Case C-453/20

Summary of the order for reference pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 September 2020

Referring court/body:

Úřad pro přístup k dopravní infrastruktuře (Czech Republic)

Date lodged:

23 September 2020

Applicant:

CityRail a.s.

Infrastructure manager and operator of the service facility:

Správa železnic, státní organizace

A. Background to the main proceedings

The Úřad pro přístup k dopravní infrastruktuře (*Transport Infrastructure Access Authority)* ('the Authority') assesses the legality of conditions for railway companies' access to places of loading (as defined below).

B. Factual and legal context of the request for a preliminary ruling

1. This request for a preliminary ruling concerns the interpretation of Directive 2012/34 [1] and Article 288 of the Treaty of the Functioning of the European Union ('TFEU').

2. The request was submitted pursuant to Article 267 TFEU by the Authority which is, pursuant to case-law, [2] deemed to constitute a 'court or tribunal' as defined by the latter provision, for the following reasons.

[1] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area ('Directive 2012/34').

a) The Authority was established by Law [3] as a permanent body. The Authority is a central administrative authority, which is independent in the exercise of its powers, impartial in its proceedings and, in doing so, governed only by Laws and other legal regulations. It is led by its Chairman who is independent of the government and any other public-law entity and may only be removed from office subject to conditions prescribed by law. Decisions of the Authority Chairman are subject only to judicial review.

b) Proceedings before the Authority are conducted pursuant to the správní řád (Code of Administrative Procedure) [4] and, in these, parties to the proceedings may assert their rights and legal interests, present evidence and arguments, propose evidence and express their opinion with respect to claims and evidence submitted by other parties, as well as with respect to the background documents on which decisions are based, whereby the adversarial nature of the proceedings is guaranteed. The Authority is obliged to ascertain all facts relevant to the protection of the public interest.

c) Pursuant to the judgment of the Court of Justice of 22 November 2012 in *Westbahn Management*, C-136/11, EU:C:2012:740, paragraphs 26 to 31, the Austrian regulatory entity Schienen-Control Kommission, which is also established pursuant to Article 55 of Directive 2012/34, is also a court or tribunal pursuant to Article 267 TFEU.

C. The questions referred

‘1. Does the *place of loading and unloading for the transport of goods*, including related tracks, constitute part of railway infrastructure as defined by Article 3(3) of Directive 2012/34?

2. Is it in accordance with Directive 2012/34 that an infrastructure manager may at any time change prices for the use of railway infrastructure or service facilities to the detriment of freight forwarders?

3. Is Directive 2012/34 binding for Správa železnic, státní organizace (the Railway Administration) pursuant to Article 288 of the Treaty on the Functioning of the European Union?

[2] Judgments of 14 June 2007, *Häupl*, C-246/05, EU:C:2007:340, paragraph 16; of 18 October 2007, *Österreichischer Rundfunk*, C-195/06, EU:C:2007:613, paragraph 19, as well as of 10 December 2009, *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 35.

[3] Zákon č. 320/2016 Sb., o Úřadu pro přístup k dopravní infrastruktuře (Law No. 320/2016 on the Transport Infrastructure Access Authority).

[4] Zákon č. 500/2004 Sb., správní řád (Law No 500/2004, the Code of Administrative Procedure)(‘the Code of Administrative Procedure’).

4. Can the rules set out in a network statement be deemed discriminatory if they are not consistent with the EU legislation to which the Railway Administration is obliged to adhere?'

D. Facts of the case and arguments of the parties in the original proceedings

1. The company CityRail, a.s.[5] lodged a complaint with the Railway Administration[6] seeking a review of a network statement,[7] specifically a document titled Service Facility Description, as amended as at 1 April 2020.[8] In its complaint, CityRail claimed that the rules set out in the Service Facility Description essentially eliminate competition on the market of individual consignments in freight transport.

2. In this regard, the contentious rules in the Service Facility Description can be summarised as follows:

a) Places of loading and unloading ('places of loading') are defined as elevated (above the track level) as well as unelevated (at track level) handling areas next to the track, built for the purpose of the loading of goods and also adjoining track for places of loading; they were included in the Service Facility Description on the basis of Annex II, point 2 to Directive 2012/34.

b) Instead of allocating capacity pursuant to Regulation 2017/2177, the Railway Administration introduced reservation of capacity for long-term use. Reservation of capacity, its cancellation, and the use of places of loading is free of charge.

c) Nearly all the capacity of places of loading is reserved, regardless of its actual use, until Friday, when it is confirmed/released and made available to others for the following week (48 hours to 9 days in

5 The company CityRail, a.s. is the applicant as defined by Article 3(19) of Directive 2012/34 ('CityRail'). Another applicant that sent its opinion to the Authority, thereby becoming actively involved in the proceedings, is ČD Cargo, a.s.

6 The infrastructure manager and operator of the service facility as defined by Article 3(2) and 3(12) of Directive 2012/34 and also the allocator as defined by Zákon č. 266/1994 Sb, o drahách (Law No. 266/1994 on Railways) ('the Law on Railways').

7 The term 'network statement' as defined in Article 27 of Directive 2012/34 is the equivalent of the term 'prohlášení o dráze' ('railway statement') as defined by Czech legislation.

8 A Service Facility Description is included in the network statement pursuant to Paragraph 33(3)(l) of the Law on Railways, and Article 27 of Directive 2012/34 and Annex IV, point 6, thereto. Pursuant to Paragraph 33(6) of the Law on Railways and Article 5 of Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services ('Regulation No 2017/2177'), a Service Facility Description may be contained in a separate document to which the network statement merely refers.

advance). This essentially bars the access of subsequent long-term as well as *ad hoc* requests of other forwarders. In many cases, capacity is reserved for a single forwarder who requests it and to whom related infrastructure capacity has been allocated (for trains bringing wagons for loading and unloading).

d) The Railway Administration has reserved the right to change prices (introduce a charge), in the form of a notice of a change of the Service Facility Description, at least one calendar month in advance.

3. The rationale given for the rules by the Railway Administration is the following:

- It is not possible to determine one year in advance specific days for the presentation of wagons for loading and their removal afterwards.

- A disturbance on the market occurs in the event of an intervention in the rules by a regulatory authority. Regulation 2017/2177 does not use the term 'reservation of service facility capacity', but if the Authority prohibits reservation, capacity will be allocated on the same terms and the possibility of its use by another forwarder in the event of its cancellation (failure to confirm) one week in advance will be eliminated. The Railway Administration can attempt to coordinate capacity allocation, but once allocated it cannot take capacity away pursuant to Article 10(1) of Commission Regulation 2017/2177.

- There is no legal basis for the imposition of sanctions against applicants.

- The Railway Administration has the right to change the Service Facility Description as required, pursuant both to Article 27(3) of Directive 2012/34 and national legislation.

E. The Authority's Position

1. First and foremost, the Authority raises the issue whether the inclusion of places of loading among service facilities as defined in Annex II, point 2, to Directive 2012/34 is compliant with the Directive.

2. Furthermore, the Authority is of the view that there is discrimination, as the Railway Administration has introduced the term 'reservation of service facility capacity', whereby it failed to take into account, contrary to Article 11 of Regulation 2017/2177, the objective of securing an efficient use of available capacity, and failed to ensure, in breach of Article 7(2) of the same regulation, consistency of the allocated capacity on infrastructure and in service facilities.

3. Furthermore, the Authority has concluded that it is difficult to introduce a sanction for the failure to use capacity in service facilities and nor, having regard to Article 31(7) of Directive 2012/34, can the levying of charges be ordered for the use of service facilities.

4. In a preliminary measure, the Authority, by way of provisional measures, disallowed the application of certain provisions of the Service Facility Description, as the parties concerned are already incurring serious harm.

F. Legal framework and reasons for referring the first question

1. The conditions of access to railway infrastructure, as regulated in Section 3 of Directive 2012/34, differ from the conditions of access to services set out in Article 13(2) to (8) of Directive 2012/34 and in Regulation 2017/2177. If places of loading were to be included in railway infrastructure instead of in service facilities, point 6 of Annex IV to Directive 2012/34 would not apply to the Service Facility Description, but, rather, its entire contents would have to be included directly in a network statement.

2. Pursuant to Article 3(3) of Directive 2012/34 in conjunction with Annex I thereto, railway infrastructure includes '*goods platforms, including in passenger stations and freight terminals*', without the platforms being defined.

3. Applying teleological interpretation, the Authority leans towards the opinion that the purpose of the provisions of the Directive is to include in railway infrastructure any places designed for the loading or unloading of goods, not only a platform defined restrictively as an elevated platform. There is no reason why such places of loading should be handled differently only on the basis of whether they are or are not elevated.

4. On the other hand, places of loading do constitute a part of stations and may constitute a part of freight terminals, which are included among service facilities according to Annex II, point 2, to Directive 2012/34.

5. The Authority leans towards the opinion that also adjoining track for loading and unloading, which constitute a part of a place of loading, despite being a part of a station or freight terminal, constitute railway infrastructure, having regard to Annex I to Directive 2012/34, which includes *sidings* in such infrastructure.

6. Furthermore, the costs expended directly on the operation of the train service determine the fees for the minimum access package referred to in Article 31 of Directive 2012/34. The calculation of direct costs on a network-wide basis is not to include the part of the costs of maintenance and renewal of civil infrastructure that is not directly incurred by operation of the train service. [9] In loading and unloading, costs may be incurred by the soiling or wear of platforms and access roads. For the purpose of charging, if places of loading were to be included in railway infrastructure, the term train service would need to be interpreted such as to also include the processes of loading and unloading.

[9] Article 4(1)(o) 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.

7. The Authority refers to the judgment of the Court of Justice of 10 July 2019, *WESTbahn Management*, C-210/18, EU:C:2019:586, according to which *"passenger platforms,"* referred to in Annex I to Directive 2012/34 in the same paragraph as goods platforms, constitute a component of railway infrastructure.

8. National legislation. Pursuant to Paragraph 3(1)(k) of Vyhláška č. 76/2017 (Decree No. 76/2017), [10] places of loading and unloading for the transport of goods are operating components of a railway station, which are, pursuant to Paragraph 2(9) of the Law on Railways, a service facility.

G. Legal framework and reasons for referring the second question

1. As stated above, the Railway Administration is entitled to change the zero rate set out in the Service Facility Description for the use of places of loading, upon notice given at least one month in advance. Any such change during the applicability of a timetable without methodology rules and calculation tables being drawn up would have a financial impact on all applicants – railway companies, public service customers, consignors, forwarders, as well as combined transport operators.

2. Article 27 of Directive 2012/34 applies to the contents, publication, and changes to a Service Facility Description, as a part of a network statement. Article 27 cannot be interpreted so broadly as to mean that a network statement may be changed to the detriment of forwarders at any point as required, without restrictions, as is the opinion of the Railway Administration. According to this article, a network statement must be published no less than four months in advance of the deadline for requests for infrastructure capacity.

5. In this regard, recitals 44 and 52 and Article 30(2) of Directive 2012/34, and Annex I, point 2, and Annex V, point 2, thereto are also relevant, in terms of ensuring transparency, foreseeability and legal certainty.

6. Charging for places of loading may also be viewed as introducing essential elements into the charging system and thus be subject to the deadline set in Article 32(6) of Directive 2012/34 (publication three months in advance of the publication of a network statement).

4. National legislation. Pursuant to Paragraph 33(1) of the Law on Railways, the Railway Administration as the allocator is to draw up a network statement and to publish it twelve months in advance of the day on which the timetable comes into force and, at least thirty days prior to that publication, it is to make it possible for interested stakeholders to submit their opinion. According to Paragraph 33(5)

[10] Vyhláška Ministerstva dopravy č. 76/2017 Sb., o obsahu a rozsahu služeb poskytovaných dopravci provozovatelem dráhy a provozovatelem zařízení služeb (Decree of the Ministry of Transport No. 76/2017 on the contents and scope of services provided to a forwarder by a railway operator and operator of a service facility).

of that Law, should a network statement change, the allocator must again publish that change. The Law on Railways does not stipulate the possibility for stakeholders to submit their opinion on such a change prior to its publication.

H. Legal framework and reasons for referring the third question

1. According to the Authority, the fact that places of loading are included among service facilities constitutes an incorrect implementation of Directive 2012/34. In that case, can the Authority therefore apply the direct effect of Directive 2012/34 vis-à-vis the Railway Administration and can CityRail claim the direct effect of the Directive with respect to the Railway Administration in a situation when the failure to apply the Directive would result in a restriction of the company's right to obtaining access to places of loading?

2. The Authority points to paragraph 18 of the judgment of the Court of Justice of 12 July 1990, *A. Foster and Others* v. *British Gas plc*, C-188/89, EU:C:1990:313, and notes that the Railway Administration is subject to the sovereign power of the State and to State supervision, thereby meeting the criteria of paragraph 18 of the judgment, and the Railway Administration may be assumed to constitute the State as provided for in Article 288 TFEU.

3. It is, however, not clear to the Authority whether the Railway Administration is obliged to apply Directive 2012/34 directly or whether it is bound solely by the national transposition. The answer to this question will influence the Authority's position as to whether the Railway Administration has breached the law.

4. National legislation. The Railway Administration was established by Zákon 77/2002 Sb., o akciové společnosti České dráhy a státní organizaci Správa železniční dopravní cesty (Law 77/2002 on the joint-stock company České dráhy (Czech Railways) and the state organisation Správa železniční dopravní cesty (Railway Track Administration)), pursuant to which the state guarantees its obligations; the organisation only manages state assets, members of its executive body are appointed and recalled by the government, and it pursues its activity (operation of a transport route) in the public interest.

I. Legal framework and reasons for referring the fourth question

1. Having regard to Article 56 of Directive 2012/34 and pursuant to Paragraph 34e(1) of the Law on Railways, the Authority is entitled to assess only whether a network statement complies with the Law on Railways, but not whether it complies with directly applicable EU legislation.

2. Should questions 1 and 3 be answered in the affirmative, the Authority takes the view that conflict arises between the network statement and Directive 2012/34,

but in principle not with the Law on Railways, with the exception of Paragraph 33(1) of the Law, which demands rules to be non-discriminatory.

3. The purpose of Article 56 would therefore be met if the Authority could find the rules contained in the network statement discriminatory in so far as they contravene directly applicable EU legislation.