PROBLEMY KOLEJNICTWA
RAILWAY REPORT Issue 194 (March 2022)
INSTYTUT KOLEJNICTWA
DOI: 10.36137/1944E
ISSN 0552-2145 (print) ISSN 2544-9451 (on-line)

Minimum Access Package to Railway Infrastructure Versus Services in Service Facilities – a Gloss to the Judgment of the Court of Justice of the European Union of 10 July 2019 in Case C-210/18

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Summary
An in-depth analysis of the legislation and legislative material with reference to the professional literature leads to the conclusion that the Court of Justice's interpretation is incorrect and leads to problems in distinguishing between the minimum access package and the scope of services in service facilities.

Keywords: railway infrastructure, minimum access package, service facilities, passenger stations, platforms, freight terminals

1. Introduction

The purpose of the gloss is to analyse the interpretation of the provisions of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012. establishing a single European railway area[2] [1] contained in the judgment of the Court of Justice in case C-210/18 [2] and its consequences. Discussions of this judgment have been published to date [3, 4, 5], but these have not attempted to assess the reasoning behind it. The Court's interpretation extended the scope of the minimum access package to railway infrastructure and limited the scope of the service facility – the passenger station. The consequences of the judgment are changes to the charges for the minimum access package and for the use of service facilities. The Court of Justice has already ruled on the new case C-453/20 which is undoubtedly a consequence of the earlier judgment concerning goods platforms, in connection with preliminary questions put by the Czech Úřad pro přístup k dopravní infrastruktuře (Office for Access to Transport Infrastructure) [6, 7, 8]. In case C-453/20, the Court held that the reference for a preliminary ruling was inadmissible because the requesting authority could not be regarded as a court or tribunal within the meaning of Art. 267 of the Treaty on the Functioning of the European Union [9]. However, further cases are to be expected, as the distinction between the scope of the minimum access package to railway infrastructure and service facilities has been blurred as a result of the judgment in case C-210/18.

2. Judgment of the Court of Justice in case C-210/18

The Schienen-Control Kommission, hearing an appeal by the railway undertaking WESTbahn Management GmbH against the Austrian railway infrastructure manager ÖBB-Infrastruktur AG concerning the charges for the use of passenger platforms, has referred two questions to the Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union:

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

2) If Question 1 is answered in the negative:

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

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[2] Hereinafter also "Directive 2012/34".

The Court of Justice provided a single answer to both questions as follows: "Annex II to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area must be interpreted as meaning that 'passenger platforms', referred to in Annex I to that directive, are an element of the railway infrastructure the use of which is part of the minimum access package, in accordance with point 1(c) of Annex II."

The Court referred to the definition of railway infrastructure in Art. 3(3) of Directive 2012/34, according to which it consists of the elements listed in Annex I to that Directive, among which are "passenger and goods platforms, including in passenger stations and freight terminals"[3]. According to the Court: "Accordingly, if passenger platforms are part of the railway infrastructure, it necessarily follows that their use falls, in accordance with point 1(c) of Annex II to that directive, under the heading 'use of the railway infrastructure'"[4]. In the Court's view, the use of passenger platforms is covered by the minimum access package.[5]

The Court did not follow the reasoning of Advocate General M. Campos Sánchez-Bordona [10], which expresses the view that railway infrastructure and service facilities are distinct from one another. However, given that the point of singling out service facilities is that the services provided therein are not covered by the minimum access package, the Court's ruling nevertheless reflects the view that, for the purposes of Directive 2012/34, the concepts of railway infrastructure and service facilities are distinct concepts.

With regard to the relationship between the concepts of passenger stations and platforms, the Court stated: "Next, the fact that, when Directive 2012/34 was adopted, the legislature stated, in Annex I to that directive, that the railway infrastructure consists, inter alia, of passenger platforms, 'including in passenger stations', shows the intention to draw a distinction between passenger platforms, on the one hand, and passenger stations on the other, with only the latter constituting service facilities within the meaning of point 2(a) of Annex II to that directive".[6]

The Court found its interpretation to be consistent with the aims of the Directive (as derived from its recitals 3, 7, 8 and 26) to improve "the efficiency of the railway system in order to integrate it into a competitive market, by stimulating, inter alia, fair competition in the area of the operation of rail transport services and by ensuring the application of the principle of the freedom to provide services to the railway sector".[7] The Court stated that "precisely for those purposes that Directive 2012/34, in accordance with its recital 65, defines the components of the infrastructure service which are essential to enable an operator to provide a service and which should be provided in return for minimum access charges."[8] The Court emphasised that the application of the provisions of Art. 13(1) and Art. 31(3) of Directive 2012/34 provides railway undertakings with cheaper and easier access to platforms than if that access were to be provided by a service facility.[9]

Following the Advocate General, the Court argued "that this Annex II has not been amended in any way by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34 as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure" [11]. In the Court's (and the Advocate General's) view, the conclusion "that the EU legislature had intended to extend the minimum access package in order to include the use of passenger platforms as a component of rail infrastructure" follows from the failure to amend Annex II by the Directive.[10]

The Court refused to limit the temporal effects of the judgment, pointing out that ÖBB-Infrastruktur had not provided any concrete evidence concerning the number of legal relationships entered into in good faith or the nature and extent of the economic burden resulting from their termination, so that it had not demonstrated the existence of exceptional circumstances justifying the limitation of the temporal effects of the present judgment.[11]

[3] Paragraphs 23 and 24 of the judgment.
[4] Paragraph 25 of the judgment.
[5] Paragraphs 26 and 30 of the judgment.
[6] Paragraph 31 of the judgment.
[7] Paragraph 35 of the judgment.
[8] Paragraph 36 of the judgment.
[9] Paragraphs 37 and 38 of the judgment.
[10] Paragraph 32 of the judgment; Point 39 of the Opinion.
[11] Paragraphs 47 and 48 of the judgment.

3. Commentary on the Court's judgment

3.1. Distinction between railway infrastructure and service facilities

It is not difficult to see that Annex I to Directive 2012/34 indicates the railway infrastructure elements which are simultaneously part of the service facilities listed in point 2 of Annex II to that Directive [12], [13, p. 5], [14, p. 24], [15, p. 12], [16, p. 83]. For example, the seventh indent of Annex I lists "Safety, signalling and telecommunications installations (...) in stations and in marshalling yards, including plant for generating, transforming and distributing electric current for signalling and telecommunications; buildings for such installations". At the same time, in point 2(c) of Annex II, marshalling yards are indicated as service facilities. It cannot be assumed that marshalling yards are service facilities, but safety, signalling and telecommunication installations and equipment for the generation and distribution of electricity in the yards are not. Furthermore, since the installations listed here are classified as railway infrastructure, it means that they are part of the way, according to the assumption expressed at the beginning of Annex I. Under these circumstances, the track and track bed at marshalling yards must also be classified as railway infrastructure, as well as the other elements listed in Annex I to Directive 2012/34. So if we removed elements of railway infrastructure from a marshalling yard, there would be nothing left of it.

A similar situation applies to storage sidings. In professional literature, they are classified, similarly to marshalling tracks, as sidings[12] [17, p. 57], [18, p. 181]. Here, too, after removing the railway infrastructure elements, nothing will remain of the service facilities.

Other service facilities will also contain elements of railway infrastructure, except only in the cases described in the introduction of Annex I, i.e. excluding "lines situated within railway repair workshops, depots or locomotive sheds, and private branch lines or sidings". It should also be noted that Art. 4(2)(c) of Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services [19] lists "sidings[13] or shunting and marshalling tracks", and thus also elements of railway infrastructure, among the examples of elements of service facility.

These arguments lead to the conclusion that the view that elements of railway infrastructure cannot at the same time be elements of service facilities leads to absurd consequences.

3.2. Platforms and passenger stations

The Court's judgment (and the Advocate General's opinion) fails to take into account the EU rules on passenger stations. In accordance with Art. 10(2) of Directive 2012/34: "Railway undertakings shall have the right to pick up passengers at any station and set them down at another." Therefore, it follows that the notion of station includes all places where trains can stop and passengers can get on and off, including passenger stops.

Art. 2(d) of Commission Implementing Regulation (EU) 2015/1100 of 7 July 2015 on the reporting obligations of Member States in the framework of railway market monitoring provides a definition of station, according to which it means a "location on a railway where a passenger train service can start, stop or end" [23]. An almost identical definition of station is given in the Glossary in point 8 of Annex I to Commission Regulation (EU) No 454/2011 of 5 May 2011 on the technical specification for interoperability relating to the subsystem 'telematics applications for passenger services', according to which a station "means a railway location where a passenger train can start, stop or end" [24]. Passenger stops as places where a passenger train can stop are therefore covered by the quoted

[12] In the definition contained in Article 3(29) of the English version of Directive 2012/34, "storage sidings" (Polish: tory postojowe) are referred to as a type of sidings or secondary tracks (depending on how the term "sidings" is translated), which are explicitly classified as railway infrastructure in Annex I to the Directive. For a discrepancy in the translation of the term „siding" see footnote 13.

[13] In the English version "sidings"(Polish: bocznice). In the Polish versions of EU acts, the term is also translated as "tory boczne", see for example the glossary in Appendix J of Annex I of Commission Implementing Regulation (EU) 2019/773 of 16 May 2019 on the technical specification for interoperability relating to the operation and traffic management subsystem of the rail system within the European Union and repealing Decision 2012/757/EU [20], where the term "tor boczny" (in English "siding") is defined as, "Any track(s) within an operational point which is not used for operational routing of a train." The same definition is contained in paragraph 3.1.(5) of the Annex to Commission Implementing Regulation (EU) 2019/777 of 16 May 2019 on the common specifications of the register of railway infrastructure and repealing Implementing Decision 2014/880/EU [21], where the equivalent of the term "siding" in the English version is the term "bocznica" in the Polish version. However, the wording of the definition indicates that it refers to an element that would be reffered to in Polish as "tor boczny". For a description of the interpretation of this concept in different Member States, see [22, pp. 5–10].

station definitions, as is also clear from the wording of this specification.[14]

The concept of station is similarly used in recital 17 and in Art. 9(5), Art. 22(1) and (3) and Art. 26 of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [25]. The new Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations [26] provides definitions in the provisions of Art. 3(10)[15], (11)[16], (18)[17] and (22)[18], which show that the concept of station includes a passenger stop and, furthermore, that a platform is an element of a station.

Importantly, the wording of Art. 10(2) of Directive 2012/34 on picking up and setting down of passengers at a station leads to the conclusion that stations include platforms, as platforms are the parts of the station used for picking up and setting down.

This is also confirmed by other EU legislation. The definition of a platform in point 8 of Annex I of the aforementioned Regulation 454/2011 on the TSI relating to the subsystem 'telematics applications for passenger services', states: "Platform means the area at a station to alight from/board train" [24].

Platforms are also included as passenger stations in the successive directives in force on the interoperability of the railway system – see point 2.1 of Annex II to Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (Recast) [27] and point 2.1 of Annex II to Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union [28].

The professional literature also classifies platforms as parts of stations, and furthermore indicates that a platform is also a place to sell tickets, a place where platform waiting rooms are located, as well as a place where information is made available to passengers, i.e. services typical of passenger stations are provided [18, p. 217 and 221]. Platforms can form the basis for the categorisation of passenger stations, which has an impact on station access charges [29, p. 98], [30, p. 18]. It should be added that platforms are also classified as components of passenger stations in UIC charters [31].

The distinction between a passenger station and a stop and the separation of the platform from the passenger station is therefore not sufficiently supported by EU law. There are sufficient grounds in EU legislation to assume that the notion of passenger station includes passenger stops and platforms.

The list of railway infrastructure elements set out in Annex I to Directive 2012/34 has been taken from Annex I to Commission Regulation (EEC) No 2598/70 of 18 December 1970 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Council Regulation (EEC) No 1108/70 of 4 June 1970 [32].[19] This Regulation, in the context of the definition of railway infrastructure, was referred to in the third indent of Art. 3 of Council Directive of 29 July 1991 on the development of the Community's railways (91/440/EEC) [34]. In the context of Regulation No 2598/70, the words "including in passenger stations and freight terminals" were not included in the context of passenger and goods platforms. These words were added to the list in Annex I during the Council's work on draft Directive 2012/34 [35]. The European Commission, in its Communication to the European Parliament, did not note this change, which implies that it considered it to be insignificant [36]. It may be noted here that platforms can exist in passenger stations as well as outside these stations (including outside passenger stops), to indicate platforms at service stops (not intended for use by passengers). However, it should be stressed that the wording "including in passenger stations" referring to platforms does not give grounds for assuming that platforms are not part of passenger stations, but quite the contrary. Therefore, it is difficult to assume on this basis that the intention of this provision was to exclude platforms from the scope of passenger stations.

[14] In the English version, for example, paragraphs 4.2.12.1, 4.2.13.1. The Polish language version also uses the concept of a stop, but, as can be seen in 4.2.13.1, it is identical to a station, as the requirement to give the name of the station applies to the stop.

[15] "(10) 'service' means a passenger rail transport service that operates between rail stations according to a timetable, including transport services offered for re-routing."

[16] "(11) 'journey' means the carriage of a passenger between a station of departure and a station of arrival;"

[17] "(18) 'arrival' means the moment when the doors of the train are opened on the destination platform and disembarkation is allowed."

[18] "(22) 'station' means a location on a railway where a rail passenger service can start, stop or end."

[19] It was replaced by Commission Regulation (EC) No 851/2006 of 9 June 2006 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Council Regulation (EEC) No 1108/70 (Codified version) without changing the content of the list from a different editorial layout [33].

In addition, the Court's interpretation implies that excluding passenger stations and access routes (which are also elements of railway infrastructure) from platforms undermines the existence of passenger stations where there are no railway stations. Following the reasoning of the Court, it should be assumed that if the platform is not part of a passenger station, then neither are elements of equipment connected to the platform, such as a ticket machine or display with announcements from transport operators.[20] Even if these elements were regarded as separate from the platform, having regard to the definition in Art. 3(11) of Directive 2012/34[21], it is difficult to assume that they will constitute a service facility – a passenger station. However, in order to correctly calculate the charges for using these services, it is necessary to include them either in the minimum access package or in the service facility – passenger station.

3.3. Scope of minimum access package

3.3.1. Right to use railway infrastructure

In support of the argument that Directive 2012/34 has extended the minimum access package, the Court has put forward several arguments. The most important of these, contained in paragraphs 25 and 26 of the judgment, is based on the assertion that the use of railway infrastructure elements is subject to use under the minimum access package and therefore cannot be subject to use under the provision of a service facility. This argument raises serious concerns.

Firstly, it can be pointed out that such a position undermines the point of singling out service facilities, as described in point 3.1 above.

In addition, numerous elements of railway infrastructure are not intended for use by railway undertakings and are therefore not provided as part of the minimum access package. However, railway infrastructure includes, inter alia, buildings used by the infrastructure department, four-foot ways, walkways, overpasses and underpasses, which are clearly not intended to be made available to transport operators.

It should be added that Directive 2012/34 included the provision in Art. 31(7): "The charge imposed for track access within service facilities referred to in point 2 of Annex II, and the supply of services in such facilities, shall not exceed the cost of providing it, plus a reasonable profit." This means that access to tracks in service facilities is not included in the minimum access package and is not included in the basic charge. The wording of Art. 31(7) of Directive 2012/34 is in no way reconcilable with the Court's interpretation. If access to the track forming part of the service facility, which is also an essential element of the railway infrastructure, is not covered by the minimum access package, it follows that, a fortiori, the other elements of the railway infrastructure forming part of that facility are not covered by the minimum access package.

The Advocate General deduced that track access within the meaning of Art. 13(2) and Art. 31(7) and point 2 of Annex II to Directive 2012/34 means "communication, by entry or departure, between services facilities and the rail network"[22], i.e. the use of the track does not fall within the scope of access to the service facility. The source of this view appears to be the Spanish version of Directive 2012/34 (in the Advisor General's native language), where, from the provision of Art. 31(7), it is clear that what is at issue are charges for access on tracks to service facilities[23] and not charges for access to tracks (to a line, to a road or similarly) within service facilities, as in almost all other language versions of the Directive.[24] Admittedly, the Court did not follow the Advisor General's argument, but did not analyse the content of Art. 31(7).

Therefore, clearly the view that the scope of the minimum access package includes the use of the entire railway infrastructure is unacceptable. This undermines the Court's main argument for including the use of platforms in the minimum access package. Since it does not follow from the fact that they are part of the railway infrastructure that their use will be included in the minimum access package, it becomes necessary to define the scope of the minimum access package.

[20] "Platform service facilities" – see e.g. for Denmark [30, p. 6 and 30].

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

[22] In the original version of the Advocate General's opinion: "comunicación de entrada y de salida entre las instalaciones de servicio y la vía férrea". The Polish version of the Advocate General's opinion contains an error and writes "infrastruktura kolejowa" (railway infrastructure) instead of "infrastruktura usługowa" (services facilities) [10 fn. 5].

[23] "El canon exigido para el acceso por vía férrea a las instalaciones de servicio".

[24] E.g. in the English version: "The charge imposed for track access within service facilities". Apart from the Spanish version, a significant difference is contained only in the Italian, Lithuanian and Latvian versions, where the provision in question deals with charges for access to service facilities without similar mention or reference to tracks.

It should also be noted that the Court judgment does not define the scope of the right to use the infrastructure as part of the minimum access package. In the case of platforms, this legislation could also include, for example, the placement of transport operator-specific information boards and ticket machines or a ticket counter on the platforms or on the access routes to the platforms, which could also be attributed to the essential importance of passenger transport operator services, although these are passenger station services as defined in point 2(a) of Annex II to Directive 2012/34. It should be stressed that the importance for transport operators' services is not a sufficient criterion for distinguishing the minimum access package, as it follows from recital 12 of Directive 2012/34 that services provided in service facilities also have such an importance.

3.3.2. The issue of the extent of use of railway infrastructure under the minimum access package

If the Court's judgment does not set out acceptable criteria for distinguishing the scope of the minimum access package from the services provided by service facilities, it is worth considering whether these criteria derive from the provisions of Directive 2012/34 on the scope of rights covered by the minimum access package.

In particular, attention should be drawn here to the provision of Art. 38(2), according to which: "The right to use specific infrastructure capacity in the form of a train path may be granted to applicants for a maximum duration of one working timetable period." In addition, a framework agreement may be concluded between a transport operator and an infrastructure manager under the provision of Art. 42. According to Art. 3(23), "framework contract means a legally binding general agreement under public or private law, setting out the rights and obligations of an applicant and the infrastructure manager in relation to the infrastructure capacity to be allocated and the charges to be levied over a period longer than one working timetable period."

Therefore, the scope of transport operator's rights relates to capacity and train path. According to the definition set out in Art. 3(24): "infrastructure capacity means the potential to schedule train paths requested for an element of infrastructure for a certain period". Whereas, as defined in Art. 3(27): "train path means the infrastructure capacity needed to run a train between two places over a given period."

It follows from the provisions referred to above that the minimum access package comprises services enabling trains to run.

Representative here is the position set out in the Commission Staff Working Document Accompanying the document Report From The Commission To The European Parliament And The Council Sixth report on monitoring development of the rail market, where the minimum access package is defined as "the essential components of the infrastructure service, such as use of tracks, traction current, train control services" [37, p. 60].

This understanding of the minimum access package is confirmed by the principles set out in the provision of Art. 31(3) of Directive 2012/34 for the setting of charges for the minimum access package and for access to infrastructure connecting service facilities, which "shall be set at the cost that is directly incurred as a result of operating the train service".[25] In accordance with Art. 5(1) of 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: "The infrastructure manager shall calculate average direct unit costs for the entire network by dividing the direct costs on a network-wide basis by the total number of vehicle kilometres, train kilometres or gross tonne kilometres forecasted for or actually operated" [38].

According to these regulations, in 24 European Union countries (including the UK), as well as Norway and Switzerland, covered by the Independent Regulators' Group – Rail reports, "Review of charging practices for the minimum access package in Europe, IRG-Rail (20)10" [39, p. 46] and "Updated review of charging practices for the minimum access package in Europe (Annex), IRG-Rail (20)10(Annex)" of November 2020 [40], charges for the minimum access package are calculated per route kilometre.

It is also worth noting that the charges for the minimum infrastructure access package set out in Art. 31(3) of Directive 2012/34 are also referred to in a number of provisions in the English version and in most other language versions of the Directive and in other EU legislation as track access charges, road access charges or similarly[26] [1, point 2 of Annex VIII], [11, recital 35], [23, Art. 2(a)], [41, recitals 3 and 6].

[25] For the English version and differences in translation in the Polish versions of the directives, see the penultimate paragraph (4) of this gloss.
[26] Except for the Polish version and a few other versions of some of the mentioned regulations, e.g. Italian, Czech, Lithuanian and Croatian versions.

In this context, the use of the phrase "for track access within service facilities" in Art. 31(7) of Directive 2012/34 in relation to charges for access to service facilities serves to distinguish between the subject matter of charges for the minimum access package and that of charges for access to service facilities.

These arguments support the assumption that the minimum access package and access charges relate to services enabling trains to run.

This conclusion is not altered by the fact that in some countries the scope of the minimum access package is broader. In Finland, Italy and Sweden, even before the Court judgment, it included the use of platforms[27] [30, pp. 11, 12 and 17]. In Belgium and Poland, the scope of the minimum access package includes shunting. At the same time, in Belgium and Poland, a charge separate from the basic charge is levied for shunting services [40, p. 4], [42, Art. 33(8) and (9)]. In the Netherlands and Norway, the use of storage siding was within the scope of the minimum access package until 2019, and from 2020 onwards within the scope of services provided by service facilities – storage siding [43, p. 6]. In Poland and in ten other countries, stopping for a certain time is included in the minimum access package[28] [43, p. 6].

3.3.3. Arguments of the Court referring to the aims of the legislator

The Court also looked for arguments in favour of the thesis that Directive 2012/34 extended the minimum access package in its recitals. According to its view, in paragraph 35 of the judgment this is consistent with the objectives of the Directive as set out in recitals 3, 7, 8 and 26 thereof.

However, the Court's assertion in paragraph 36 of its judgment that it was "precisely for those purposes" that the definition of the components of the infrastructure services to be provided in return for minimum access charges was introduced in accordance with recital 65 indicates that the Court missed an important point. In fact, these recitals (with the exception of recital 26) were adopted from several previous directives in force, which were replaced by Directive 2012/34. Recitals 3 and 8 had their counterparts in the second and fifth recitals of the preamble to Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [34]. Recital 7 had its counterpart in the second recital of Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [44]. Recital 65 had its counterpart in recital 33 of Council Directive 2001/14/EC 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[29] [45]. While recital 26 appears for the first time in Directive 2012/34, it does not deal with services provided as part of a minimum access package, but with another issue, namely ensuring non-discriminatory access for transport operators to service facilities operated by other transport operators. Therefore, the counterpart of recital 65 and the definitions described therein were already introduced earlier and, moreover, without any link to recitals or counterparts of recitals 3, 7, 8 and 26.

It should be noted that in accordance with Directive 2001/14 [45] and the European Commission's Proposal of 17 September 2010 based on it, which was the basis for initiating legislative work on Directive 2012/34 [46], the minimum access package to railway infrastructure included the item of use of "running track points and junction".[30] This item was amended to read "use of the railway infrastructure, including track points and junctions" during the Council's work on the draft directive [35].

It is noteworthy that this change was not noted by the Commission in its Communication to the European Parliament, which implies that the Commission considered it to be insignificant [36]. One can guess that this change was the result of the simple observation that the use of the train path also involves the use of other elements of the railway infrastructure than just track points and junctions. It is unlikely that the Council, whose members are representatives of the governments of the Member States, would be in favour of a solution that would reduce the level of coverage of the infrastructure managers' operating costs by charges and consequently increase the Member States' expenditure needed to cover the managers' deficits. It is much more likely that the amendment was of formal nature, which does not give grounds to

[27] Raport Independent Regulators' Group – Rail, "An overview of charges and charging principles for passenger stations", IRG-Rail (19)11, 25th of November 2019, https://www.irg-rail.eu/irg/documents/position-papers/166,2019.html – retrieved on 19 January 2022 r.

[28] In Poland this is a maximum of two hours – Art. 33(10) of the Railway Transport Act of 28 March 2003 [42].

[29] Hereinafter "Directive 2001/14".

[30] In the English version "running track points and junctions". In the Polish version instead of "punkty" it would be more accurate to use the word "rozjazdy".

claim that the will of the EU legislator was to extend the minimum access package in this way.

The Court's argument in paragraph 32 of its judgment that confirmation of the EU legislature's intention to extend the minimum access package is to be derived from the fact that Annex II to Directive 2012/34 has not been amended by Directive 2016/2370 [11] of the European Parliament and of the Council is also misplaced. It should be noted that the Commission's proposal No 2013/0029 (COD) to amend Directive 2012/34 is dated 30.01.2013, i.e. shortly after the adoption of the directive and well before the deadline for its transposition into national legislation. The purpose of amending Directive 2012/34 was not to change the rules on access to railway infrastructure or the rules on access to service facilities. There is no indication that there was a problem with the interpretation of the scope of the minimum access package during the drafting of the amendment to the Directive. Therefore, the failure to amend the Directive does not provide any basis for concluding that the intention of the legislator to extend the minimum access package, as attributed by the Court, has been confirmed.

It is also difficult to agree with the Court's argument in paragraphs 38 and 39 of the judgment that the inclusion of the use of platforms in the minimum access package is supported by the need to facilitate access to them for transport operators, given the possibility of refusing access to service facilities where there is a viable alternative (Art. 3(10) of Directive 2012/34). It should be pointed out that one of the main objectives of Directive 2012/34 was to ensure non-discriminatory access to service facilities for railway undertakings (cf. e.g. recitals 26 and 27). Therefore, the conditions for demonstrating a viable alternative are strictly defined (see Art. 3(10) and Art. 13(4) and (5) of Directive 2012/34). At the same time, it is impossible to find grounds for refusing to provide passenger stations when the railway infrastructure has sufficient capacity.

Problems related to the access to service infrastructure, especially to cargo terminals, were described in detail by R. Pacewicz in the article "Infrastruktura usługowa w Polsce i w Europie – obecne problemy dostępu do niej a zmiany wynikające z konieczności implementacji Dyrektywy 34/12" [47]. In his opinion, "thanks to the provisions of Directive 2012/34, most of the problems in terms of access to service infrastructures in the European market that we currently face should be overcome" [47, p. 33]. In Poland, providing transport operators with access to freight terminals was the subject of a procedure initiated in 2011 by the President of the Office of Rail Transport [12, 48].

These problems were also reflected in point 40(a) of the European Court of Auditors' 2016 Special Report "Rail freight transport in the EU: still not on the right track". The European Commission pointed out in its reply "s that the deadline for transposition of Art. 13 of Directive 2012/34/EU which has introduced a comprehensive set of new rules to address difficulties in accessing terminals and other service facilities, expired only in June 2015." [49, pp. 34 and 74].

In case C-210/18, the fees for the provision of platforms were at issue, not their availability. The same applies to case C-453/20 concerning access charges to goods platforms [7, 6]. However, the Court did not refer in its reasoning to any problems of access to platforms or to other service facility or railway infrastructure. In this context, the attribution to the EU legislator of a desire to strengthen the right of access to platforms for transport operators has no justifiable basis.

The Court emphasised that the charges for the minimum access package corresponding to the cost that is directly incurred as a result of operating the train service (Art. 31(3) of Directive 2012/34) are more favourable to transport operators than the charges for the services provided in the service facilities, which shall not exceed the cost of providing it, plus a reasonable profit (Art. 31(7) of Directive 2012/34).[31]

One has to consider whether the Court's position that the use of all elements of the railway infrastructure is included in the minimum access package is not contrary to the will of the EU legislator. In particular, it is difficult to reconcile this with the new rules on charges for access to service facilities, which, in accordance with Art. 31(7) of Directive 2012/34, also cover access to tracks in those facilities. Furthermore, it could not have been the will of the legislator to exclude from service facilities the elements of railway infrastructure without which they cannot function. Consequently, it is doubtful whether the legislator's intention was to shift the burden of part of the costs from the transport operators to infrastructure managers or operators of service facilities.

As a result of the Court's interpretation, the inclusion of the use of platforms and goods platforms within the scope of minimum access for a basic charge significantly complicates the implementation of the principles of: equal and non-discriminatory

[31] Paragraphs 37 and 38 of the judgment.

access to railway infrastructure, optimisation of the use of the infrastructure and the setting of appropriate and fair charges (cf. recitals 39, 43 and 67 of Directive 2012/34). It is sufficient to note that when the charges for the minimum access package depend on the length of the train route, it is difficult to take into account the differences between operators in the use of platforms and freight ramps. While it is relatively easy to differentiate the amount of charges between freight and passenger trains, it is much more difficult to include in the charges the use of platforms or ramps depending on the number of kilometres per route. Therefore, the possible benefit of transport operators, which would consist in lowering the amount of charges for the minimum access package and for the use of service facilities, may not be properly distributed.[32]

3.4. Current interpretation of the provisions on the use of platforms by the Member States

In his statement, the Advocate General mentioned that the regulations were clear, as in most Member States platforms were components of the railway infrastructure. He referred to the report of the Independent Regulators' Group – Rail "An overview of charging practices for access to service facilities and rail-related services in the IRG-Rail member states" IRG-Rail (17)6 of 27 November 2017 [50]. On page 14 of the report, it is stated that in most countries, such as the UK, Belgium, Finland, Poland and Sweden, the cost of access to platforms was included in the minimum access package. In contrast, in Austria, Germany, France, Greece and Spain, access to platforms was treated as access to a service facility. Thus, Poland has been included in the group of countries where platforms are not classified as service facilities, despite the fact that the Act of 28 March 2003 on rail transport, in Art. 3(53), amended by the Act of 16 November 2016 on the amendment to the act on rail transport and certain other acts [51], unambiguously treats platforms as passenger stations. It should be noted that at least part of the data contained in the aforementioned report referred to 2015, a situation where the deadline for transposition of Directive 2012/34 was set for 16 June 2015 and, in Poland, transposition took place only at the end of 2016.

A completely different point of view is presented in the report of Independent Regulators' Group – Rail, published later on, "An overview of charges and charging principles for passenger stations" IRG-Rail (19)11 of 25 November 2019 [30]. Only three countries were identified as those where access to platforms was included in the minimum access package: Finland, Italy and Sweden; while in Sweden those were only platforms owned by the main manager of infrastructure [30, p. 11, 12 and 17].

Regarding the lack of grounds for postponing the effects of the judgment in time, the Court did not repeat the arguments of the Advocate General but shared his position.

As per the presented grounds, most of the Member States understood the provisions of Directive 2012/34 differently than the Advocate General and the Court, which, however, the Advocate General and the Court may not have been aware of.

4. Consequences of judgment given by the Court of Justice in case C-210/18

It should be noted at the outset that a judgment of the Court of Justice does not formally have an erga omnes effect. It does not constitute a precedent with effects going beyond the case in respect of which it was issued and towards third parties. In accordance with the concept of acte éclairé, the national court is relieved of its obligation to refer questions for a preliminary ruling under Article 267 TFEU if a question related to the EU law has already been sufficiently clarified by the jurisprudence of the Court of Justice of the European Union. In such a case, the Court could refuse to issue a ruling, which has an express legal basis in Article 99 of the Rules of Procedure of the Court of Justice [52]. However, it should be emphasised that national courts retain the right to refer questions for a preliminary ruling even if the issue has already been clarified by the jurisprudence of the Court of Justice [53, paragraphs 32 and 33], [54]. It is pointed out that "a preliminary judgment is binding on each national court, provided that it does not refer its own questions to the Court of Justice" [55, p. 11]. Thus, if the court "does not agree with the views of the Court of Justice, the acte éclairé rule ceases to function (...) and the obligation to refer the case to the Court becomes valid again" [56, p. 155]. It will therefore be legitimate for a national court to refer to the Court a case which has already been dealt with and in the case of which new

[32] It can be envisaged that the basic charges will be increased, see the penultimate paragraph of point 4 of this gloss, while charges for the use of passenger stations, and possibly also freight terminals, will be reduced.

arguments have arisen, which could result in a different preliminary ruling on the same issue. The position of the Court can be changed [57, point 11]. Given the presented reservations, it would be justified for the Court to depart from its interpretation in subsequent judgments. With regard to the case C-453/20, Advocate General M. Campos Sánchez-Bordona upheld the interpretation [6, points 60, 67–70].

The Court's interpretation contained in the discussed judgment leads to the reconstruction of Directive 2012/34 and the system of the EU law related to railway. Based on the interpretation, it would have to be concluded that all components of railway infrastructure are subject to use as part of the minimum access package and not as part of service facilities. One can also expect that charges for other elements of railway infrastructure in service facilities will be questioned, in particular, freight terminals, passenger stations, marshalling yards, storage sidings and ports.

To ensure a uniform understanding of EU law and to prevent disputes, a number of EU regulations should be amended. In particular, there is a need to clarify the legal situation concerning service facilities, which include elements of the railway infrastructure, to define the scope of use of railway infrastructure by railway entities as part of the minimum access package, and to clarify Art. 31(7) of Directive 2012/34, which seems irreconcilable with the judgment. It would also be advisable to amend Commission Implementing Regulation (EU) 2015/909 to allow charging for the use of platforms and goods platforms regardless of the number of kilometres of the route. To ensure the consistency between the system of EU law and the discussed judgment, the definitions and regulations concerning passenger stations and platforms should be changed.

The adoption of the Court's interpretation would also require numerous changes to the national legislation. In Poland, the Railway Transport Act has already been amended to adapt it to the judgment related to platforms [58]. However, access routes to platforms are still included in the definition of a passenger station, even though they are components of railway infrastructure. There are also other provisions in the Railway Transport Act that can be considered incompatible with the Court's position, for example: Art. 4(36c), according to which a freight terminal includes a railway track, or Art. 35a(1) and (2), according to which railway infrastructure may be a component of a service facility [42].

The consequence of the judgment will be a deterioration in the financial situation of the infrastructure management. As a result, it will be necessary to increase state expenditure on the maintenance of railway infrastructure.

The inclusion, as a result of the judgment, in the minimum access package of the right to use additional components of the railway infrastructure will entail an increase in the amount of the basic charge. The calculation of the cost related to platforms included in the basic charge is acceptable, although difficult.[33] Pursuant to Art. 31(3) of the Polish version of Directive 2012/34, the charges for the minimum access package "shall be set at the cost directly incurred as a result of a train passage" ("ustala się po koszcie, który jest bezpośrednio ponoszony, jako rezultat przejazdu pociągu"). In the English version, the wording is a bit more flexible: "shall be set at the cost that is directly incurred as a result of operating the train service". Closer to the above is the translation: "ustalone po koszcie, który jest bezpośrednio ponoszony jako rezultat wykonywania przewozów pociągami".[34] Therefore, it should be assumed that, in the legal state adapted to the judgment, the use of platforms has an impact on the amount of the basic charge. As already indicated in point 3.3.3., the problem is, however, the appropriate differentiation of the charges depending on the scope of the use of platforms.

Until the situation of service facilities is clarified, their management will be subject to legal risk. Introduction of changes to regulations and the possible change of the position of the Court of Justice take time. Hence, it should be assumed that a long period of uncertainty awaits all concerned.

5. Conclusions

The aforementioned observations lead to the conclusion that the interpretation of Directive 2012/34 contained in the discussed judgment is incorrect and the arguments put forward to support the interpretation are also incorrect. The Court's interpretation was based on a superficial and selective analysis of the

[33] See refusal to approve the charges of PKP Polskie Linie Kolejowe S.A. by decision of the President of the Railway Transport Office of 25 March 2022 [59].

[34] In the Polish version of Art. 7(3) of Directive 2001/14. In the English version of the Directive, the wording was identical to that in Art. 31(3) of Directive 2012/34.

provisions of Directive 2012/34 (disregarding other EU railway legislation) and a very subjective interpretation of the legislator's intentions.

In particular, the Court did not verify the syllogism it had applied, that is, since platforms are components of the railway infrastructure and the use of the railway infrastructure falls within the minimum access package, the use of the platforms also falls within the minimum access package. It is not difficult to notice that applying that syllogism to other components of railway infrastructure leads to absurd consequences. The judgment also ignored the meaning of the provision of Art. 31(7) of Directive 2012/34, based on which it is clear that track, i.e. railway infrastructure, may be a component of a service facility.

The exclusion by the Court of platforms from passenger stations is based on a rather superficial interpretation of Annex I to Directive 2012/34, completely disregarding other provisions of that Directive and provisions of other EU acts.

The Court also drew wrong conclusions from the quoted recitals to Directive (3, 7, 8, 26 and 65), since the equivalent recitals were included in previous directives and, moreover, there is no connection between them. The argument that, since the amendment of Directive 2012/34 did not change the content of Annex II the intention of the EU legislator was to extend the minimum access package, is also incorrect, and there is no proof that the interpretation of the Court was envisaged at the time.

The effects of the judgment presented in point 4 should be assessed as unfavourable.

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