Case C-120/20

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 March 2020

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

28 November 2019

Appellant:

Koleje Mazowieckie — KM sp. z o.o.

Respondents:

Skarb Państwa — Minister Infrastruktury i Budownictwa, now Minister Infrastruktury, and Prezes Urzędu Transportu Kolejowego

PKP Polskie Linie Kolejowe S.A.

Subject matter of the main proceedings

Proceedings concerning the payment of an amount of PLN 220 204 408.72, plus interest, by way of basic charges for minimum access to railway infrastructure during railway timetable periods between 2009 and 2013 levied on the appellant, in its view unduly, on account of the incorrect transposition of Directive 2001/14

Subject matter and legal basis of the questions referred

Interpretation of Article 4(5), Article 7(3), Article 8(1) and Article 30(1), (3), (5) and (6) of Directive 2001/14.

Article 267 of the Treaty on the Functioning of the European Union (‘TFEU’).

Questions referred

(1) Are the provisions of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001, and in particular Article 4(5) and Article 30(1), (3), (5) and (6) thereof, to be interpreted as precluding a railway undertaking from claiming, with no judicial review of the decision of a supervisory body, damages against a Member State on grounds of incorrect implementation of a directive in a situation where an element of the damages is an overpaid charge for the use of railway infrastructure?

(2) Does the assumption that a right to damages under Community law for misapplication of EU law, and in particular the incorrect implementation or non-implementation of a directive, exists only where the rule of law infringed is intended to confer rights on individuals, the infringement of the law is qualified in nature (in particular in the form of manifest and grave disregard of a Member State's discretion in implementing a directive), and the causal link between the infringement and the damage is direct in nature, preclude rules of law of a Member State which, in such cases, confer a right to damages where less stringent conditions are satisfied?

Provisions of EU law relied on

Article 4(5), Article 7(3), Article 8(1) and Article 30(1), (3), (5) and (6) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29; 'Directive 2001/14')

Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32)

Commission Implementing Regulation (EU) 2015/909 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)

Second paragraph of Article 340 TFEU

Provisions of national law relied on

Articles 361, 417 and 417^1 of the Civil Code

Articles 33 and 35 of the Ustawa o transporcie kolejowym (Law on rail transport) of 28 March 2003 in the version in force in the period concerned by the dispute

(consolidated version, *Dziennik Ustaw* of 2016, item 1727, as amended; now: consolidated version, *Dziennik Ustaw* of 2019, item 710, as amended; 'the Law on rail transport')

Paragraph 8 of the Regulation of the Minister Infrastruktury (Minister for Infrastructure) of 27 February 2009 concerning conditions for access to and the use of railway infrastructure (*Dziennik Ustaw* No 35, item 274; 'the 2009 Ministerial Regulation')

Cited case-law of the Court of Justice

Judgment of the Court of Justice of the European Union ('the Court of Justice') of 30 May 2013, C-512/10, *Commission* v *Poland*, EU:C:2013:338 ('the judgment in *Commission* v *Poland*'); and also judgments of 9 November 2017, C-489/15 *CTL Logistics GmbH* v *DB Netz AG*, EU:C:2017:834, paragraphs 77, 78, 87 to 92, and 97 to 99; of 5 March 1996, C-46/93 and C-48/93, *Brasserie du pecheur S.A.*, EU:C:1996:79, paragraphs 42, 51, and 66; and of 19 November 1991, C-6/90 and C-9/90, *Francovich and Others*, EU:C:1991:428

Summary of the facts and the procedure

1 By judgment of 24 March 2016, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) dismissed the action brought by Koleje Mazowieckie — KM sp. z o.o., in Warsaw, ('KM' or 'the appellant') against the Skarb Państwa — Minister Rozwoju i Prezes Urzędu Transportu Kolejowego (Public Treasury — Minister for Development and President of the Rail Transport Office) and PKP Polskie Linie Kolejowe S.A., in Warsaw ('PKP PLK' [or 'the respondent company']), for payment, jointly and severally, of an amount of PLN 220 204 408.72, plus interest from 6 December 2014 to the date of payment.

2 The appellant derived its claim from the fact that the respondent company had levied on it inflated amounts by way of basic charges for minimum access to railway infrastructure during railway timetable periods between 2009 and 2013. It argued that the charges had been set and levied as a result of the issue, effect and application of the 2009 Ministerial Regulation, issued pursuant to Article 35 of the Law on rail transport, which was contrary to Directive 2001/14, as confirmed by the judgment in *Commission* v *Poland*. As a basis for its claim, the appellant also relied on provisions relating to undue consideration. The respondents contended that the action should be dismissed.

3 The above judgment was given on the basis of the following findings: the appellant is a rail carrier, and at the same time a municipal company, whose activities are not aimed at maximising profit, but meeting the needs of the public in terms of public transport. The shares in that company are owned by the Województwo Mazowieckie (Regional Authority of Mazovia). The respondent

company is a railway infrastructure manager, and its founder and shareholder is Polskie Koleje Państwowe S.A. (Polish State Railways, a public limited company), in Warsaw ('PKP'); in addition, as at 31 December 2013 the Public Treasury, which at the same time is a shareholder of PKP, was also a shareholder of the respondent company. That company's activities include service activities incidental to land transportation, in particular the operation of rail traffic and the administration of railway lines, and also maintenance of railway lines in a state which ensures the efficient and safe transportation of people and goods, the regularity and safety of rail traffic, fire protection, and protection of the environment and railway property. PKP PLK manages 98% of the rail network in Poland.

4 KM and PKP PLK concluded contracts on the use of allocated train paths for the years 2009 to 2011, pursuant to which the respondent company provided rail infrastructure to the appellant, allocating it train paths on railway lines and facilitating use of the necessary railway infrastructure. Those contracts were concluded for consecutive timetable periods. The appellant used the infrastructure provided for consideration. The basic charge for minimum access to railway infrastructure constitutes the sum of the products of the kilometres covered by the carrier's trains and the unit rates of the basic charge for minimum access to railway infrastructure assigned to the individual sections of railway line by the infrastructure manager. The amount of the charge is the product of the number of services and the unit rates of the charges for individual services. The unit rates, calculated beforehand by the infrastructure manager, were approved by decisions of the President of the Rail Transport Office ('the President of the RTO'). In the years 2011 to 2013 the parties did not conclude contracts and the decisions of the President of the RTO laying down the conditions for providing railway infrastructure, which replaced the contracts, were in force. The respondent company issued invoices for the use by the appellant of the railway infrastructure managed by the respondent company. The appellant was charged and paid to PKP PLK a total of PLN 537 633 779.10 by way of charges for minimum access to railway infrastructure in the timetable periods 2009/2010, 2010/2011, 2011/2012 and 2012/2013.

5 On 19 May 2009 the appellant (the operator) concluded with the Regional Authority of Mazovia (the organiser) a framework agreement for the provision of public services concerning the provision of regional rail passenger services in the territory of the Regional Authority of Mazovia during 15 consecutive timetable periods from 13 December 2009 to 14 December 2024. The entire cost incurred in providing the public services not covered by the carrier's revenue is covered by the compensation provided by the organiser. In Paragraph 5(1) of the agreement the organiser undertook to cover the operator's losses arising from operation of the services, the compensation being the difference between the documented costs and the revenues relating to the transport activities covered by the framework agreement and a reasonable profit.

6 On 26 October 2010 the European Commission brought an action against the Republic of Poland before the Court of Justice seeking a declaration that, by failing to transpose correctly the provisions on the levying of charges for the use of railway infrastructure contained in Directive 2001/14, as amended by Directive 2004/49/EC, the Republic of Poland had failed to fulfil its obligations under Article 6(3) of, and Annex II to, Directive 91/440, Article 4(2), Article 6(2) and (3), Article 7(3), Article 8(1) and Article 14(2) of Directive 2001/14, and also Article 6(1) of Directive 2001/14, read in conjunction with Article 7(3) and (4) of Directive 91/440. In the judgment in *Commission* v *Poland* the Court of Justice ruled that by permitting the inclusion, in the calculation of charges levied for the minimum access package and track access to service facilities, of costs which could not be regarded as costs directly incurred as a result of operating the train service, the Republic of Poland had failed to fulfil its obligations under Article 7(3) of Directive 2001/14, as amended by Directive 2004/49.

7 On the basis of the established facts the Sąd Okręgowy found that there are no legal bases for granting the application. It pointed out that the case-law of the Court of Justice may also constitute a precedent within the meaning of Article 417^1(1) of the Civil Code (see paragraph 36 below). In proceedings before the Court of Justice an act may be declared incompatible with a ratified international agreement, which the *acquis communautaire* must be construed as constituting. On the other hand, according to the case-law of the Court of Justice, national courts examining claims for compensation are themselves entitled to rule on the condition relating to unlawfulness without it being confirmed in 'appropriate proceedings' by the Court of Justice or any other body. If, however, a ruling of the Court of Justice finding that EU law has been infringed by a Member State has been given, a national court may not rule on whether the condition relating to sufficiently serious infringement has been satisfied merely on that basis. In an action the Court of Justice merely finds that the law has in fact been infringed by the Member State and the condition relating to liability for damages is not normal, but qualified, unlawfulness. Therefore, a situation is permissible in which an infringement of EU law is found in a ruling of the Court of Justice, but the Member State does not bear liability for compensating for the damage caused by that infringement.

8 The Sąd Okręgowy concurred with the argument, put forward by the Public Treasury, that its liability may be established in the event of non-implementation (incomplete or incorrect implementation) pursuant to Article 417(1) of the Civil Code, (under which 'liability for any damage caused by acts or omissions in the exercise of State authority which are incompatible with the law shall be borne by the Public Treasury or the relevant regional authority or other legal person exercising such authority by virtue of the law'), in conjunction with Article 417^1(4) thereof (see paragraph 36 below), and not Article 417^1(1) thereof. The obligation to compensate for damage must arise from particular provisions of the law and be specified in terms of time and content so that it is possible to establish the time until which the normative act covered thereby should be issued and what its content should be.

9 The position of the Sąd Okręgowy is that the case-law of the Court of Justice sets out the following conditions relating to State liability for infringement of the provisions of a directive: the aim of the directive must be to confer rights on individuals and the content of those rights must be unconditional, precise and quantifiable on the basis of the provisions of the directive; there must be a causal link between the State's infringement of the directive and the damage sustained by the individual; and that infringement must be sufficiently serious in nature. However, the Sąd Okręgowy considers that Directive 2001/14 does not confer on the appellant any subjective rights to pay fees for the use of railway infrastructure up to a given maximum amount. The aim thereof was to safeguard equitable and non-discriminatory access to railway infrastructure for all undertakings and to promote a dynamic, competition-oriented, and transparent railway market in the European Union. The legislature's intentions are set out directly in the provisions of that directive. Directive 2012/34, which repealed Directive 2001/14, also stated that rail carriers should bear only the cost directly incurred as a result of operating the train service, but at the same time required the Commission to issue the relevant implementing acts setting out the modalities for the calculation of that cost and enabled the infrastructure manager to adapt to the modalities for charging during a period of 4 years after the entry into force of those acts (Article 31(3)). This contradicts the assumption that the aim of Article 7(3) of Directive 2001/14 was to confer subjective rights on individuals. In the view of the Sąd Okręgowy, it is not possible, on the basis of the content of Directive 2001/14, to define precisely the scope of the rights conferred on the individual, which entails the non-specific definition 'the cost that is directly incurred as a result of operating the train service'.

10 Furthermore, the manager may apply additional charging criteria by levying mark-ups on the basis of efficient, transparent and non-discriminatory principles guaranteeing optimal competitiveness, and also discounts in so far as is provided for in the directive and within the limits laid down by the individual Member States. This means that the directive confers on the manager the right to set rates at a level higher than the cost that is directly incurred as a result of operating the train service. The provisions of EU law and the case-law of the Court of Justice did not, and do not, provide bases for determining the cost which may form the basis for calculating the basic charge for minimum access to railway infrastructure. The rules governing the calculation and levying of charges for the use of infrastructure were laid down in Article 31(3) of Directive 2012/34, which states that the charges for the minimum access package and for access to infrastructure connecting service facilities are to be set at the cost that is directly incurred as a result of operating the train service. The content of that provision is identical to that of Article 7(3) of Directive 2001/14, which was the basis for the Court of Justice's assessment of the provisions in force in Poland. The term 'costs directly incurred as a result of operating the train service' was first clarified in EU law in Regulation 2015/909 (in Articles 3 and 4). At the same time, under Article 31(3) of Directive 2012/34 and Article 9 of the abovementioned regulation, the infrastructure manager was required to submit its method of calculating the direct costs and, if applicable, a phasing-in plan to the regulatory

body no later than 3 July 2017. However, the infrastructure manager was able gradually to adapt to the rules laid down in that regulation by 1 August 2019.

11 Therefore, the Sąd Okręgowy ruled that the content of Article 7(3) of Directive 2001/14 cannot be regarded as sufficiently precise and thus that its incomplete implementation provided grounds for compensation for its infringement by the State since application of that provision was de facto made dependent on the implementation of further measures adopted by the Member States.

12 As regards unlawfulness, the Sąd Okręgowy noted that it must be 'qualified unlawfulness', and therefore the infringement of EU law must be sufficiently serious. Incorrect implementation of a directive, unlike non-implementation, does not determine whether or not the condition relating to serious infringement of the law has been satisfied. The infringed rule of Directive 2001/14 was so unclear and imprecise that it caused uncertainty in the practice of many Member States, which resulted in the Commission bringing several actions against them. Neither the directive nor the case-law of the Court of Justice expressly and unequivocally defines the category of cost which is to be taken into consideration in the cost base. In the view of the Sąd Okręgowy, this shows that there are no grounds for assuming State liability under the rules of Community law or the provisions of national law. The mere issuing by the Court of Justice of a ruling finding that national law is incompatible with EU law does not determine whether or not an act of a public authority is lawful. It is possible to conclude from the judgment in *Commission* v *Poland* only that the amount of the charges for access to railway infrastructure was set incorrectly, but the Court of Justice did not find that the charges were inflated. Consequently, the failure by Poland to fulfil its obligation to implement Directive 2001/14 correctly does not mean that the price lists and rules drawn up by the respondent company were contrary to that directive, since, despite incorrect assumptions being made at the time of their calculation, the charges were levied by PKP PLK in the correct amount (that is, the amount permitted by EU law).

13 In addition, the entire cost incurred by the appellant for access to railway infrastructure was covered by the recipients of the services provided by it and by the Head of the Regional Authority of Mazovia. The compensation took full account of all the charges incurred by the appellant for the use of PKP PLK's railway infrastructure.

14 The appellant did not demonstrate that its difficult financial situation during the period at issue was caused solely by the need to incur costs for access to railway infrastructure. The amount of the charge for access to infrastructure did not affect the amount of the tariffs and price lists applied by the appellant since the rates approved by the President of the RTO were the same for all carriers. Consequently, the amount of the charges did not affect the appellant's competitiveness vis-à-vis other rail carriers.

15 As the Sąd Okręgowy emphasised, under Article 8(1) of Directive 2001/14 the basic charge for access to infrastructure may be fixed at an amount which allows managers to recover in full the cost of providing infrastructure. That provision makes it possible to fix charges for access to infrastructure at a higher level than that stated in Article 7(3) of that directive. A charge fixed on that basis can lead to full compensation of the cost incurred by the infrastructure manager since it introduces the principle of total costs. Thus, that provision provided the basis for fixing charges for access to infrastructure at a higher level than that stated by the appellant in the application on the basis of Article 7(3) of the directive. Even hypothetically accepting the need to apply the provisions of the directive directly, in the light of its incomplete implementation it is not possible to apply Article 7(3) of Directive 2001/14 without applying Article 8 thereof.

16 The Sąd Okręgowy emphasised that it is not possible to calculate a model charge for access to railway infrastructure by simply deducting certain categories of costs from the total costs since neither the directive nor the case-law of the Court of Justice specifies what the correct model for calculating the charge for access to the respondent company's [railway] infrastructure should be. Furthermore, there are no grounds for assuming that a causal link exists between the issue of the 2009 Ministerial Regulation and the damage caused since if the regulation had had a different content the appellant would not have been subject to inflated basic charges.

17 By judgment of 18 December 2017, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) dismissed the appeal lodged by the appellant. It concurred with the position of the Sąd Okręgowy. It added that the appellant was wrong to infer that the provisions of Directive 2001/14 conferred on it the right to pay charges for the use of railway infrastructure at a maximum amount — related to the direct cost. It is not possible to apply (interpret) Article 7(3) of the directive without having regard to Article 8 of that directive on account of the reference contained in Article 7(3) thereof.

18 In the view of the Sąd Apelacyjny, there are no grounds for assuming that Paragraph 8(1) of the 2009 Ministerial Regulation leads to an interpretation thereof contrary to a rule of higher-ranking national law, that is to say Article 33(2) of the Law on rail transport. On the contrary, the content of the latter provision indicates that the basic charge for the use of railway infrastructure is to be set in light of the costs directly incurred by the manager as a result of the rail carrier operating the train service. It does not therefore follow that those costs alone may form the basis for calculating the basic charge. Those costs are to be taken into account, and thus included in the cost base used to calculate the rate of the basic charge, which does not preclude other costs from also being entered in that cost base.

19 The appellant lodged an appeal on a point of law against the above judgment in its entirety, claiming infringement of provisions of substantive law: firstly Article 417^1(1) of the Civil Code, secondly Article 7(3) of Directive 2001/14 and

Article 33(2) of the Law on rail transport and, thirdly, Article 33(2) of the Law on rail transport (in the versions in force during the period covered by the action brought in the case) through misinterpretation of those provisions, as a result of which the Sąd Apelacyjny ruled that the respondents were correct to include in the cost base a number of costs other than those incurred directly (that is to say the indirect costs, all depreciation and the financing costs).

Essential arguments of the parties to the main proceedings

20 The appellant claims that as a result of the incorrect transposition of Directive 2001/14 into Polish law it sustained damage since it was subject to inflated charges for the use of railway infrastructure during railway timetable periods between 2009 and 2013. In its view, the Polish State bears liability for that damage, for which it therefore seeks compensation.

21 The respondents contend that notwithstanding the incorrect transposition of Directive 2001/14 the State is not liable for the damage which the appellant has purportedly sustained. The charges for the use of railway infrastructure at issue did not exceed the amount permitted in EU law. The respondents consider that, having regard to EU law and the case-law of the Court of Justice, the conditions relating to State liability for such damage are not satisfied in the present case.

Reasons for the reference for a preliminary ruling

Grounds for the referral of Question 1

22 Directive 2001/14, which was addressed to the Member States of the European Union (Article 40) and which they were to transpose by 15 March 2003 (Article 38), entered into force on 15 March 2001.

23 Under the first sentence of Article 5(1) of that directive, railway undertakings are, on a non-discriminatory basis, to be entitled to the minimum access package and track access to service facilities that are described in Annex II. The directive primarily draws a distinction between two categories of service supplied by the infrastructure manager: ‘minimum access package’ services (point 1 of Annex II to the directive) and ‘track access to service facilities’ services (point 2 of Annex II to the directive). Article 4(5) of Directive 2001/14 provides that infrastructure managers are to ensure that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market and that the charges actually applied comply with the rules laid down in the network statement. In this regard, the Member States were required to create rules for funding the activities of the railway infrastructure manager such that its costs were at least balanced: on the one hand — income from infrastructure charges, surpluses from other commercial activities and State funding (and thus

public funding), and on the other — infrastructure expenditure (Article 6(1) of the directive).

24 Article 7 of Directive 2001/14 lays down the principles for charging for the use of railway infrastructure, and paragraph 3 thereof states that without prejudice to paragraphs 4 or 5 or to Article 8, 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. However, Article 8 of the directive sets out the exceptions to the charging principles laid down in Article 7.

25 Article 30 of Directive 2001/14 requires the Member States to establish a regulatory body whose task is, inter alia, to ensure that charges set by the infrastructure manager comply with Chapter II of the directive and are non-discriminatory.

26 At the time Poland acceded to the European Union (1 May 2004) the [Law on rail transport] was in force in Polish law. Article 33(1) thereof provided for charges for the use of railway infrastructure provided by the manager of that infrastructure. That manager is PKP PLK, which is owned (in the economic sense and indirectly in the legal sense) by the Public Treasury. The unit rates of the basic charges and the additional charges, together with the calculation of the amount thereof, are communicated for approval to the President of the RTO (Article 33(7) of the Law on rail transport), who, within 30 days of receiving the rates, approves them or refuses to approve them in the event that they are found to be incompatible with the principles referred to in paragraphs 2 to 6, Article 34 and the implementing provisions issued pursuant to Article 35 (Article 33(8) of the Law on rail transport).

27 From 6 December 2008, Article 33(2) of the Law on railway transport provided that the basic charge for the use of railway infrastructure is to be set having regard to the costs directly incurred by the manager as a result of the rail carrier operating the train service. The charge for the use of railway infrastructure was the sum of the basic charge and additional charges (Article 33(3) of the Law on rail transport). The basic charge is divided into the basic charge for minimum access to railway infrastructure, which encompasses the services listed in point 1 of Part I, of the annex to the law (inter alia for enabling a train to run on a railway line managed by a particular railway infrastructure manager) and the basic charge for access to equipment connected with train maintenance, which encompasses the services listed in point 2 of Part I of the annex to the law (inter alia for enabling use of the platforms at railway stopping points which are managed by a particular railway infrastructure manager). An additional charge is levied inter alia for the use of electricity transmitted in an overhead line system (Article 33(3a) of the Law on rail transport). Under Article 33(4) of the Law on rail transport, the basic charge for minimum access to railway infrastructure was to be calculated as the product of train runs and the unit rates set according to the category of railway line and type of train, such charge to be calculated separately for passenger transport and freight. However, under Article 33(4a) of the Law on rail transport,

the manager may apply a minimum unit rate for the basic charge for minimum access to the railway infrastructure. The minimum rate is to apply on an equivalent basis to all rail carriers for the use of the railway infrastructure in connection with activities performed under the agreement for the provision of public services.

28 The 2009 Ministerial Regulation, which was in force in the period from 13 March 2009 to 23 June 2014, was issued pursuant to Article 35 of the Law on rail transport. Under Paragraph 8(1) of that regulation, in calculating the rates for the planned provision of railway infrastructure, the manager must take into consideration: (1) the direct costs, which cover: (a) maintenance costs; (b) rail traffic management costs; and (c) depreciation; (2) the indirect costs of the activity, which cover reasonable costs incurred by the infrastructure manager other than those referred to in subparagraphs 1 and 3; (3) the financial costs relating to the repayment of loans taken out by the manager to develop and modernise the infrastructure provided; and (4) operational work established for the different categories of lines and trains referred to in Paragraph 7. The 2009 Ministerial Regulation was repealed by the Regulation of the Minister Infrastruktury i Rozwoju (Minister for Infrastructure and Development) of 5 June 2014 concerning conditions for access to and use of railway infrastructure (*Dziennik Ustaw* of 2014, item 788), which was in force from 24 June 2014.

29 The above provisions of the Law on rail transport and the 2004, 2006, 2009 and 2014 ministerial regulations issued pursuant thereto constituted implementation of Article 7(3) of Directive 2001/14.

30 In relation to the present case and the first question referred it should be noted that the liability of the Member State arises from the fact the provisions of Directive 2001/14 were not transposed correctly into Polish law.

31 It may be concluded from paragraphs 79 to 82 of the judgment in *Commission* v *Poland* that the damage arising from the incorrect transposition of Directive 2001/14 into national law may be the overpaid part of the charge for use of the railway infrastructure and in particular the elements affecting the amount of the damage as a result of the incorrect transposition of Directive 2001/14 are: in part, fixed costs relating to the provision of a stretch of line on the rail network which the manager must bear even in the absence of train movements, and the maintenance and rail traffic management costs referred to in Paragraph 8(1) of the 2009 Ministerial Regulation, and, in full, the indirect costs and financial costs listed in that provision and depreciation in so far as it is determined, not on the basis of actual wear of the infrastructure attributable to rail traffic, but with reference to accounting rules. It can be concluded that although in relation to the first of those elements the Member State enjoyed a certain discretion, which may arise from the indefinite phrase ‘in part’, in relation to the other two aspects the Member State was not granted such discretion, which means that they could not be an element of the rules of the 2009 Ministerial Regulation.

32 In the context of a case concerning compensation for failure to transpose Article 7(3) of Directive 2001/14 correctly, the judgment of the Court of Justice in *CTL Logistics GmbH* v *DB Netz AG* is relevant (see, inter alia, paragraphs 77, 78, 86 to 92, and 97 to 99). It related to the possibility of review by the civil courts of the amount of infrastructure charges instead of review of a decision of the supervisory body in appropriate proceedings. In that judgment the Court of Justice determined the permissibility or otherwise of ordinary courts reviewing the amount of charges for the use of railway infrastructure, on a case-by-case basis, and the possibility of amending those charges, independently of the monitoring carried out by the regulatory body referred to in Article 30 of Directive 2001/14. The subject matter of the proceedings under consideration by the Sąd Najwyższy (Supreme Court) is not directly the determination of the amount of such charges; however, the possible award of compensation from the Public Treasury or another person, an element of which would be an overpaid charge, could, from an economic point of view, lead to a situation identical to that of a decision on the amount of a charge in court proceedings. This gives rise to dangers similar to those set out in paragraphs 87 to 89 and 97 to 99 of the judgment of the Court of Justice in *CTL Logistics GmbH* v *DB Netz AG*.

33 In view of the foregoing, the Sąd Najwyższy, as a court against whose decisions there is no judicial remedy, takes the position that it is necessary to ascertain whether the provisions of Directive 2001/14, and in particular Article 4(5) and Article 30(1), (3), (5) and (6) thereof, are to be interpreted as precluding a railway undertaking from claiming, with no judicial review of the decision of a supervisory body, damages against a Member State on grounds of incorrect implementation of a directive in a situation where an element of the damages is an overpaid charge for the use of railway infrastructure (**Question 1**). In other words, is it legitimate to take the position that the incorrect implementation of a directive in national law, confirmed by the judgment in *Commission* v *Poland*, may result in a Member State being liable for damages vis-à-vis an operator on the market (a rail carrier), instead of the avenue provided by judicial review of the decision of a supervisory body (provided for in Article 30 of Directive 2001/14, including in paragraph 6 thereof), which was required to interpret Paragraph 8(1) of the 2009 Ministerial Regulation in the light of Article 7(3) of Directive 2001/14?

Grounds for the referral of Question 2

34 In the judgment in *Brasserie du pecheur* the Court of Justice found — in relation to failure to implement an EU directive — that in a situation where the national legislature has a ‘margin of discretion’ the liability of the Member State is contingent on three conditions being satisfied, namely: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the actions of the State must be vitiated by a sufficiently serious breach of the law; and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured person (paragraph 51). The case-law of the Court of Justice (including the above judgment) also emphasises that,

as regards the liability of the Member States for infringement of Community law, a manifest and grave disregard by a Member State for the limits on its discretion is fundamental in assessing whether or not there has been a serious breach of the law. It notes that the factors which the competent court may take into consideration are primarily the clarity and precision of the rule infringed, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

35 The Court of Justice derived the conditions relating to liability formulated above from the second paragraph of Article 215 of the Treaty establishing the European Economic Community, as amended by the Maastricht Treaty. The equivalent thereof currently in force is the second paragraph of Article 340 TFEU.

36 The Member State's liability for compensation serves not only to protect the individual, but also to ensure the application of EU law. The abovementioned conditions relating to the Member State's liability for compensation, derived from EU law but implemented and to a certain extent even laid down having regard to national law, are recognised by the Court of Justice as a necessary and at the same time sufficient condition of that liability vis-à-vis individuals for infringement of EU law. It would appear that the Court of Justice derives from the nature of those conditions, on the one hand, a prohibition on making the compensation by the State for damage caused by an infringement of EU law dependent, in national law, on substantive and procedural requirements for compensation for damage less favourable than those relating to similar domestic claims and requirements which mean that it is in practice impossible or excessively difficult to obtain compensation and, on the other, the conclusion that the State may incur liability for the abovementioned damage under national law where the conditions laid down in national law do not go beyond the requirements of EU law.

37 Under Article 417^1(1) of the Civil Code, if the damage was caused by the issuing of a normative act, compensation for that damage may be claimed once it has been established in appropriate proceedings that that act is incompatible with the Constitution of the Republic of Poland, a ratified international agreement or a law. However, under paragraph 4 of that article, if the damage was caused by a failure to issue a normative act, which is required to be issued by law, the incompatibility with the law of the failure to issue that act is to be determined by the court hearing the case relating to compensation for the damage. As regards the second situation, the prevailing view draws a distinction between two forms of legislative omission: (1) situations in which no legal act at all has been issued ('proper omission'); (2) situations in which such an act has been issued but contains only incomplete, fragmented rules which means that the possibility of exercising certain rights arising from, for example, another legal act is restricted or removed ('relative omission').

38 However, regardless of the basis of the State's liability, for there to be such liability in its area of responsibility, under national law in every situation the following conditions, inter alia, must be satisfied: there must be (1) an act or omission incompatible with the law; (2) damage; and (3) a causal link between the act or omission and the damage. To this should be added the special conditions laid down in the provisions of the law governing the particular situation.

39 Crucially, as regards State liability, it is assumed that an act or omission incompatible with the law, and thus 'unlawfulness', does not have to be qualified in nature and limited to cases of gross infringement of the law. Only in relation to liability under Article 417[1](2) of the Civil Code is reference made to the qualified nature of the unlawfulness, which, however, does not apply to the case under consideration.

40 At the same time, as pointed out above, the case-law of the Court of Justice refers to making the Member State's liability dependent on there being 'qualified unlawfulness', and thus the infringement of EU law being 'sufficiently serious'. Such infringement involving disregard for the limits on discretion must be manifest (gross) and grave (serious). Accordingly, in this case there is a situation where an act or omission by a public authority (for example in the event of the incorrect transposition of an EU directive) may be alleged under national law but — having regard to the position of the Court of Justice — under EU law the Member State may be exempted from liability for compensation.

41 A further issue is the need for there to be a causal link. In seeking to establish the liability of a public authority, the injured person must demonstrate to the national court that, inter alia, the act or omission incompatible with the law in the exercise of State authority resulted in damage; therefore there must be a link between those conditions for the purposes of Article 361 of the Civil Code, under which the person liable to pay compensation is to bear liability only for the normal consequences of the act or omission from which the damage arose. Within these limits, under Article 361(2) of the Civil Code the obligation to compensate for damage covers actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*).

42 In the light of Article 361(1) of the Civil Code even an indirect causal link between an incorrect act or omission and damage may provide grounds for liability for the damage.

43 In its case-law the Court of Justice refers to the direct causal link theory when considering the liability of a Member State for legislative omission (related, for example, to the transposition of an EU directive). Thus, in contrast to national legislation, any damage which is only indirectly related to an act or omission by a public authority would be excluded.

44 In the light of the foregoing considerations, the question arises as to whether the assumption that a right to damages under EU law for misapplication of that law,

and in particular the incorrect transposition or non-transposition of a directive, exists only where the rule of law infringed is intended to confer rights on individuals, the infringement of the law is qualified in nature, and the causal link between the infringement and the damage is direct in nature, precludes rules of law of a Member State which, in such cases, confer a right to damages where less stringent conditions are satisfied (**Question 2**). If national law lays down less stringent conditions relating to a Member State's liability for the incorrect transposition or non-transposition of a directive than EU law, the assumption of the primacy of EU law over national laws would mean that that State would be exempt from liability for compensation for that act or omission, which does not appear to be compatible with the principles of equity.

45 The need to answer Question 2 also arises from doubts as to the content of the judgment in *Brasserie du pecheur*, which is of particular importance as regards Member States' liability for infringement of EU law. Paragraph 42 of that judgment states as follows: '… the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage'.

46 Since the above section of the grounds of that judgment of the Court of Justice refers to a uniform standard for liability for damages currently laid down in the second paragraph of Article 340 TFEU, this clearly supports an answer in the affirmative to Question 2, that is to say an assumption that the rules of EU law preclude less stringent rules of national law for injured persons. The Sąd Okręgowy and Sąd Apelacyjny clearly made the same assumption in the present case. On the other hand, however, paragraph 66 of that ruling of the Court of Justice states as follows: 'The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law'. The Sąd Najwyższy is inclined to concur with the second position.