Case C-12/20

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:

13 January 2020

Referring court:

Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany)

Date of the decision to refer:

10 December 2019

Applicant:

DB Netz AG

Defendant:

Federal Republic of Germany

Subject-matter of the main proceedings

Regulatory control of network statements regarding the application for international train paths in freight corridors under Regulation (EU) No 913/2010, specifically: Control of an amendment, intended by the applicant, to point 4.2.5.1 of its 2016 network statement (deletion of a sentence)

Subject-matter and legal basis of the reference

Interpretation of Regulation (EU) No 913/2010 and Directive 2012/34/EU; Article 267 TFEU

Questions referred

1. Is Regulation (EU) No 913/2010, in particular with regard to the tasks assigned to the management board of a freight corridor in Article 13(1), Article 14(9) and Article 18(c) of that Regulation, to be interpreted as meaning

that the management board for a freight corridor is authorised to define the procedure for submitting applications for allocation of infrastructure capacity to the one-stop shop referred to in Article 13(1) of the Regulation itself, for example by requiring, as in the present circumstances, the exclusive use of an electronic booking tool, or is that procedure subject to the general provisions of Article 27(1) and (2) read in conjunction with point 3(a) of Annex IV to Directive 2012/34/EU, which means that it may be regulated solely by the infrastructure managers involved in a freight corridor in their respective network statements?

2. If the first question is to be answered to the effect that the procedure referred to in point 1 has to be regulated solely in the network statement of the infrastructure managers involved in a freight corridor, is the review of the network statement by a national regulatory body governed in this respect by Article 20 of Regulation (EU) No 913/2010 or likewise exclusively by the provisions of Directive 2012/34/EU and the national legislation adopted for its transposition?

(a) If the review is governed by Article 20 of Regulation (EU) No 913/2010, is it compatible with the provisions of that article for a national regulatory body to object to a regulation in the network statement such as that referred to in point 1, without acting jointly and in a substantively uniform manner with the regulatory bodies of the other States involved in the freight corridor or at least consulting them beforehand in order to ensure a uniform approach?

(b) Insofar as the review is governed by the provisions of Directive 2012/34/EU and the national legislation adopted for its transposition, is it compatible with those provisions, in particular with the general duty of coordination laid down in the second sentence of Article 57(1) of that directive, for a national regulatory body to object to such a regulation, without acting jointly and in a substantively uniform manner with the regulatory bodies of the other States involved in the freight corridor or at least having consulted them beforehand in order to ensure a uniform approach?

3. If the first question is to be answered to the effect that the management board for a freight corridor is authorised to define the procedure mentioned in point 1 itself, does a national regulatory body have the authority, under Article 20 of Regulation (EU) No 913/2010 or the provisions of Directive 2012/34/EU and the legislation created for its transposition, to review the network statement of an infrastructure manager for more than its substantive compliance with the procedure defined by the management board and, where appropriate, to object thereto, if the network statement of an infrastructure manager contains regulations on that procedure? If this were to be answered in the affirmative, how are the questions set out in point 2(a) and (b) to be answered with regard to this authority of the regulatory body?

4. Insofar as the national regulatory bodies, on the basis of the questions above, are authorised to review the procedure referred to in point 1, is Article 14(1) of Regulation (EU) No 913/2010 to be interpreted as meaning that the framework

defined by the executive board under that provision is EU law which binds the national regulatory bodies and the national courts, has priority of application over national law and is subject to the ultimately binding interpretation of the Court of Justice?

5. If the fourth question is to be answered in the affirmative, does the designation made under Article 14(1) of Regulation (EU) No 913/2010 by the executive boards of all the freight corridors under Article 8(2) of the respective framework, according to which the corridor capacity is to be published and allocated via an international application system, which shall as far as possible be harmonised with the other freight corridors, preclude a decision of a national regulatory body by which an infrastructure manager involved in a freight corridor is provided, for its network statement, with stipulations for structuring that application system which are not agreed with the national regulatory bodies of the other States involved in the freight corridors?

Provisions of EU law cited

Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight, Article 13(1) (‘One-stop shop for application for infrastructure capacity’), Article 14 (‘Capacity allocated to freight trains’), paragraphs 1 and 9, Article 20 (‘Regulatory bodies’), paragraphs 1 and 3, and Recitals 7, 25 and 26

Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, Article 27 (‘Network statement’), paragraphs 1 and 2, Article 57 (‘Cooperation between regulatory bodies’), paragraph 1, and Annex IV (‘Contents of the network statement’), point 3(a)

Provisions of national law cited

Allgemeines Eisenbahngesetz (General Railway Law), Paragraph 14 (‘Access to railway infrastructure’), subparagraph 1, Paragraph 14d (‘Particular notification duties of public railway infrastructure companies’), point 6, and Paragraph 14e (‘Preliminary examination by the regulatory body’), subparagraphs 1 and 3

Eisenbahninfrastruktur-Benutzungsverordnung (Railway Infrastructure Use Regulation), Paragraphs 3, 4 and 6, Annex 1 point 1(a), and Annex 2 point 3(a)

Brief summary of the facts and procedure

1 As a railway track operator, the applicant is obliged, in implementation of Article 27 of Directive 2012/34 pursuant to Paragraph 4 of the Eisenbahninfrastruktur-Benutzungsverordnung (Railway Infrastructure Use

Regulation; EIBV), to draw up and publish a network statement. Information on the principles and criteria for the allocation of railway track capacity must also be included in this network statement. This also includes information on the performance and time limits of the procedure for allocating railway track capacity, in particular on the procedure by which parties with access entitlement make applications to the railway track operator for allocation of train paths.

2 In 2015, the executive boards responsible for the freight corridors (see Article 8(1) of Regulation No 913/2010) agreed on common framework regulations within the meaning of Article 14(1) of Regulation No 913/2010 and defined these for each of the corridors under their responsibility. Article 8 of those identical framework regulations determined the principles for the functioning of what is known as the corridor one-stop shop (see Article 13(1) of the Regulation) and in particular provided in its second paragraph that the corridor capacity is to be published and allocated via an international application system, which shall as far as possible be harmonised with the other freight corridors. The original English-language version of the provision of Article 8(2) of the framework regulations (of the freight corridors) read verbatim: 'The corridor capacity shall be published and allocated via an international path request coordination system, which is as far as possible harmonised with the other rail freight corridors.'

3 At the same time, the management boards (see Article 8(2) of Regulation No 913/2010) of the freight corridors resolved, with the involvement of the applicant, that applications for allocation of railway track capacity on pre-agreed international train paths can be made to the respective one-stop shop exclusively via the electronic booking tool known as the Path Coordination System (PCS), and published these regulations in each case in Book 4 of the Corridor Information Document (CID) concerning the freight corridor.

4 On 31 August 2015, the applicant informed the Bundesnetzagentur (Federal Network Agency), as the national regulatory body, of an intended amendment of its 2016 network statement. The subject of the applicant's intended amendment was, amongst other things, a regulation, included under point 4.2.5.1 of the 2016 network statement, on the procedure for applying for railway track capacity on pre-agreed train paths in freight corridors under Regulation No 913/2010 at the respectively responsible one-stop shop. Specifically, point 4.2.5.1 of the 2016 network statement provided that path applications can in principle only be made via the PCS (first sentence). Point 4.2.5.1 of the 2016 network statement also provided that, in the event of a technical failure of the PCS, it should be possible to apply for paths at the one-stop shop using an application form provided by the RailNetEurope association (third sentence, hereinafter: 'third sentence or passage of text at issue').

5 With the amendment, the applicant intended to delete without replacement the use of the application form provided for as backup in the event of a technical failure of the PCS, that is to say the third sentence concerning this case in point 4.2.5.1 of the 2016 network statement. It based this on the ground that the use of the

application form was not provided for in the provisions on making an application that were agreed and published by the management boards of the freight corridors. The application form was also only designed for applying for other international train paths. It was unsuitable for applying for railway track capacity on pre-agreed international train paths, because it did not ask for all the information required for that purpose.

6 By decision of 22 September 2015, the Federal Network Agency opposed the intended amendment with the result that this amendment – also affecting the contractual relations concluded by the applicant on the basis of its 2016 network statement and existing to this day – cannot enter into force. The Federal Network Agency rejected the applicant's opposition. As reasoning for its decision, the Federal Network Agency stated that, if the passage of text at issue were to be deleted without replacement, the regulation in point 4.2.5.1 of the 2016 network statement would violate the applicant's duty to guarantee non-discriminatory use of the railway infrastructure managed thereby and non-discriminatory provision of the obligatory services offered thereby, including the processing of applications for allocation of train paths. According to the regulations for the allocation of train paths, the time at which the application is received could be of decisive importance. An alternative form of application had to remain assured as backup for the parties with access entitlement in the event of a technical failure of the PCS. In this case, it was left to the applicant to propose a regulation taking account of the statutory requirements instead of the intended deletion without replacement of the passage of text at issue in point 4.2.5.1 of the 2016 network statement.

7 The applicant brought an action before Verwaltungsgericht Köln (Administrative Court of Cologne) on 15 March 2016. The Administrative Court dismissed the action by judgment of 20 April 2018. The applicant's appeal is directed against that judgment.

Principal arguments of the parties in the main proceedings

8 The applicant has already contested before the Administrative Court the Federal Network Agency's authority to review the provisions contained in point 4.2.5.1 of the 2016 network statement and to oppose intended amendments. It stated that, under Regulation No 913/2010, the configuration of the application procedure at the one-stop shop was solely a matter for the respectively responsible executive and management boards. The resolutions thereof, like the Regulation itself, had priority over national law and were not subject to control by the national regulatory bodies. The Federal Network Agency was only allowed to review indications such as those in point 4.2.5.1 of the 2016 network statement for their compliance with the provisions issued by the management board. Even if the configuration of the application procedure at the one-stop shop were subject to control by the national regulatory bodies, the Federal Network Agency would only have been allowed, pursuant to the first sentence of Article 20(1) of Regulation

No 913/2010, to act together with the other national regulatory bodies concerned. Moreover, the decision of the Federal Network Agency was also substantively incorrect. There was no need for a backup, because making an application by means of the PCS was sufficiently reliable. The parties with access entitlement could be guaranteed that the system is at least 98.5% technically reliable.

9 The defendant asserted inter alia that the allocation of railway track capacity was also still subject to the general national provisions on granting access that were based on Directive 2012/34. The provisions regarding the application procedure at the one-stop shop were therefore a necessary part of the network statement to be drawn up by the applicant and in this respect were also subject to the full control of the Federal Network Agency as the national regulatory body. Regulation No 913/2010 did not give the management board of a freight corridor the competence to issue binding provisions for the structuring of the application procedure with priority of application over national law. The application procedure was instead to be structured as allowed and stipulated by the network statements drawn up by the relevant infrastructure managers and checked and approved by the national regulatory bodies. It would otherwise be in the power of the infrastructure managers in the area of the freight corridors to autonomously create special regulations for applying for railway track capacity that would not be subject to any regulatory authority control for ensuring non-discriminatory access for the railway undertakings.

Brief summary of the basis for the reference

10 The referring Oberverwaltungsgericht (Higher Administrative Court) points out that the decision in the main proceedings hinges on whether the Federal Network Agency was right to oppose the applicant's intended amendment of point 4.2.5.1 of the 2016 network statement. The provisions to be observed in this regard include in particular the prohibition of discrimination under Paragraph 14(1) of the Allgemeines Eisenbahngesetz (General Railway Law; AEG). Under point 4 of Paragraph 14e(1) AEG, the Federal Network Agency, as the responsible regulatory body, can, after receiving a corresponding notification from a public railway infrastructure company, oppose the intended revision or amendment of the network statement, insofar as this does not comply with the provisions of the railway law regarding access to the railway infrastructure.

11 However, the referring court has doubts as to whether the procedure for making applications for allocation of infrastructure capacity of a freight corridor to the one-stop shop referred to in Article 13(1) of Regulation No 913/2010 is even to be regulated by the applicant in its network statement and in this respect is subject to control by the Federal Network Agency under point 4 of Paragraph 14e(1) AEG. The first question of the referring court is connected therewith.

12 With that first question, the referring court seeks clarification as to whether or not the procedure for applying for railway track capacity falls under Article 27(1) and

(2) in conjunction with point 3(a) of Annex IV to Directive 2012/34. This is contradicted (and therefore the applicant's opinion is supported) by the fact that the provisions of Regulation No 913/2010 could possibly be understood in their entirety as meaning that access to and use of infrastructure capacity of a freight corridor are subject to an independent regulatory system. Within that regulatory system, it would be incumbent upon the management board to be established for a freight corridor under Article 8(2) of the Regulation to define the procedure for making an application for allocation of infrastructure capacity to the one-stop shop referred to in Article 13(1) of the Regulation and to inform the parties with access entitlement thereof in the Corridor Information Document (CID). The management board at the level of a freight corridor would thereby exclusively take on those tasks otherwise assigned to the infrastructure managers under Article 27(1) and (2) in conjunction with point 3(a) of Annex IV to Directive 2012/34.

13 However, it cannot be expressly gathered from the provisions of Article 13(1), Article 14(1) and (9) and Article 18(c) in conjunction with Recital 26 of Regulation No 913/2010 that the management board has the authority to define the procedure for making an application to the one-stop shop referred to in Article 13(1) of that Regulation. This is also not immediately evident from any other provision of the Regulation. In contrast, the EU legislature expressly provided for the executive board to have the authority to define a framework in Article 14(1) of the Regulation. If the EU legislature had also wanted to regulate exclusive authority of the management board to define the application procedure under Article 13(1) of the Regulation, an equally explicit regulation would therefore presumably have to be expected.

14 It can also at no point be expressly gathered from the provisions of Regulation No 913/2010 that access to and use of a freight corridor of assigned infrastructure capacity no longer falls under the general regulatory system of Directive 2012/34. Recital 7 of the Regulation points in this direction. This seems (within the meaning of the defendant's legal opinion) to be an important indication that the procedure for making applications for allocation of rail infrastructure capacity falls under the general provisions of railway law under Article 27(1) and (2) in conjunction with point 3(a) of Annex IV to Directive 2012/34 even if that rail infrastructure capacity is part of the infrastructure capacity of a freight corridor and the application is made to the one-stop shop referred to in Article 13(1) of Regulation No 913/2010. In this case, the activity of the one-stop shop would have to be oriented towards the network statements of the infrastructure managers involved, which are fundamentally subject to the regulatory control of the national regulatory bodies.

15 The second question is to be answered if the procedure for making applications for allocation of rail infrastructure capacity pursuant to Article 27(1) and (2) in conjunction with point 3(a) of Annex IV to Directive 2012/34 and the national legislation adopted for its transposition is also to be regulated by the applicant in its network statement insofar as that rail infrastructure capacity is part of the

infrastructure capacity of a freight corridor within the meaning of Regulation No 913/2010 and the application is made to the one-stop shop referred to in Article 13(1) of that Regulation.

16 The referring court has doubts as to whether a national regulatory body can act without cooperation with the national regulatory bodies of the other Member States involved in a freight corridor and provide the infrastructure manager with stipulations for structuring the application procedure at the one-stop shop, as in this case for providing a backup in the event of a technical failure of the PCS.

17 In this context, the referring court, with the second question under letter (a), would like to know whether a national regulatory body has to observe the provisions of Article 20 of Regulation No 913/2010 when reviewing a network statement within the meaning of Article 27 of Directive 2012/34, if the network statement regulates the procedure for making applications for allocation of infrastructure capacity to the one-stop shop referred to in Article 13(1) of Regulation No 913/2010. If the provisions of Article 20 of Regulation No 913/2010 are to be observed in whole or in part, it also needs to be clarified which stipulations emerge therefrom in circumstances such as those in the present case in respect of the activity of a national regulatory body. The national regulatory bodies' duty of cooperation referred to in the first sentence of Article 20(1) of the Regulation could in particular have to be interpreted as meaning that a national regulatory body may either only act jointly and in a substantively uniform manner with the national regulatory bodies of the other States involved in a freight corridor, if it objects to a regulation on the application procedure at the one-stop shop referred to in Article 13(1) of the Regulation, or must in any case agree its approach with the other national regulatory bodies.

18 If Article 20 of Regulation No 913/2010 were not to be applicable, the referring court, with its second question under letter (b), would like to know whether, in circumstances such as those in the present case, corresponding duties such as those set out above emerge from Directive 2012/34, and in this respect refers in particular to Article 57 of that Directive.

19 The third question is only to be answered if Regulation No 913/2010 were to be interpreted as meaning that the management board for a freight corridor would be authorised to define the procedure for making applications for allocation of infrastructure capacity to the one-stop shop referred to in Article 13(1) of the Regulation itself, for example by requiring, as in the present circumstances, the exclusive use of an electronic booking tool. Although the national provisions of the EIBV in implementation of Directive 2012/34 only determine the minimum content of the network statement, which means that the applicant would not be prevented under national law from also reproducing the regulations drawn up by the management board of a freight corridor in its network statement, the referring court has doubts as to whether the Federal Network Agency is allowed to review the applicant's network statement in this respect for more than its substantive compliance with the regulations drawn up by the management board.

20 If the national regulatory bodies – on the basis of the previous questions – are authorised to review the procedure for making applications for allocation of infrastructure capacity to the one-stop shop referred to in Article 13(1) of Regulation No 913/2010, clarification is finally sought in the scope of the fourth question as to the importance, in the exercise of that authority, of the framework defined by the executive board for a freight corridor under Article 14(1) of Regulation No 913/2010. The executive boards of the freight corridors involved here established in Article 8(2) of the respective framework that the corridor capacity is to be published and allocated via an international application system, which shall as far as possible be harmonised with the other freight corridors. The referring court is uncertain as to the legal nature and binding effect of a framework within the meaning of Article 14(1) of the Regulation, and whether it is subject to the ultimately binding interpretation of the national courts or the Court of Justice.

21 The fifth question is linked thereto and is only to be answered if the ultimately binding interpretation of the framework falls within the competence of the Court of Justice.