Case C-538/23

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:

22 August 2023

Referring court:

Bundesverwaltungsgericht (Austria)

Date of the decision to refer:

21 August 2023

Appellants:

ÖBB-Infrastruktur AG

WESTbahn Management GmbH

Respondent:

Schienen-Control Kommission

Subject matter of the main proceedings

Complaints against the approval of market mark-ups on infrastructure charges in accordance with Article 32 of Directive 2012/34

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling under Article 267 TFEU concerns the interpretation of Article 32 of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area

Questions referred

I. Must EU law, in particular Article 32 of 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/EU), be interpreted as meaning that the Member State concerned must approve market mark-ups ***ex ante***, before the start (or at least before the end) of the relevant working timetable period for which the market mark-ups have been requested? Or can the Member State also approve the market mark-ups ***ex post*** after the end of the relevant working timetable period (possibly years later)? Must the approval of market mark-ups by the Member State in accordance with Article 32 of Directive 2012/34/EU be understood as a **legally binding** approval?

II. Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(4) thereof, be interpreted as meaning that – in **chronological order** – the market mark-ups (in the event of changes to essential components) must first be published in the network statement (if necessary subject to approval) and are to be approved by the Member State only after they have been published? Has there already been a **modification of essential elements**, for the purposes of Article 32(6) of Directive 2012/34/EU, if 'only' the level of the market mark-ups in relation to the working timetable period for the previous year is changed?

III. (If the first sentence of Question II is answered in the affirmative) Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(2) and (4) thereof and in conjunction with point 2 of Annex IV to Directive 2012/34/EU – read in the light of the obligation of transparency and planning security set out in recital 34 of Directive 2012/34/EU – be interpreted as meaning that **market mark-ups** may not be approved by the Member State if the levels of the market mark-ups themselves have not been **published** in the network statement for the relevant working timetable period (for which approval of those market mark-ups was requested), but rather, in that network statement, only a total charge per train path kilometre (as the sum of the charges for costs directly incurred as a result of operating the train service in accordance with Article 31(3) of Directive 2012/34/EU and the market mark-ups in accordance with Article 32 of Directive 2012/34/EU) was published for each market segment? Railway undertakings therefore could not find out from those network statements either the charges for 'direct costs' (within the meaning of Article 31(3) of Directive 2012/34/EU, read in conjunction with point 1 of Article 2 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 (Implementing Regulation 2015/909/EU)), or the market mark-ups in accordance with Article 32 of Directive 2012/34/EU per market segment.

IV. (If the first sentence of Question II is answered in the affirmative) Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(4) thereof – read in the light of the obligation of transparency and planning security set out in recital 34 of Directive 2012/34/EU – be interpreted as meaning that the market mark-ups published in the network statement for the relevant working timetable period have a **binding effect** for the approval by the Member State? Does it follow from that binding effect that the Member State may

not approve higher market mark-ups per market segment than those published in the accompanying network statement? Or is there a binding effect only to the extent that the total charges approved (thus the charges for 'direct costs' in accordance with Article 31(3) of Directive 2012/34/EU in conjunction with point 1 of Article 2 of Implementing Regulation (EU) 2015/909 and market mark-ups in accordance with Article 32 of Directive 2012/34/EU) may not be higher than those published in the network statement, whereas the market mark-ups themselves may be approved at a level which is higher than that published in the network statement? Is there also a binding effect in respect of the level of the application for approval originally submitted to the Member State with regard to the market mark-ups? If so, in what sense (no increase, no further reduction permissible)? Is there any other form of binding effect?

V. Must EU law, in particular Article 32(1) of Directive 2012/34/EU, be interpreted as meaning that, for the purposes of determining whether market mark-ups are permissible in principle (apart from the market viability to be verified) – thus, for the purposes of the full recovery of the infrastructure manager's costs – it is not necessary to take as a basis an overall revenue which must be **obtained by the Member State** from the railway infrastructure manager ('**revenue target**'), consisting of the sum of the charges for the costs directly incurred as a result of operating the train service in accordance with Article 31(3) of Directive 2012/34/EU and the market mark-ups in accordance with Article 32(1) of Directive 2012/34/EU? Rather, must the costs, in order to obtain full recovery, be determined and established in order to make it possible to assess on the basis thereof whether and to what extent any market mark-ups can be approved? When determining whether market mark-ups are permissible in principle (apart from the market viability to be verified), must **State subsidies** from the Member State to the railway infrastructure undertaking also be taken into account? If so, what form should this take? Must those State subsidies, where appropriate, be deducted from the costs required for full recovery (in addition to the charges for the costs directly incurred as a result of operating the train service)? In that context, must EU law, in particular Article 32(1) of Directive 2012/34/EU in conjunction with Article 8(4) thereof, be interpreted as meaning that, in addition to the charges for the costs directly incurred as a result of operating the train service and any State subsidies to be taken into account, the Member State must determine – and include in the assessment of whether market mark-ups are permissible – **all other profits** of the railway infrastructure undertaking from other economic activities and all **non-refundable incomes received** by that undertaking **from private sources**? If so, what form should this take? Where appropriate, should they also be deducted from the costs required for full recovery? Must other **charges levied** by the railway infrastructure undertaking – such as charges for the use of passenger platforms ('station charges') and charges for the use of electrical supply equipment for traction current – as well as **other business positions** of the railway infrastructure undertaking be included in that assessment?

Provisions of EU law cited

Directive 2012/34, recital 34, Article 8(4), Article 27(2) and (4), Article 31(3), Article 32(1) and (6), Annex IV, point 2

Implementing Regulation 2015/909, Article 2, point 1

Provisions of national law relied on

Bundesgesetz über Eisenbahnen, Schienenfahrzeuge auf Eisenbahnen und den Verkehr auf Eisenbahnen (Eisenbahngesetz) (Federal Law on railways, rolling stock and rail traffic (Law on railways), 'the EisbG'), Paragraph 59, in the version resulting from BGBl I No 143/2020, 67; Paragraph 67, in the version resulting from BGBl. No 137/2015 and in the version resulting from BGBl. No 231/2021; Paragraph 67d, in the version resulting from BGBl. No 137/2015

Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Bundesbahnen (Bundesbahngesetz) (Federal Law reorganising the legal relationships of the Austrian Federal Railways (Federal Law on railways) in the version resulting from BGBl. No 95/2009, Paragraph 42(1) to (3)

Brief summary of the facts and procedure

1 ÖBB-Infrastruktur AG ('ÖBB-Infra') is the railway infrastructure undertaking which is responsible in Austria for the publication of charges in the relevant network statement ('NS') and for the collection of charges. Market mark-ups are approved by the competent national regulator, the Schienen-Control Kommission (Railway Supervisory Commission; 'the SCK').

2 For the 2018 working timetable period, ÖBB-Infra applied for the first time for the approval of market mark-ups on infrastructure charges. That working timetable period ran from 10 December 2017 to 8 December 2018. Up until 10 April 2017, rail transport undertakings could make requests for the allocation of infrastructure capacity for that period. Four months before the expiry of that period, ÖBB-Infra published in its NS the train path product catalogue for the corresponding period.

3 The 2019 working timetable period ran from 9 December 2018 to 7 December 2019. Up until 9 April 2018, rail transport undertakings could make requests for the allocation of infrastructure capacity for that period. Four months before the expiry of that period, ÖBB-Infra published in its NS the train path product catalogue for the corresponding period.

4 The product catalogues for the 2018 and 2019 working timetable periods each contained the following information: *'Infrastructure charges shall be paid by [rail transport undertakings] for services provided in the minimum access package in*

accordance with [reference to other sections of the NS]. The infrastructure charge shall be set in accordance with the provisions of the Law on railways (in particular Paragraph 67 et seq.) and Implementing Regulation 2015/909/EU. … Infrastructure charges include costs directly incurred as a result of operating the train service (Paragraph 67(1) of the EisbG) and market mark-ups (Paragraph 67d of the EisbG) as well as surcharges/discounts (Paragraph 67a et seq. of the EisbG). … Market mark-ups are set for the market segments "commercial passenger transport", "public service passenger long-distance transport", "abundant local transport", "limited local transport" and "freight transport not handled".'

5 In the 2018 NS, only the total charge to be paid per train path kilometre travelled was indicated for each of the five abovementioned market segments and not the level of the charges for direct costs and market mark-ups in each market segment.

6 In the 2019 NS, by contrast, for each market segment both the market mark-ups and the charges for direct costs were indicated per train path kilometre travelled, and then from both the total charge to be paid was calculated.

7 The 2018 and 2019 NS each contained the following sentence with regard to market mark-ups: '*The procedure for approving market mark-ups under Paragraph 67d(6) of the EisbG is still ongoing.*' Only the 2019 NS contained in addition a more detailed approval requirement in the event that '*a final decision has not been made in that procedure until after the start of the working timetable period*' whereby, in that case, '*subsequent and/or back charging of any infrastructure charges that may have been overcharged or undercharged up to that point*' was announced.

8 By letter of 12 August 2016, ÖBB-Infra applied to the SCK for approval of the precisely determined market mark-ups for the five market segments mentioned above (which had not previously been published in the 2018 NS) as an infrastructure charge for the 2018 working timetable period. Those market mark-ups were approved by the SCK for the 2018 working timetable period.

9 On appeal by WESTbahn against that decision, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) annulled the decision on the ground that the investigation procedure was defective and referred the case for a new hearing and decision back to the SCK, which continued its procedure relating to the 2018 working timetable period.

10 By letter of 18 August 2017, ÖBB-Infra applied to the SCK for approval of the precisely determined mark-ups for the five market segments mentioned above (the levels of which had previously been published in the 2019 NS) as an infrastructure charge for the 2019 working timetable period.

11 The SCK joined that procedure with the procedure for the 2018 mark-ups and initiated a procedure to examine ÖBB-Infra's direct costs, which was also joined with the other two procedures.

12 The SCK requested that ÖBB-Infra recalculate the direct costs. Subsequently, by letter of 24 June 2019, ÖBB-Infra requested amendments to the market mark-ups initially requested for 2018 and 2019 on the ground that, if the direct costs were likely to be set at a lower level by the SCK than those envisaged by ÖBB-Infra, the market mark-ups would have to be set at a higher level in order to attain the revenue target set at ministerial level.

13 As a result, the SCK gave a decision on ÖBB-Infra's applications for approval of mark-ups pursuant to Paragraph 67d(6) of the EisbG as an infrastructure charge for 2018 and 2019 and in the competition monitoring procedure on ÖBB-Infra's direct costs. In point 1 of the operative part of its decision, it determined the market mark-ups and charges for direct costs per train path kilometre travelled for each of the five market segments for the 2018 working timetable period and then from both calculated the total charge to be paid. In point 2 of the operative part of its decision, it determined the market mark-ups and charges for direct costs per train path kilometre travelled for each of the five market segments for the 2019 working timetable period and then from adding both calculated the total charge to be paid.

14 Both ÖBB-Infra and WESTbahn appealed against that decision before the referring court, each also challenging points 1 and 2 of the operative part of that decision concerning the mark-ups and direct costs for the 2018 and 2019 working timetable periods.

15 ÖBB-Infra receives State subsidies from the Republic of Austria in accordance with Paragraph 42 of the Federal Law on Railways and also received such subsidies for 2018 and 2019. In that context, the Republic of Austria notifies ÖBB-Infra, via the Ministry of Transport and after consultation with the Ministry of Finance, on the basis of Paragraph 42 of the Federal Law on Railways, for each working timetable period, of the total charges ('revenue target' or 'target revenue') which ÖBB-Infra must generate from the infrastructure charges plus market mark-ups in the relevant working timetable period. For the 2018 working timetable period, the Republic of Austria set a target revenue of EUR 369.05 million, excluding service trains and excluding discounts and surcharges (such as the congestion surcharge or locomotive factor) (including service trains, however excluding discounts and surcharges, the target revenue was fixed at EUR 377.67 million). The term 'service trains' must be construed as purely 'locomotive train journeys' and 'empty passenger trains', thus transfer journeys without goods and without passengers. For the 2019 working timetable period, the Republic of Austria set a target revenue of EUR 376.49 million, excluding service trains and excluding discounts and surcharges (including service trains, however excluding discounts and surcharges, the target revenue was fixed at EUR 385.53 million).

16 The SCK bases its calculation of the market mark-ups on the respective 'revenue target' (excluding service trains and excluding discounts and surcharges) and states the following in its decision: *'This revenue target (excluding service trains and excluding discounts and surcharges) must be covered by charges, taking into*

account a subdivision into direct costs, on the one hand, and mark-ups, on the other. Whereas mark-ups are intended to cover at least part of the overhead costs, thus fixed costs, charges are based on the costs incurred directly as a result of operating the train service (c). These vary – unlike overheads – according to the number of train path kilometres (Ztrkm). Thus, as a first step, the direct costs of all train path kilometres of the respective market segment must be deducted from the specified revenue target in order to determine the level of the share of overhead costs to be covered by mark-ups. This is henceforth referred to as the contribution margin target.'

Main arguments of the parties to the main proceedings

17 As regards the approval of market mark-ups, ÖBB-Infra takes the view in law that this is a time-related approval, thus an *ex-post* approval. The SCK shares that view and relies on, first, the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) and legal literature and, secondly, on the judgment [of the Court of Justice] of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834) (inter alia, paragraph 97).

18 Against this, WESTbahn argues that the obligation of transparency under railway law and the protection of legitimate expectations preclude retroactive approval, which is why *ex-ante* approval is provided for. The case-law of the Supreme Administrative Court on which the SCK relies was, WESTbahn submits, adopted in the context of the SCK's general *ex-post* competition supervision. However, the present case concerns an *ex-ante* approval procedure in relation to charges which constitute an exception to the general charging schemes under railway law. The main objective of *ex-ante* control and approval of charges is to avoid shortcomings in legal protection and in law enforcement for railway undertakings which might arise due to the significant imbalance of powers resulting from a monopoly on the part of the network owner. *Ex-post* control does not reliably prevent restriction of competition. The judgment of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834), is not, it contends, relevant since that case concerned the delimitation of powers in relation to the review of charges subject to regulation under public law. It neither explicitly nor implicitly contains a statement with regard to the power of regulatory authorities to determine the level of charges retroactively.

19 WESTbahn takes the view that the EU legislature has adopted a coherent system in the order of establishing, approving, publishing and applying charges. This constitutes an exception to the general charging system. Thus, the establishment of charges already requires approval. It is only subsequently that the charges are published in the NS, on the basis of which contracts governed by private law are then concluded between railway infrastructure undertakings and rail transport undertakings. Therefore, the use of the market mark-ups which were published in the 2018 and 2019 NS, but not authorised, is, it submits, unlawful.

20 The SCK considers that the market mark-ups may be approved despite the failure to publish them in the 2018 NS. It states that it is true that infrastructure charges and market mark-ups must be indicated separately. However, the principle of proportionality, which is also decisive in the context of the implementation of EU law and is enshrined in Article 51(1) of the Charter of Fundamental Rights of the European Union, precludes eligibility being denied on the ground of a lack of publication. The rail transport undertakings were aware of the overall infrastructure charge per market segment as a result of the publication in the 2018 NS. Thus, financial planning security also existed.

21 In its decision, the SCK assumes that the published charges have a binding effect in so far as it may not set higher total charges per market segment, thus the sum of the charges for direct costs and market mark-ups, than those previously published in the NS. However, it is free to set both the charges for direct costs and market mark-ups at levels which are higher or lower than those published in the NS, so long as the published total charges are not exceeded.

22 ÖBB-Infra takes the legal view that, as a railway infrastructure undertaking, it should also be protected in respect of its planning security: it submitted applications for approval of the mark-ups for each of the two working timetable periods 16 months in advance and started planning the charges with lead times of approximately 22 months before the beginning of each working timetable period. Thus, in the final setting of the charges, the referring court must be free to alter in any direction the charges for direct costs and the market mark-ups, even if this results in the level of the total charges published or applied for being exceeded. ÖBB-Infra therefore asks the referring court, in its principal claims, to set the charges for direct costs and market mark-ups at specific levels (and thus regardless of a binding effect and in part at a level which is higher than that published in the NS).

23 WESTbahn considers that a ‘revenue target’ is, in principle, unlawful. The SCK, it argues, should instead have determined the costs for full cost recovery and should have set market mark-ups only if there was a ‘shortfall’ in relation to ÖBB-Infra’s total revenue. In that regard, the State subsidies under Paragraph 42 of the Federal Law on Railways should also have counted towards the coverage costs, as should other charges levied by ÖBB-Infra, for example those for the use of passenger platforms or for the use of utilities.

24 Against this, ÖBB-Infra contends that the SCK’s assessment of the ‘revenue target’ is too low. It states that the SCK should not have disregarded service trains in the calculation, but should rather have used the overall revenue target set by the minister responsible.

Brief summary of the reasons for the request for a preliminary ruling

25 The referring court does not make any submissions of its own, but confines itself to reproducing the submissions of the parties.