legislation in question, in the event of disruption to train movements or danger, the infrastructure managers, that is, the MÁV and the GySEV, take the measures necessary to ensure that normal operating conditions are resumed and may also withdraw train paths on safety grounds. In such a case, it is for the VEP to allocate a new train path.

63 In those circumstances, contrary to the Commission's submissions, it cannot be found that the Hungarian legislation at issue fails to comply with the requirements laid down in Article 6(3) of Directive 91/440 and Article 14(2) of Directive 2001/14 on account of the fact that it allows infrastructure managers to take the measures necessary to restore normal operation in the event of disruption to train movements or danger.

64 It is also necessary to examine the Commission's argument that, in order to fulfil its management obligations, the traffic manager has to be apprised of capacity allocation decisions, with the result that, as the MÁV and the GySEV will be informed of all capacity allocation decisions concerning their competitors, they essentially become parties to the capacity allocation process.

65 That argument cannot be accepted, since the traffic manager has no influence on the process for the adoption of capacity allocation decisions simply because it is informed of such decisions. Indeed, as established at paragraph 54 above, traffic management consists in implementing decisions on the allocation of train paths which have been adopted by the independent allocation body, so that the activity of traffic management necessarily occurs after the adoption of those decisions. Furthermore, under the Hungarian legislation in question, the infrastructure manager is required to conclude a contract in respect of the path allocated with the operator which has been granted rights of access and to ensure that that operator's train can run on that path, failing which it may be subject to penalties. The MÁV and the GySEV cannot, therefore, be regarded as being in a position to have any influence on the adoption of capacity allocation decisions.

66 Similarly, information on capacity allocation decisions relating to their competitors cannot procure a competitive advantage for the MÀV or the GySEV since, first, that information is imparted after the independent body, being in this case the VPE, has adopted such decisions and, second, that information is usually included in the working timetables which, by their very nature, can be accessed by third parties. It should also be recalled that the second subparagraph of Article 6(3) of Directive 91/440 provides that a railway undertaking may be entrusted with infrastructure management, with the exception of essential functions. Consequently, the European Union legislature must have accepted that, where the network is maintained by a railway undertaking, even if it is not responsible for traffic management, that undertaking must have access to information on the allocation of train paths.

67 It follows from all the foregoing considerations that the first complaint relied on by the Commission in support of its action cannot be accepted.

The second complaint, concerning the independence of the charging function

Arguments of the parties

68 The Commission submits that, under Article 6(3) of Directive 91/440 and Article 4(2) of Directive 2001/14, a railway undertaking cannot take decisions concerning the determination of charges since such an undertaking is empowered only to collect charges. According to those provisions, charges must be established and set by an independent charging body.

69 According to the Commission, the Hungarian legislation at issue conflicts with those two provisions in so far as the detailed invoices for the charges to be paid for the use of infrastructure are drawn up by the infrastructure managers, namely the MÁV and the GySEV, which are also railway undertakings.

70 The Commission contends that the words 'the determination of the charge for the use of infrastructure' in the second subparagraph of Article 4(1) of Directive 2001/14 must be construed as referring to, first, the overall setting of charges, which consists in setting out in the Network Operating Rules the amount of the charge per kilometre for each section of track and, second, to the specific calculation of the amounts chargeable to the various users on the basis of the length of track section used. The possibility under Article 4(2) of the directive for an infrastructure management which is not independent to undertake the collection of charges should be interpreted strictly, since it is an exception to the general rule.

71 The Commission is of the view that a railway undertaking which is responsible for drawing up detailed invoices of charges enjoys a competitive advantage, in so far as such invoices refer necessarily, inter alia, to the services used by competing railway undertakings, the volume of the services in question and the times at which they are used. Article 6(3) of Directive 91/440 expressly refers to the principle of equitable and non-discriminatory access to infrastructure.

72 Hungary disputes that the infrastructure managers, namely the MÁV and the GySEV, take decisions concerning the determination of charges, since those undertakings are responsible only for invoicing – an operation forming part of the collection of charges – which is not an essential function within the meaning of Directive 91/440 that must be carried out by an independent body. Invoicing is a technical measure necessary for the recovery of charges.

73 Hungary makes a distinction between the formulation of the charges, the actual setting of the charges and their collection. The first of those concepts corresponds to the establishment of various charging rules, which is carried out by the Member State concerned or the infrastructure manager. The actual setting of the charges consists in determining the various individual charges which a given railway undertaking is required to pay in a specific situation, on the basis of the services provided to it. It is the VEP, as an independent body recognised by the Commission, which will carry out the tasks associated with the formulation and setting of charges. The collection of charges denotes the actual act of payment by which the charges thus set are paid to the infrastructure manager. Invoicing is simply the technical expression of the amount of the charges based on the calculations carried out by the VPE and does not, therefore, relate to the formulation or the actual setting of the charges but to their collection.

74 Hungary doubts whether access to information obtained from detailed invoices would result in distortion of competition, since the infrastructure manager has no actual influence on the setting of network access charges. Moreover, that manager would necessarily be aware of that information from other sources, such as the contract concluded with the railway undertaking.

75 The Republic of Poland, like Hungary, contends that invoicing does not consist in determining the amount of charges or in adopting decisions of any kind on matters connected with the levying of charges but constitutes an aspect of charging for the purpose of Article 4(2) of Directive 2001/14. Indeed, charging is a secondary activity intended, by means of mathematical operations, to arrive at a figure on the basis of a charging rate determined in advance and in accordance with train paths allocated prior to the levying of that charge and the use made of those paths.

Findings of the Court

76 It is apparent from Article 6(3) of Directive 91/440, in conjunction with Annex II to that directive and Article 4(2) of Directive 2001/14, that the determination of charges is an essential function for the purpose of ensuring equitable and non-discriminatory access to infrastructure, which must be performed by a charging body that is independent of any railway undertaking in its legal form, organisation and decision-making functions. A railway undertaking acting as infrastructure manager may be authorised, under those provisions, only to collect or recover charges.

77 By the complaint under consideration, the Commission essentially criticises Hungarian legislation for allocating the task of invoicing charges to the MÁV and the GySEV, namely two railway undertakings which are also the infrastructure managers, even though, in its view, invoicing forms part of the determination of charges and those undertakings derive a competitive advantage from this.

78 As to the question whether invoicing forms part of the determination of charges, it should be recalled that Article 4(1) of Directive 2001/14 provides that Member States are required to establish a charging framework and may also establish specific charging rules, while respecting the management independence of the infrastructure manager. It is the infrastructure manager that is responsible for determining the charges and for collecting them.

79 By the use of the word ‘determination’, Directive 2001/14 provides, as the Advocate General observed at point 82 of his Opinion, that responsibility for the charging scheme must be reserved to an infrastructure manager which is independent of any railway undertaking. The determination of

charges necessarily entails a degree of flexibility on the part of the infrastructure manager, enabling it to adopt, at the very least, decisions involving choices and assessments as to the factors or parameters on which calculations are to be based.

80 That finding is supported by the regulatory context of Article 4(1) of Directive 2001/14.

81 Article 30 of Directive 2001/14 provides for the establishment of a body to regulate decisions taken by the infrastructure manager concerning, inter alia, the charging scheme and level or structure of infrastructure fees. Article 8(2) of the directive provides that the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of certain specific investment projects. Article 9 of the directive allows the infrastructure manager to introduce a discount scheme for charges levied on operators which takes account of actual savings of administrative costs or encourage the use of considerably under-utilised lines.

82 However, under Article 4(2) of Directive 2001/14, if the infrastructure manager is not independent of any railway undertaking in its legal form, organisation or decision-making functions, it may be entrusted only with the collection of charges. That function is not, therefore, regarded as essential for the purpose of ensuring equitable and non-discriminatory access to infrastructure. As an exception to the general rule that the infrastructure manager must be independent, 'collection' in this context must therefore be interpreted strictly, as advocated by the Commission.

83 Hungary draws a distinction between, on the one hand, the formulation and the setting of charges, which are the responsibility of the VPE, and, on the other, the collection of charges, which is entrusted to the infrastructure managers. According to that Member State, invoicing is simply the technical expression of the charges based on the calculations carried out by the VPE and thus forms part of the collection of charges.

84 It is clear that the Commission accepts that invoicing is technical or mechanical in nature. It should also be noted that, according to the Commission, the determination of charges includes, in addition to the general setting of charges in the Network Operating Rules, the specific calculation of the amounts payable by the various users, on the basis of the length of track section used.

85 It is apparent from the written pleadings submitted by Hungary that the VPE establishes general charging rules in the Network Operating Rules and sets the amounts to be paid by individual users, taking account of the length of track section they intend to use, its characteristics and the services proposed when in operation.

86 Since, in Hungary, the specific calculation of the amount of the charge payable is carried out by the VPE, the Commission's first argument, to the effect that invoicing forms part of the determination of charges, cannot be accepted.

87 The second argument put forward by the Commission maintains that invoicing confers on the railway undertakings concerned, namely the MÁV and the GySEV, a competitive advantage in so far as they are able to obtain access to information on the services used by competing railway undertakings, the volume of services and the times at which they are used.

88 It is clear that Article 6(3) of Directive 91/440 and Article 4(2) of Directive 2001/14 allow a railway undertaking to collect or recover charges. In those circumstances, the possibility cannot be ruled out that such a railway undertaking will be aware of the supporting information on which the invoices they are responsible for processing are based. In that regard, as observed by the Advocate General at point 85 of his Opinion, there is no decisive difference between invoicing carried out by the mechanical application of a calculation formula to data supplied to the collecting entity and the collection of the amounts which appear on invoices prepared by a third party.

89 The second argument put forward by the Commission in support of its second complaint cannot therefore be accepted and, accordingly, the second complaint must be rejected.

The third complaint: the financial equilibrium of the infrastructure manager and incentives to reduce costs and charges

Arguments of the parties

90 The Commission claims that Hungary has failed to lay down conditions to ensure that the accounts of infrastructure managers are balanced, contrary to the requirements of Article 6(1) of Directive 2001/14. It notes that Article 28(1) of the Law on rail transport provides that the minister responsible is to undertake by contractual agreement to fund all expenditure recognised as justified incurred in the management of the network by the railway undertaking entrusted with infrastructure management. No such contractual agreement has so far been concluded.

91 Similarly, the Commission maintains that the Hungarian legislation at issue contains no incentives to reduce costs and charges, contrary to the requirements of Article 6(2) and (3) of Directive 2001/14. It refers to Article 28(1) of the Law on rail transport, which provides that the contractual agreement mentioned in that provision must provide infrastructure managers with incentives to reduce their management costs and network access charges.

92 Hungary states that a draft contractual agreement within the meaning of Article 28(1) of the Law on rail transport is in the process of being prepared.

93 In its reply, the Commission states that it has not yet received the draft contractual agreement and is therefore not in a position to assess whether the terms of that agreement comply with Directive 2001/14.

Findings of the Court

94 It should be noted, first, that the first subparagraph of Article 6(1) of Directive 2001/14 provides that the Member States are required to lay down appropriate conditions to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager are at least to balance income from charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other. In accordance with Article 6(2) of the directive, infrastructure managers are to be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

95 It is sufficient to note in that regard that Hungary does not dispute this complaint. It simply submits that the draft of the contractual agreement referred to in Article 28(1) of the Law on rail transport, by which the minister responsible undertakes to fund the expenditure incurred in the management of the infrastructure, and which is required to provide infrastructure managers with incentives to reduce their management costs and access charges, is in the process of being prepared.

96 It is established case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-89/09 *Commission* v *France* [2010] ECR I-12941, paragraph 18, and the judgment of 14 April 2011 in Case C-390/10 *Commission* v *Luxembourg*, paragraph 11).

97 In the present case, it is common ground that, at the expiry of the period laid down in the reasoned opinion, the draft contract intended to implement the requirements of Article 6(1) and (2) of Directive 2001/14 had not yet been adopted.

98 The third complaint raised by the Commission in support of its action is therefore well founded.

The fourth complaint, concerning the establishment of charges on the basis of the direct costs

Arguments of the parties

99 The Commission claims that the Hungarian legislation at issue fails to comply with Article 7(3) of Directive 2001/14, in so far as it does not at present contain any measure ensuring application of the 'direct costs' principle, contrary to the requirements of that provision.

100 In its defence, Hungary states that the VPE adopted Regulation No 83/2007 (X.6) GKM-PM, which lays down the method for establishing charges. That method entered into force on 12 December 2010 for a period of five years with effect from the financial year 2010-2011. Under that method, charges are set on the basis of factual data pertaining to costs and performance during the infrastructure manager's previous financial year. Hungary adds that an overall mark-up was applied for basic services under Article 55(8) of the Law on rail transport, in order to ensure that infrastructure access charges cover the infrastructure managers' justified costs. It is for the National Transport Authority to review the increase in those charges.

101 In its reply, the Commission points out that the document approving the method of establishing charges has not yet been sent to it and contends, on the basis of its reading of the defence, that that method does not in its view appear to meet the requirements of Article 7 of Directive 2001/14.

102 The Republic of Poland notes that the Commission stated in its reasoned opinion that the direct costs referred to in Article 7(3) of Directive 2001/14 should be 35% of the total cost of infrastructure maintenance. According to that Member State, that statement is not based on any provision in Directive 2001/14, since the latter does not define the cost that is directly incurred as a result of operating the train service and the Member States have a certain degree of flexibility in setting infrastructure access charges.

Findings of the Court

103 By its fourth complaint, the Commission claims in essence that the Hungarian legislation at issue fails to apply the direct costs principle, required by Article 7(3) of Directive 2001/14.

104 Under that provision, the charges for the minimum access package and track access to service facilities are to 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 Directive 2001/14.

105 In the present case, it is common ground that, at the expiry of the period laid down in the reasoned opinion, that is by 8 December 2009, Hungarian legislation had not introduced any method of calculating charges based on the direct costs principle, such legislation having come into force only on 12 December 2010.

106 The fourth complaint raised by the Commission in support of its action is therefore well founded.

107 It follows from all the foregoing considerations, first, that, by failing, within the period prescribed, to bring into force all the laws, regulations and administrative provisions necessary to comply with Article 6(1) and (2) and Article 7(3) of Directive 2001/14, Hungary has failed to comply with its obligations under those provisions and, second, that the application must be dismissed as to the remainder.

Costs

108 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 Hungary have each been successful in two of the four pleas, they must be ordered to bear their own costs. 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 Czech Republic and the Republic of Poland are to be ordered to bear their own costs.

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

1. **Declares that, by failing, within the period prescribed, to bring into force all the laws, regulations and administrative provisions necessary to comply with Article 6(1) and (2) and Article 7(3) 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 2007/58/EC of the European Parliament and of the Council of 23 October 2007, Hungary has failed to comply with its obligations under those provisions;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission and Hungary to bear their own costs;**

4. **Orders the Czech Republic and the Republic of Poland to bear their own costs.**

[Signatures]