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Court of Justice of the European Union

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Judgment in Joined Cases C-349/18 to 351/18
Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Mbutuku
Kanyeba and Others

When a passenger boards a train without a ticket, he concludes a contract with the carrier

That is the case where access to the train is free

In accordance with its conditions of carriage, the Belgian national railway company (SNCB) penalises passengers who travel by train without being in possession of a valid ticket. At the time of the facts at issue, those passengers were given the opportunity to regularise their situation by paying immediately the price of the journey, plus an 'on board' surcharge, or, within 14 days of after the establishment of the infringement, a surcharge of €75. After that 14-day deadline, there remained the opportunity to pay a surcharge of €225.

In the present case, three passengers who were penalised made no use of those opportunities. Therefore, the SNCB sued them before the Vredegerecht te Antwerpen (Magistrates' Court, Antwerp, Belgium), seeking an order that they pay it, respectively, the amounts of €880.20, €103.90 and €2,394. In the context of those applications, the SNCB claimed that the legal relationships between it and each of the passengers in question are not contractual, but regulatory, since the latter did not purchase tickets.

The Magistrates' Court questions the nature of the legal relationship between the SNCB and passengers without tickets. In that regard, the question is raised whether the EU regulation on rail passengers' rights and obligations must be interpreted as meaning that a situation in which a passenger boards a train for the purpose of travel without having obtained a ticket is covered by the concept of 'transport contract' within the meaning of that regulation¹. Moreover, where that is the case, it is necessary to determine, in the light of the directive on unfair terms in contracts, whether the court which establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair may moderate the amount of the penalty².

In today's judgment, the Court of Justice holds first of all that, on the one hand, by allowing free access to its train and, on the other hand, by boarding that train with an intention to travel, both the rail undertaking and the passenger demonstrate their agreement to enter into a contractual relationship.

As regards the question whether the possession, by the passenger, of a ticket is essential for the purposes of considering that there exists a 'transport contract', the Court considers that the ticket is only the instrument which embodies the transport contract. **The concept of 'transport contract' is independent from the possession, by the passenger, of a ticket and it thus covers a situation in which a passenger boards a freely accessible train for the purposes of travel without having obtained a ticket.** In the absence of provisions in that regard in Regulation No 1371/2007, that interpretation is however without prejudice to the validity of that contract or the consequences which could result from the fact that a party fails to perform its contractual obligations, which remain governed by the applicable national law.

¹ Article 3(8) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 4).

² Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

As regards the power of the national court to moderate the penalty clause which is, as the case may be, unfair, the Court notes that that clause is part of the SNCB's general conditions of carriage, in relation to which the national court states that they are 'considered to be generally binding on the basis of their regulatory nature' and that they are part of a 'publication in an official State publication'. **The contractual terms which reflect, in particular, mandatory statutory or regulatory provisions are not to be subject to the provisions of the directive.**

However, that exclusion from the scope of application of the directive requires, according to the Court's case-law, two conditions to be met. Firstly, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory. Determining whether those conditions have been satisfied is a matter for the national court.

If those conditions are not satisfied in the view of the national court and it considers that the penalty clause comes therefore within the scope of application of the directive, the Court notes that that court may not moderate the amount of the penalty deemed to be unfair and may also not replace that clause, in accordance with the national law on contracts, with a supplementary provision of national law, but must in principle exclude the application thereof, except where the contract at issue cannot continue in existence in the event that the unfair term is deleted and where the cancellation of the contract in its entirety exposes consumers to particularly unfavourable consequences.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355