Case C-721/20

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

Date lodged:

30 December 2020

Referring court:

Kammergericht Berlin (Germany)

Date of the decision to refer:

10 December 2020

Defendant and appellant:

DB Station & Service AG

Applicant and respondent:

ODEG Ostdeutsche Eisenbahn GmbH

Subject matter of the main proceedings

Rail transport – Directive 2001/14/EC – Station charges – Power of civil courts to review user charges based on the criteria laid down in Article 102 TFEU and/or in national competition law

Subject matter and legal basis of the request

Interpretation of EU law, subparagraph (b) of the first sentence of Article 267 TFEU

Questions referred for a preliminary ruling

1. Is it compatible with Directive 2001/14/EC, including its provisions on the management independence of the infrastructure undertaking (Article 4), the principles of charging (Articles 7 to 12) and the tasks of the regulatory body (Article 30), for national civil courts to review the charges levied based on the criteria laid down in Article 102 TFEU and/or in national competition

law on a case-by-case basis independently of the monitoring carried out by the regulatory body?

2. If Question 1 is answered in the affirmative: Are the national civil courts permitted and required to conduct an assessment of abusive practices in the light of the criteria laid down in Article 102 TFEU and/or in national competition law, even where the rail transport undertakings have the possibility to request the competent regulatory body to review the fairness of the charges paid? Must the national civil courts wait for a decision in the matter by the regulatory body and, where applicable, if it is contested before the courts, for that decision to become enforceable?

Provisions of EU law cited

Article 102 TFEU

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).

Provisions of national law cited

Allgemeines Eisenbahngesetz (General Law on Railways, 'the AEG') in the version in force from 30 April 2005 to 1 September 2016 of the Drittes Gesetz zur Änderung eisenbahnrechtlicher Vorschriften (Third Law amending provisions of the law on railways) of 27 April 2005 (Federal Law Gazette I 2005, p. 11389), especially Paragraphs 14b, 14d, 14e and 14f

Brief summary of the facts and procedure

1 The defendant, DB Station & Service AG, a subsidiary of Deutsche Bahn AG, is a railway infrastructure undertaking within the meaning of Paragraph 2(1) of the AEG. It maintains approximately 5 400 stations (traffic hubs) in Germany. The applicant is a rail transport undertaking which uses the defendant's traffic hubs for passenger railway services. The parties are in dispute as to the charge that should be levied for that purpose.

2 The defendant enters into framework contracts governing the use of stations with individual rail transport undertakings wishing to use the infrastructure provided by it, in which it refers for the purpose of user charges to its station price list in force at the time (station price system, 'the SPS'). The use of individual stations is regulated under separate contracts governing the use of stations. The defendant applied a new '2005 price system' ('SPS 05') as of 1 January 2005, to replace the original '1999 price system' ('SPS 99'), under which prices were determined as a

flat rate for each individual federal state based on defined price categories. The applicant, for which the new system resulted in price increases, paid the increased charges as of 1 January 2005, but without prejudice.

3 By decision of 10 December 2009, the Bundesnetzagentur (Federal Network Agency), acting as the competent regulatory body, declared the SPS 05 to be invalid with effect from 1 May 2010. The defendant has contested that decision. The administrative court has yet to deliver judgment in the main proceedings.

4 By its actions brought before the Landgericht Berlin (Regional Court, Berlin), the applicant sought reimbursement of the station charges which it paid between November 2006 and December 2010, inasmuch as they exceed the charges under the SPS 99. The Regional Court upheld those actions, with the exception of a part of the claim for interest. It gave as its reason, in keeping with the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany) at the time, that the charges levied by the defendant are subject to review of their equity by virtue of Paragraph 315 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), and that, as the charges based on the SPS 05 do not withstand that review of equity, the defendant is obliged to reimburse the amounts concerned in accordance with the principles of unfair enrichment. That is contested by the defendant in its appeals and by the applicant in its cross-appeals, by which the parties are each pursuing their claims at first instance.

5 In the meantime, the Court has ruled, in the context of a request for a preliminary ruling in a similar dispute, that a review of the equity of train path charges by the ordinary courts may not be conducted independently of the monitoring carried out by the competent regulatory body (judgment of 9 November 2017, *CTL Logistics*, C-489/15).

6 By order of 11 October 2019, the Federal Network Agency has since dismissed as inadmissible the applications by a number of rail transport undertakings for ex-post review of the charges levied on the basis of SPS 05. However, that order has been contested. The action is currently pending before the Verwaltungsgericht Köln (Administrative Court, Cologne).

Brief summary of the basis for the request

7 Before judgment can be given on the parties' appeals, it would appear to be appropriate to stay the proceedings and seek a preliminary ruling by the Court of Justice of the European Union on the questions set out in the operative part of the order, as judgment on the merits depends on the answer to the questions referred for a preliminary ruling.

8 Although an enforceable decision has not yet been adopted in the proceedings pending before the Federal Network Agency on the ex-post review of the station charges levied by the defendant based on the SPS 05, it would no longer appear reasonable, in light of the duration of the proceedings to date, to wait for

administrative court proceedings that will probably take several more years to be completed, in order to request a preliminary ruling by the Court on the questions referred if and when the decision of the Federal Network Agency is upheld.

9 Directive 2001/14/EC was repealed under Article 65 of Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32 et seq.) and replaced by that directive, the rules of which are essentially identical in content. However, it still applies in this case, as the applicant is seeking reimbursement of charges paid to the defendant in the period up to December 2010, during which Directive 2001/14/EC was still in force. However, it has to be assumed that the Court's answers to the questions referred for a preliminary ruling can automatically be applied to Directive 2012/34/EU.

10 The charges levied in this case for the use of stations also fall within the substantive scope of Directive 2001/14/EC. Although, unlike the later Directive 2012/34/EU, that Directive does not comprehensively regulate non-discriminatory access to service facilities, passenger stations are listed in point 2([c]) of Annex II to Directive 2001/14/EC, to which the principle of non-discrimination laid down in Article 5(1) of Directive 2001/14/EC explicitly refers. Furthermore, the spirit and purpose of the Directive suggest that its scope should extend to the use of passenger stations. Non-discriminatory allocation of train paths does not suffice for a rail transport undertaking unless it is supplemented by adequate access to the facilities, such as passenger stations, which are indispensable for effective use of the railways.

11 Judgment on the merits depends on the answers to the questions referred for a preliminary ruling. Were Question 1 to be answered in the negative, the actions could not succeed simply because the fairness of the user charges levied by the defendant is not open to review by the civil courts. The answer to Question 2 will determine whether it is necessary to wait for the order of the Federal Network Agency of 11 October 2019 to become enforceable before ruling on the defendant's appeal (see paragraph 6 above).

12 The questions referred for a preliminary ruling have not yet been answered by the Court. By its judgment of 9 November 2017, *CTL Logistics*, C-489/15, the Court simply found that a review of equity by virtue of Paragraph 315 of the BGB, as practised up to that point by the German civil courts, is incompatible with the provisions of the Directive. However, that judgment of the Court did not address whether national civil courts are entitled and obliged to review the charges levied based on the criteria laid down in Article 102 TFEU and/or in national competition law on a case-by-case basis independently of the monitoring carried out by the regulatory body.

13 Nor can a request for a preliminary ruling be precluded because, although the questions referred have not yet been answered by the Court, the correct application of EU law within the meaning of an *acte clair* is so obvious as to leave no scope for any reasonable doubt as to the manner in which the questions raised

are to be resolved. According to the case-law of the Court, affirmation of an *acte clair* depends upon the national court itself being convinced not only of the correct interpretation of EU law, but also that it is equally obvious to the courts of the other Member States and to the Court of Justice (judgment of 6 October 1982, *CILFIT*, 283/81).

14 Different views as to the scope of the consequences of the judgment of 9 November 2017, *CTL Logistics*, C-489/15, have been argued both in the case-law of the German civil courts and in German commentaries following its delivery.

15 The referring court is of the opinion that the better grounds suggest that the principles established by the Court in its judgment in *CTL Logistics* should also be applied to an assessment of abusive practices under competition law, which would preclude any review of user charges by the national civil courts independently of the monitoring carried out by the competent regulatory body.

16 By its judgment of 9 November 2017, *CTL Logistics*, C-489/15, the Court gave the following reasons for the incompatibility of a review of equity by a civil court by virtue of Paragraph 315 of the BGB with the material and formal requirements of Directive 2001/14/EC:

17 First, a review of the equity of user charges based on the specific circumstances of each individual contractual relationship, as provided for in Paragraph 315 of the BGB, is contrary to the principle of non-discrimination anchored in Directive 2001/14/EC and the principle of equal treatment (paragraphs 69 to 76).

18 Second, a review of equity deprives the infrastructure manager of the latitude to set user charges deliberately allowed under Article 4(1) of Directive 2001/14/EC in order to encourage optimal use of the infrastructure. At the same time, it interferes in the management independence of the infrastructure manager safeguarded by the Directive (paragraphs 77 to 83).

19 Third, a review of equity by a civil court is incompatible with the assessment criteria of regulatory law. If, *per contra*, the civil courts were to take account of those criteria and apply the provisions of railway legislation directly, that would encroach on the exclusive competence of the regulatory body established under Article 30 of Directive 2001/14/EC (paragraphs 84 to 87).

20 Fourth, the Court raises the ‘practically insurmountable difficulty’ faced by the regulatory body in integrating as rapidly as possible, in a non-discriminatory system, the various individual judicial decisions given by different civil courts. Until such time as a supreme court gives judgment, this would necessarily result in unequal treatment between the undertakings which seised a court and those which did not. The regulatory body would then have to react to final judgments by the civil courts by adjusting the charges, which would again interfere inadmissibly in the latitude of the infrastructure manager and would equally inadmissibly

encroach on the exclusive competence of the regulatory body (paragraphs 88 to 93).

21 Fifth, a review of equity by a civil court would undermine the *erga omnes* effect of decisions by the regulatory body, which are binding on all parties concerned in the railway sector. The effect of a civil court judgment ordering excessive charges to be reimbursed is necessarily restricted to the parties to the dispute. Thus the prevailing party would, at the same time, gain an advantage over other undertakings and the objective of the Directive of ensuring fair competition would be undermined (paragraphs 94 to 97).

22 Sixth, an amicable settlement is possible in the context of civil proceedings without the participation of the regulatory body. That is incompatible with the second and third sentences of Article 30(3) of Directive 2001/14/EC, which state that negotiation between the parties must be carried out under the supervision of the regulatory body and that it must intervene if negotiations are likely to contravene the Directive (paragraphs 98 to 99).

23 Seventh, a review of equity by a civil court is incompatible with the objective of Directive 2001/14/EC of encouraging infrastructure managers to make optimal use of the infrastructure (paragraphs 100 to 102).

24 The arguments of the Court militating against any review of equity by the civil courts can be applied to the review of user charges under competition law without any substantial restrictions. That is true in particular of the decisive viewpoint argued, namely the risk that judgments given by various civil courts on a case-by-case basis and independently of the monitoring carried out by the regulatory body may ultimately result in various railway undertakings having to pay different charges for identical services. At the same time, it would reverse the key concern of Directive 2001/14/EC of ensuring non-discriminatory access to rail infrastructure and thus fair competition in the provision of railway services (see, in that regard, recitals 5, 11 and 16). Also, the encroachment on the exclusive competence of the regulatory body and the practically insurmountable difficulties evoked would be identical. All this suggests that an assessment of abusive practices carried out by a national civil court in a particular case under competition law likewise runs counter to the provisions of Directive 2001/14/EC.

25 The Chamber is also loath to concur with the finding of the Bundesgerichtshof that a different assessment is absolutely necessary because, unlike Paragraph 315 of the BGB, Article 102 TFEU is a provision of EU primary law, not national law, and thus takes precedence over the provisions of Directive 2001/14/EC. Although it is true that, as a rule of EU primary law, Article 102 TFEU applies directly in all EU Member States, it is likewise true that the national courts are required to apply Article 102 TFEU directly (see judgment of 30 January 1974, *BRT* v *SABAM*, 127/73, ECR 1974 p. 51, paragraphs 15-17).

26 However, the Court has yet to decide whether that also applies where the charges set are monitored by a regulatory body whose decisions are likewise subject to judicial review. The judgment of the Court in *Telefónica* in particular suggests that it does. Although the Court noted that action by the Commission on the basis of Article 102 TFEU is not subject to prior consideration of any intervention on the part of the national regulatory authorities (judgment of 10 July 2014, C-295/12), that finding cannot be applied to the facts at issue in this case. That is because, unlike a review of charges by the civil courts on a case-by-case basis, the application of Article 102 TFEU by the Commission neither harbours the risk of a plethora of possibly different court judgments nor paves the way for numerous uncoordinated legal processes. On the contrary, decisions adopted by the Commission are subject to review by the Court, thereby ensuring their uniform application case by case.

27 The other legal viewpoint raised by the Bundesgerichtshof, that differing legal assessments of a review of equity by virtue of Paragraph 315 of the BGB, on the one hand, and of an assessment of abusive practices under competition law, on the other, are justified because the latter relates solely to the past and, for that reason alone, cannot conflict with regulatory law, would also appear to be unfounded. Although it is true that, in the event of culpable violation of Article 102 TFEU, damages can be claimed for past periods under Paragraphs 33(1) and 33a(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against Restraint of Competition, 'the GWB'), any transaction in breach of Article 102 TFEU is void (albeit possibly in part only) by virtue of Paragraph 134 of the BGB; this can also be established with future effect by an action for declaratory judgment under Paragraph 256 of the Zivilprozessordnung (German Code of Civil Procedure, 'the ZPO'). Lastly, in the event of violation of Article 102 TFEU, the injured party has a rectification and injunction claim under Paragraph 33(1) of the GWB, which likewise seeks future effect. Furthermore and that notwithstanding, there is nothing to suggest, in fact quite the contrary, that fair competition in the provision of railway services would also be undermined were charges already paid to be subsequently reimbursed to individual undertakings in the form of damages; that would again run counter to the objective of Directive 2001/14/EC.

28 Lastly, the Bundesgerichtshof is of the unconvincing opinion that the regulatory body referred to in Article 30(3) of Directive 2001/14/EC has no powers to review charges already paid. The Bundesgerichtshof bases that interpretation of the Directive solely on the Opinion of Advocate General Mengozzi of 24 November 2016, *CTL Logistics*, C-489/15 (see point 58), which the Court failed to espouse in its judgment of 9 November 2017. The Commission explicitly took the opposite view in its observations of 23 December 2015, with which, *per contra*, the Court ultimately concurred (see observations, paragraphs 19 and 20). Nor is there anything in the wording of the provision or the recitals of the Directive that offers firm evidence of the interpretation given by the Bundesgerichtshof. Finally, this is also a question that must be decided by the Court, which alone has the powers to make a binding interpretation of EU law.