Case C-671/21

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

Date of receipt:

9 November 2021

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the order for reference:

5 November 2021

Appellant:

‘Gargždų geležinkelis’ UAB

Other parties to the proceedings:

Lietuvos transporto saugos administracija,

Lietuvos Respublikos ryšių reguliavimo tarnyba,

‘LTG Infra’ AB

Subject matter of the action in the main proceedings

Dispute concerning the allocation of public railway infrastructure capacity following application of the priority rule provided for in a provision of national law.

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

Interpretation of provisions of Directive 2012/34/EU of the European Parliament and of the Council; third paragraph of Article 267 TFEU.

Questions referred

Must the first and second sentences of Article 47(4) of Directive 2012/34/EU be interpreted as unambiguously prohibiting the establishment of a national legal regulation which provides that, in the event of congested infrastructure, the intensity of the use of railway infrastructure can be taken into account at the time of capacity allocation? Does it have a bearing on this assessment whether the railway infrastructure utilisation rate is linked to the actual utilisation of that infrastructure in the past or to the planned utilisation during the period for which the relevant timetable is in force? Do the provisions of Articles 45 and 46 of Directive 2012/34/EU, which confer a broad discretion on the public infrastructure manager or on the entity making decisions on the capacity to coordinate the requested capacity, and the implementation of those provisions in national law have any significance for that assessment? Does the fact that infrastructure is identified as congested in a particular case due to the capacity applied for by two or more railway undertakings in respect of the carriage of the same freight have any significance for that assessment?

Does the provision of Article 45(2) of Directive 2012/34/EU that '[t]he infrastructure manager may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49' mean that the infrastructure manager may also apply a national priority rule in cases where infrastructure is not identified as congested? To what extent (on the basis of which criteria) must the infrastructure manager, prior to identifying infrastructure as congested, coordinate the requested train paths and consult with applicants on the basis of the first sentence of Article 47[(1)] of Directive 2012/34/EU? Should that consultation with applicants cover the assessment as to whether two or more applicants have submitted competing requests for the carriage of the same freight (goods)?

Provisions of EU law cited

Article 39(1), Article 45(1) and (2), Article 46(1) and (2), Article 47 and Article 52(1) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

Provisions of national law cited

Paragraph 5 of Article 7(3) of the Railway Transport Code of the Republic of Lithuania of 22 April 2004 (hereinafter referred to as the 'RTC') (the version as set out in Law No XIII-588 of 30 June 2017 is relevant in the present case), which provides that the railway traffic safety authority is to allocate public railway infrastructure capacity to railway undertakings (carriers).

Article 29 of the RTC (the version as set out in Law No XII-2488 of 23 June 2016 is relevant in the present case), which sets out the basic provisions governing the allocation of public railway infrastructure capacity. Paragraph 6 of this article states that '[t]he principles governing the allocation of public railway infrastructure capacity and the procedure for the submission of applications for infrastructure capacity (rejection thereof), the declaration that an element of public railway infrastructure is congested, establishment of the working railway timetable, cooperation where capacity is to be allocated on more than one railway network, capacity analysis and capacity enhancement plans, and the procedure governing the conclusion of contracts and framework agreements for the use of public railway infrastructure shall be set out in the Rules on the Allocation of Public Railway Infrastructure Capacity. These Rules shall be approved by the Government'.

Point 28 of the Rules on the Allocation of Public Railway Infrastructure Capacity, approved by Government Resolution No 611 of 19 May 2004 (hereinafter referred to as 'the Rules').

Brief description of the facts and procedure in the main proceedings

1 On 3 April 2019, the appellant, the private limited liability company Gargždų geležinkelis (hereinafter referred to as '"Gargždų geležinkelis" UAB'), submitted an application for the allocation of public railway infrastructure capacity for freight and service trains for the period of validity of the 2019–2020 working timetable (hereinafter referred to as the 'WT').

2 By letter of 3 May 2019, Lietuvos transporto saugos administracija (the Lithuanian Transport Safety Administration) (hereinafter referred to as the 'Administration') forwarded that application for assessment to the public infrastructure manager – 'Lietuvos geležinkeliai Geležinkelių infrastruktūros direkcija' AB (the Railway Infrastructure Directorate of the limited liability company 'Lietuvos geležinkeliai') (hereinafter referred to as 'the infrastructure manager'). From 8 December 2019, the functions of the infrastructure manager have been exercised by a subsidiary established by 'Lietuvos geležinkeliai' AB.

3 On 10 July 2019, the infrastructure manager provided the Administration with a draft version of the WT and informed it that it was not possible to include in the timetable all the capacity requested by applicants due to limited capacity at certain elements of the railway infrastructure, as some of those requests were mutually incompatible. It also stated that it was not possible to offer them the use of the requested capacity at different times or on alternative routes because maximum capacity had already been reached at specific sections. The infrastructure manager requested allocation of reserve capacity to meet last-minute applications at specified sections of the infrastructure.

4 By letter of 23 September 2019, the infrastructure manager informed the appellant that the declaration that an element of public railway infrastructure was congested

was based on the actual capacity of the section, which was determined following analysis of the applications for the allocation of capacity received for the period during which the relevant working timetable was in force.

5 On 24 September 2019, the infrastructure manager informed the Administration that, following coordination, it was unable to satisfy all the applications in one of the elements of the public railway infrastructure because the capacity at that element of the public railway infrastructure was insufficient and the element of the public railway infrastructure at the specified sections was congested for the period during which the 2019–2020 WT was in force.

6 In September 2019, the infrastructure manager provided the Administration with an updated draft version of the WT for the purpose of taking decisions on the allocation of capacity and with information on the actual capacity of the sections calculated in accordance with the applications which had been received.

7 On 30 September 2019, the appellant requested the Administration to examine the actions of the infrastructure manager.

8 By decision of 15 October 2019, the Administration decided that the actions of the infrastructure manager in examining and coordinating applications had been performed in compliance with the requirements of the legislation in force at that time and that they did not infringe the rights and legitimate interests of the appellant. The Administration also found that the facts set out in the appellant's complaint of 30 September 2019 were irrelevant for the decision on the allocation of capacity for the 2019–2020 WT.

9 By decision of 17 October 2019, the Director of the Administration decided not to allocate to the appellant the capacity requested in the application on the ground that no capacity was available. Following application of the priority rule set out in Point 28 of the Rules, the capacity was allocated to other undertakings. The decision indicated that it was not possible to offer alternative capacity because the element of the public railway infrastructure was congested.

10 By order of 13 February 2020 concerning the complaint of 'Gargždų geležinkelis' UAB of 12 November 2019, the Director of Lietuvos ryšių reguliavimo tarnyba (Communications Regulatory Authority of Lithuania) declared the appellant's complaint regarding the contested decision to be unfounded and dismissed it.

11 The appellant brought proceedings before the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court). By judgment of 22 October 2020, the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court) dismissed that action. The appellant has now brought an appeal against that judgment before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).

Essential arguments of the parties to the main proceedings

12 The referring court indicates that Directive 2012/34 provides for two capacity allocation options in the event of congested infrastructure: the congested infrastructure charge (Article 31(4)) and priority rules (Article 47). In the present case, the priority rule provided for in Point 28 of the Rules was the only measure designed to address the problem of congested infrastructure during the period concerned. Under this rule, capacity is allocated by, in the first place, taking into account the type of service to be provided: (1) to an applicant who will perform the carriage of passengers and luggage on international routes; (2) to an applicant who will perform such carriage on local routes; or by, in the second place, taking into account the intensity of capacity utilisation, (3) to an applicant who will use the capacity for more days; or, if the number of days coincides, (4) to an applicant who requests allocation of more runs on the route in question.

13 The appellant claims that the priority rule provided for in national law in cases where capacity is allocated to a carrier who performs carriage for more days or performs more runs fails to ensure compliance with the principle of non-discrimination. This rule, it argues, unjustifiably confers an advantage on an incumbent carrier because new carriers seeking to enter the railway transport market are not able to perform more runs or to perform carriage for more days than a carrier who has already established itself in the market.

14 In the opinion of the infrastructure manager, the fact that the appellant is unable to guarantee a more intensive use of the network proves that it is not prepared to ensure as effective a utilisation of the public railway infrastructure as possible, on which the priority linked with more intensive use of the network is based. The infrastructure manager claims that the priority rule is not, in principle, intended for monopolising the relevant market but is designed to use limited resources – that is to say, the railway infrastructure – in such a way as to achieve maximum added value. Where two or more applicants are in competition for the same section, the allocation of the capacity to the applicant which ensures the highest and most efficient overall occupancy of the network allows the network to be used in a manner that is most economically advantageous for society.

Concise justification of the request for a preliminary ruling

15 The referring court has doubts as to the interpretation of the provisions of Directive 2012/34 in two respects: first, concerning the application of the priority rules when public railway infrastructure is identified as congested according to Article 47 of the directive; and, second, concerning the procedure for the allocation of public railway infrastructure capacity provided for in that directive.

16 The referring court points out that, according to the second sentence of Article 47(4) of Directive 2012/34, Member States may take any measures necessary, under non-discriminatory conditions, to ensure that services in areas of public interest are given priority when infrastructure capacity is allocated, and it

draws attention to the judgment of 28 February 2013, *European Commission* v *Kingdom of Spain* (C-483/10, EU:C:2013:114), in which the Court of Justice analysed the content of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001, which was in force prior to the adoption of Directive 2012/34.

17 In paragraphs 95 to 99 of the judgment in Case C-483/10, the Court of Justice stated that the criterion based on actual use of the network, as a criterion for the allocation of infrastructure capacity, is discriminatory in so far as it leads, where there is more than one application or where the network is congested, to advantages being maintained for the incumbent users and access to the most attractive train paths being denied to new market entrants. The Court of Justice noted that the objective of ensuring more efficient use of infrastructure capacity could be attained on the basis of specific provisions of Directive 2001/14, for example, Article 27(2), which provides that it is possible for the infrastructure manager to specify conditions whereby it will take account of previous levels of utilisation of train paths in determining priorities for the capacity allocation process. It also stated that the application of the said discriminatory criterion cannot be justified on the ground of its purported compliance with Article 22(4) of Directive 2001/14, which provides that, where the infrastructure is congested, the priority criteria are to take account of the importance of a service to society, relative to any other service which will be excluded. In fact, that provision does not allow for any allocation criterion, since, under the second subparagraph of that provision, where the infrastructure is congested, infrastructure capacity must be allocated 'under non-discriminatory conditions'.

18 The referring court expresses doubts as to the assessment of the first and second sentences of Article 47(4) of Directive 2012/34/EU as unambiguously prohibiting the establishment of a legal regulation according to which, in the event of congested infrastructure, the intensity of the use of railway infrastructure can be taken into account at the time of capacity allocation. It points out the following relevant circumstances.

19 First, unlike in the situation examined by the Court of Justice in Case C-483/10, Point 28 of the Rules provides for the possibility to take into account the future, but not the past, intensity of the use of railway infrastructure during capacity allocation. In this regard, it should be noted that Directive 2012/34 provides safeguards which would allow the entity making a decision on capacity to take into account the use of capacity by the railway undertaking, such as the reservation charge provided for in Article 36, which may be levied for capacity that is allocated but not used.

20 Second, the provisions of Directive 2012/34 regulating the allocation of capacity confer on the infrastructure manager or on the entity performing its functions a wide discretion to decide on potential disagreements concerning competing capacities. Article 45(1) of Directive 2012/34 provides that the infrastructure manager, inter alia, 'shall, as far as possible, take account of all constraints on

applicants, including the economic effect on their business'. Article 46(1) of the directive requires the infrastructure manager to attempt, through coordination of conflicting requests, to ensure the best possible matching of all requirements, and Article 46(2) enables the infrastructure manager 'to propose infrastructure capacity that differs from that which was requested'. Article 46(3) of Directive 2012/34 provides that '[t]he infrastructure manager shall attempt, through consultation with the appropriate applicants, to resolve any conflicts'. Finally, Article 46(5) of the directive indicates that '[w]here requests for infrastructure capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination'.

21 Third, although Article 52(1) of Directive 2012/34 allows the infrastructure manager to take account of previous levels of utilisation of train paths, that is to say, previous utilisation of the infrastructure, it also establishes the possibility to rely on the actual infrastructure utilisation rate in allocating capacity. Given the fact that railway undertakings may compete for the same freight, the interpretation of Article 47(4) of Directive 2012/34 as unambiguously prohibiting the application of the actual infrastructure utilisation criterion or as not prohibiting this would lead to a situation in which, in the case of conflicting applications, either a new market entrant or an already existing market player would have an advantage in all cases, depending on the extent to which the actual infrastructure utilisation can be taken into account in the case of congested infrastructure.

22 Fourth, the present appellant claims that there is no actual congestion of infrastructure in the present case because it is competing with another undertaking for the same freight. Therefore, it argues, the rules of priority should probably not even be applied in this case, and the issue of the overlap of capacity should be addressed on the basis of the consultation and coordination procedures provided for in Articles 45 and 46 of Directive 2012/34, while proposing that the problem of competition for freight should not be addressed by use of the procedure relating to congested infrastructure. In such a situation, if it is found that two or more railway undertakings are indeed competing for the same freight, an unambiguous interpretation of the priority rules may encourage abuse of the right to request capacity, in the knowledge that the infrastructure will be identified as being congested and the rules will be favourable to either an incumbent market player or a new market entrant.

23 The referring court then goes on to state that it is clear from the structure of the capacity allocation process provided for in Directive 2012/34 that the infrastructure manager, once all applications have been received, must first of all seek to coordinate them and, in the event of failure to coordinate certain applications, must declare the infrastructure to be congested and take measures related to the problem of congested infrastructure, such as the application of the priority rule.

24 It may be concluded from Article 47(1) of Directive 2012/34 that the priority rule applies only if the infrastructure has been declared to be congested. However,

Article 45(2) of Directive 2012/34 provides that the infrastructure manager may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49. Therefore, according to Directive 2012/34, priority may also be applied at an earlier stage, that is to say, prior to the declaration that the infrastructure is congested. According to Point 28 of the Rules, the infrastructure manager may apply the priority rule when coordinating applications.

25 The referring court refers to the judgment of the Court of Justice of 28 February 2019, *Konkurrensverket* v *SJ* (C-388/17, EU:C:2019:161), paragraph 39 of which states that 'although the railway infrastructure manager must, pursuant to Article 45 of Directive 2012/34, endeavour as far as possible to meet all requests for infrastructure capacity, it is required, in accordance with Article 46 of that directive, in the case of competing requests, to coordinate those requests in order to ensure the best match between them. It may thus, within reasonable limits, propose capacity that differs from that which was requested or may be unable to respond favourably to certain applications'.

26 In this regard, the referring court is uncertain as to the content of the obligation of the infrastructure manager or of the entity allocating capacity to coordinate the requested train paths and to consult with applicants prior to identifying the infrastructure as congested, as provided for in Article 47(1) of Directive 2012/34. The facts relating to the present case suggest that the appellant is in competition with another railway undertaking, with both undertakings requesting at least partially overlapping capacity. Where two or more railway undertakings are competing for carriage of the same freight, there is, technically, no congestion of infrastructure because the freight in question will be carried by one or other undertaking in any event. It is therefore questionable whether the conditions laid down in Article 47 of Directive 2012/34 – *to coordinate the requested train paths and to consult with applicants* – covers the obligation of the infrastructure manager to determine the potential overlap of the freight of two or more railway undertakings prior to identifying the infrastructure as congested.

27 In those circumstances, having assessed the provisions of the national legislation and the practice applied by the infrastructure manager, the referring court requests the Court of Justice to answer the questions referred for a preliminary ruling.