Case C-144/20

Request for a preliminary ruling

Date lodged:

27 March 2020

Referring court:

Administratīvā rajona tiesa (District Administrative Court, Riga, Latvia)

Date of the decision to refer:

26 March 2020

Applicants:

AS LatRailNet

VAS Latvijas dzelzceļš

Defendant:

Valsts dzelzceļa administrācija (State Railway Administration)

[…]

The ADMINISTRATĪVĀ RAJONA TIESA

(District Administrative Court) HAVING ITS SEAT IN RIGA

ORDER

[…] 26 March 2020

The Administratīvā rajona tiesa

[…]

[composition of the court]

[…] [information on the parties' representatives]

having examined […] the administrative-law dispute initiated by way of the action for annulment brought by the public limited company LatRailNet against the decision […] of the State Railway Administration of 27 June 2018, and the action brought by the public limited company governed by public law Latvijas dzelzceļš against the decision […] of the State Railway Administration of 7 November 2018,

states

Factual background

1. On 30 June 2017, the applicant AS LatRailNet (responsible for performing the essential functions of the railway infrastructure manager; a subsidiary of VAS Latvijas dzelzceļš ('Latvian Railway')], adopted the provisions […] relating to the 'charging scheme' ('the charging scheme'; https://www.lrn.lv/wp-content/uploads/2020/02/LRN_CHRG_SCHEME_30_06_2017_ENGLISH_23_12_2019.pdf). In Section II of Annex 3 to that charging scheme, entitled 'Quantitative criteria for determining the mark-ups applicable in specific market segments', point 3 provides that, for the market segment [']sab pak pas['], the value of criterion $S_s = 1$, while the value of criterion S_s as applicable in other market segments is to be determined on the basis of an expert assessment.

2. On 27 June 2018, the defendant, the State Railway Administration, the regulatory body for the railway sector, adopted a decision […] ('the contested decision') ordering the applicant to bring the charging scheme into line with Article 11^1(1) and (7) of the Dzelzceļa likums (Law on Railways), by 24 August 2018, by establishing criteria for assessing the mark-up applicable to the market segment comprised of passenger transport services within the framework of a public service contract in such a way as to exclude from them pre-scheduled costs covered by the State budget or by local authority budgets which passenger transport operators cannot meet out of transport revenue.

   The contested decision establishes that, in accordance with the provisions relating to the charging scheme, the charges for the minimum access package and for access to infrastructure connecting service facilities ('the infrastructure charge') are to be calculated as being the sum of the direct costs and mark-ups for a particular railway segment. For its part, the amount of the mark-up for a particular market segment is to be calculated in accordance with the formula contained in the charging scheme, whereby the main factor in determining the amount of the mark-up is the market weighting coefficient mcb_s [a ratio characterizing the allowable level of mark-ups in market conditions of a particular market segment] which describes the amount of mark-up allowed in a particular market segment, defined as being the maximum value of the assessment criteria C_s, V_s and S_s [valuation criteria characterizing, respectively: the impact of different types of utilization of the railway infrastructure on the costs of railway infrastructure within a particular market segment; the productivity achieved by railway

undertakings within a particular market segment; the optimal railway competitiveness within a particular market segment (charging scheme, 35.2)]. Thus, if $mcb_s = 0$, the mark-up will not apply to the market segment in question, but, if $mcb_s = 1$, the maximum mark-up will apply to the market segment concerned. In accordance with Section II of Annex 3 to the charging scheme, entitled 'Quantitative criteria for determining the mark-ups applicable in specific market segments', the value of criteria C_s and V_s is 0, while the value of S_s for the passenger transport market is set at 1. Given that the maximum value of assessment criteria C_s, V_s and S_s for the passenger transport market segment is 1, it may be concluded that the value of the market weighting coefficient mcb_s will also be set at 1. In accordance with the charging scheme, therefore, the mark-up applicable to the passenger transport market segment will automatically be at its maximum value whatever the market situation of the segment in question.

Since, in accordance with the Law on Railways and with 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'), mark-ups are applicable only if the market situation allows this, and given the requirement that infrastructure charges must not prevent use of public-use railway infrastructure in those segments which can at least cover direct costs, the Administration concluded that, before applying the mark-up and determining the amount thereof, it was necessary to assess the competitiveness and solvency of the market segment in question.

Since the charging scheme should include criteria for assessing the competitiveness and solvency of the passenger transport market segment, but does not in fact do so, and given, on the other hand, that that scheme establishes a procedure for determining the mark-up applicable to the passenger transport market segment, the effect of which is that that mark-up is always imposed at its maximum value, the State Railway Administration concluded that the charging scheme was not in conformity with Article 11^1(1) and (7) of the Law on Railways.

The performance by the State Railway Administration of the role mentioned in [Article] 31(1), point 9, of the Law on Railways, under which it declared the charging scheme to be incompatible with Article 11^1(1) and (7) of the Law on Railways, also includes the obligation to adopt a decision remedying that situation, although the Administration enjoys some discretion with respect to the content of the administrative act.

3. On 26 July 2018, the applicant AS LatRailNet brought before the Administratīvā rajona tiesa (District Administrative Court) an action for the annulment of the contested decision.

In the application and the annex thereto, AS LatRailNet states that, in accordance with Article 11^1(1) of the Law on Railways, the development and adoption of the charging scheme are matters that fall within its competence. AS LatRailNet takes the view that the State Railway Administration, in proceeding as it did, acted *ultra vires*, which is to say that it manifestly exceeded its powers, inasmuch as, by the

contested decision, it essentially imposed on AS LatRailNet an obligation to make changes to the charging scheme, prescribing the specific content which that Scheme should include. In addition, Article 13[1](1), point 4, of the Law on Railways provides that the essential functions of the public-use railway infrastructure manager cannot be performed by State institutions which have been entrusted with the task of regulating the railway transport sector.

AS Pasažieru vilciens has been granted the exclusive right to provide public transport services on regional intercity rail routes up to 30 June 2031. Consequently, there is no competition in the provision of public transport services by rail. In the light of the foregoing, it is not possible for the State Railway Administration to perform the task of monitoring competition on the markets in railway services (Article 31(1), point 9, of the Law on Railways) because the market segment relating to the provision of public transport services by rail is not open to competition. Since there is no competition in the provision of public transport services by rail, AS LatRailNet cannot meet the Administration's requirements to assess the competitiveness and solvency of the market segment concerned before applying the mark-up and determining the amount thereof.

4. By order of the Administratīvā rajona tiesa (District Administrative Court) of 13 November 2018, VAS Latvijas dzelzceļš ('Latvian Railway'; the railway infrastructure manager) was invited to participate in the proceedings as an interested third party.

VAS Latvijas dzelzceļš takes the view that the State Railway Administration, in adopting the contested decision, acted beyond the limits of its competence, inasmuch as, in accordance with Article 31(1), point 9, of the Law on Railways, the Administration is competent only to verify that charging schemes are not discriminatory, but not to adopt the contested decision, which affects an aspect of the charging scheme which is not in any way potentially discriminatory. VAS Latvijas dzelzceļš contends that the State Railway Administration, contrary to its obligation under Article 13[1](6) of the Law on Railways to enforce the requirement that the independence of AS LatRailNet must be maintained, undermined the independence of AS LatRailNet..

As regards the passenger transport services market segment, VAS Latvijas dzelzceļš considers that it is possible to set a maximum value for criterion S_s, since AS Pasažieru vilciens, the sole representative of the passenger transport market segment, which pays VAS Latvijas dzelzceļš an infrastructure charge (including a mark-up) was also protected against any harm that might arise from the determination of that charge.

5. On 21 August 2018, the applicant AS LatRailNet, having agreed to amend the charging scheme […], made those amendments, and worded the first sentence of point 3 of Section II of Annex 3 to the provisions [relating to the charging scheme] as follows: 'the value of criterion S_s shall, in the case of all market segments, be determined on the basis of an expert assessment'.

6. On 20 September 2018, VAS Latvijas dzelzceļš lodged with the State Railway Administration an objection to the amendments to the charging scheme.

After examining the objection lodged by VAS Latvijas dzelzceļš, the State Railway Administration, on 7 November 2018, adopted a decision […] stating that VAS Latvijas dzelzceļš had no subjective right to seek the adoption of an administrative act annulling the [defendant's] decision amending the charging scheme.

On 5 December 2018, VAS Latvijas dzelzceļš brought an action for the annulment of the decision of the State Railway Administration of 7 November [2018].

By order […] of the Administratīvā rajona tiesa (District Administrative Court) of 5 February 2019, the two sets of administrative-law proceedings were joined.

On 19 February 2020, VAS Latvijas dzelzceļš asked that court to make a reference for a preliminary ruling to the Court of Justice of the European Union. VAS Latvijas dzelzceļš seeks clarification as to whether Article 56(2) of Directive [2012/34] is to be interpreted as meaning that it confers on the regulatory body the power to adopt on its own initiative a decision ordering the undertaking performing the essential functions of the railway infrastructure manager to make to provisions concerning the calculation of infrastructure charges amendments that are unrelated to discrimination against applicants. VAS Latvijas dzelzceļš also seeks clarification as to whether the obligation on Member States under Article 32(1) of Directive [2012/34] to guarantee optimal competitiveness of rail market segments by establishing mark-ups on infrastructure charges also applies to the determination of infrastructure charges in segments where there is no competition.

Applicable law

EU law

7. Directive 2012/34, recital 19 and Articles 7, 32(1) and 56(2), and […] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and 1107/70 ('Regulation No 1307/2007'), Article 2(f).

Latvian law

8. Article 1, point 23, of the Law on Railways (available at: *https://likumi.lv/doc.php?id= 47774*), provides that, in that Law, the following terms are to be used:

23) essential functions of an infrastructure manager: decision-making on capacity allocation, train path allocation, including both the definition and the assessment

of availability and the allocation of individual train paths, and decision-making on infrastructure charging, including determination and collection of charges.

Article 11(1) of the Law on Railways provides that, after consulting applicants [Directive 2012/34, Article 3(19)] and the public-use railway infrastructure manager, the person responsible for performing the essential functions of the public-use railway infrastructure manager is to develop and approve a charging scheme in relation to the minimum access package referred to in Article 12^1(1) of that Law and in relation to access to infrastructure connecting service facilities and forward it to the public-use railway infrastructure manager for inclusion in the network statement. Other than in the specific cases provided for in Article 11^1(10) of that Law, the person responsible for performing the essential functions of a public-use railway infrastructure manager is to ensure that the aforementioned charging scheme is based on the same principles throughout the network and that that scheme operates in such a way that that different transport undertakings providing services of a similar nature in a similar part of the market pay equivalent and non-discriminatory charges.

Article 11(2) of the Law on Railways provides that the charges for the minimum access package referred to in Article 12^1(1) of that Law and for access to infrastructure connecting service facilities are to be determined on the basis of the direct costs of operating the rail service and in accordance with the provisions of paragraphs (3) and (4) of that article and Article 11^1 of that Law.

Article 11^1(1) of the Law on Railways establishes that, in order to obtain full recovery of the costs incurred by the public-use railway infrastructure manager, the person responsible for performing the essential functions of the public-use railway infrastructure manager may, if the market can bear this, levy mark-ups on the charges for the minimum access package referred to in Article 12^1(1) of that Law and for access to infrastructure connecting service facilities.

Article 11^1(2) of the Law on Railways provides that, before applying the mark-ups, the person responsible for performing the essential functions of the public-use railway infrastructure manager is to evaluate their relevance in at least the following market segments and choose the most important of them: (1) passenger and freight services.

Article 11^1(7) of the Law on Railways provides that the mark-ups are to be applied on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimal competitiveness of railways and taking into account the productivity increases achieved by railway undertakings. The level of charges is not to exclude the use of public-use railway infrastructure by market segments which can pay at least the direct costs, plus a rate of return which the market can bear.

Article 31(1)(9) of the Law on Railways provides that the State Railway Administration is to perform the following functions:

9) monitoring the competitive situation in the rail services markets, in particular in the high-speed passenger transport services market, and the activities of the public-use railway infrastructure manager, the person responsible for performing the essential functions of the public-use railway infrastructure manager and the service facility operator in the areas referred to in point 8(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j), without prejudice to the powers of the authority responsible for enforcing the law governing competition in the rail services markets. It must, on its own initiative and with a view to preventing discrimination against applicants, control the elements referred to in point 8(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j), and, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the public-use railway infrastructure manager, the person responsible for performing the essential functions of the public-use railway infrastructure manager or the service facility operator that may be used to discriminate against applicants.

Reasons for the existence of doubts as to the interpretation of EU law

9. By the contested decision, the State Railway Administration, in its capacity as regulatory body, compelled the person responsible for performing the functions of the railway infrastructure manager to amend the criterion for calculating the mark-up applicable to the market segment comprised of passenger services within the framework of a public service contract, as provided for in the charging scheme. The regulatory body based the adoption of that decision on Article 31(1), point 9, of the Law on Railways, which provides that the regulatory body must perform the following functions: monitor the competitive situation in the rail services market and, on its own initiative and with a view to preventing discrimination against applicants, control the elements referred to in point 8(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of [Article 31(1)].

Article 56 of Directive 2012/34 defines the ‘functions of the regulatory body’ and provides, in paragraph 2, that the regulatory body is to have the power to monitor the competitive situation in the rail services markets and is, in particular, to control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants.

It may be inferred from this that the regulatory body has the power to act on its own initiative only with a view to preventing discrimination against applicants.

10. The case-law of the Court of Justice of the European Union has recognised the discretion available to the railway infrastructure manager (in this case, the person responsible for performing the essential functions of the railway infrastructure manager) with respect to the content of the charging scheme; the functions of the regulatory body, however, are confined exclusively to verifying that that scheme is not discriminatory (judgments of the Court of Justice of 28 February 2013, *Commission* v *Spain*, C-483/10, EU:C:2013:114, paragraph 44; of 28 February 2013, *Commission* v *Germany*, C-556/10, EU:C:2013:116, paragraph 82; and of 9 November 2017, *CTL Logistics*, C-489/15, EU:C:2017:834, paragraph 85).

11. Articles 4 and 7 of Directive 2012/34 provide for the independence of the railway infrastructure manager and its essential functions.

The case-law of the Court of Justice of the European Union has recognised that the railway infrastructure manager is competent to determine and collect charges (judgment of the Court of Justice of 11 July 2013, *Commission* v *Czech Republic*, C-545/10,EU:C:2013:509, paragraphs 33 and 34). The Court has also held that the discretion available to the railway infrastructure manager must be such as to enable it to adopt, at the very least, decisions involving choices and assessments as to the factors or parameters on which calculations are to be based (judgments of the Court of Justice of 28 February 2013, *Commission* v *Spain*, C-483/10, EU:C:2013:114, paragraph 44, and of 28 February 2013, *Commission* v *Germany*, C-556/10, EU:C:2013:116, paragraph 82).

VAS Latvijas dzelzceļš considers that the discretion enjoyed by the person performing the essential functions of the railway infrastructure manager, recognised by the Court of Justice of the European Union, may exist only if the functions of the regulatory body are limited to assessing possible discrimination. Otherwise, if the regulatory body's powers were extended, those two functions would merge, thus empowering the regulatory body to influence (and, effectively, to determine) the content of charging schemes. This would undermine the discretion enjoyed by the person responsible for performing the essential functions of the railway infrastructure manager and make it impossible for it to act with the independence which the Court of Justice of the European Union has recognised it as enjoying.

12. The market segment in respect of which the contested decision imposed the obligation to amend the charging scheme is passenger transport services within the framework of a public service contract, which, in Latvia, are provided by AS Pasažieru vilciens. That company is the only operator in that market segment, to the exclusion of all competition.

Article 32 of Directive 2012/34, which provides for exceptions […] to charging principles, provides in paragraph 1 that, in order to obtain full recovery of the costs incurred by the infrastructure manager, a Member State may, if the market can bear this, levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimal competitiveness of rail market segments. As regards the level of mark-ups, Article 32(1) of Directive 2012/34 provides that the application of mark-ups in specific market segments must be assessed, in particular, by evaluating their effects in the market segment comprised of passenger transport within the framework of a public service contract. Consequently, the provisions of Directive 2012/34 state that, in determining the level of mark-ups for the market segment comprised of passenger transport within the framework of a public service contract, account must be taken of, inter alia, the competitiveness of that segment.

Recital 19 of Directive 2012/34 makes reference to Regulation No 1370/2007 and states that the provision of the aforementioned service under Regulation No 1307/2007 may entail the conferment of exclusive rights, thus fundamentally excluding any kind of competition. Nonetheless, Directive 2012/34 does not create for that market segment any exceptions to the requirement to evaluate the competitiveness of the market segment.

13. In the light of the aforementioned rulings of the Court of Justice of the European Union, this [referring] court considers that a *prima facie* analysis of the legislative framework indicates that the regulatory body has the power to act on its own initiative only with a view to preventing discrimination against applicants, and, in addition, that, for the purposes of determining the amount of the mark-up applicable to the market segment comprised of passenger transport within the framework of a public service contract, it is important to take into account, inter alia, the competitiveness of that segment.

Given that the referring court has doubts about the interpretation of Articles 32(1) and 56(2) of Directive [2012/34], it considers it necessary to make a reference for a preliminary ruling to the Court of Justice of the European Union. The proceedings in this case must therefore be stayed until such time as the Court of Justice gives a ruling on the questions referred.

In accordance with Article 267 of the Treaty on the Functioning of the European Union, […] [reference to national procedural provisions], this court

hereby decides

To refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 56(2) of Directive [2012/34] be interpreted as meaning that it confers on the regulatory body the power to adopt on its own initiative a decision ordering the undertaking performing the essential functions of a railway infrastructure manager, as mentioned in Article 7(1) of that directive, to make to provisions relating to the calculation of infrastructure charges (the charging scheme) certain amendments that are unrelated to discrimination against applicants?

2. If the first question is answered in the affirmative, is the regulatory body empowered to set out, in that decision, the conditions that must be laid down by such amendments, for example by laying down an obligation to exclude from the criteria for determining infrastructure charges pre-scheduled costs covered by the State budget or by local authority budgets which passenger transport operators cannot meet out of transport revenue?

3. Must Article 32(1) of Directive [2012/34] be interpreted as meaning that the obligation imposed on Member States in that paragraph to guarantee optimal competitiveness of rail market segments, by establishing mark-ups on

infrastructure charges, also applies to the determination of infrastructure charges in market segments where there is no competition, because, for example, in the market segment concerned, transport is delivered exclusively by a single rail operator which has been given the exclusive right under Article 2(f) of Regulation No 1370/2007 to provide transport in that market segment?

To stay the proceedings pending a ruling from the Court of Justice of the European Union.

[…] [signatures]