

Case C-563/20**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:**

28 October 2020

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

6 October 2020

Applicant:

ORLEN KolTrans sp. z o.o.

Defendant:

Prezes Urzędu Transportu Kolejowego

Subject matter of the case in the main proceedings

Refusal by the Prezes Urzędu Transportu Kolejowego (President of the Office of Rail Transport) – a regulatory body within the meaning of Directive 2001/14/EC – to initiate administrative proceedings for the annulment of the decision of that body approving the unit rates of the basic charge for the use of railway infrastructure at the request of a railway undertaking (ORLEN KolTrans sp. z o.o.).

Subject matter and legal basis of the reference

The right of a railway undertaking which uses or intends to use railway infrastructure to participate in a procedure conducted by a regulatory body for setting the level of charges for access to railway infrastructure by the railway infrastructure manager.

Right of appeal against the decision of the regulatory body approving the level of charges for access to railway infrastructure set by the infrastructure manager.

Article 267 TFEU

Questions referred

1. Must Article 30(2)(e) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification be interpreted as conferring on a railway undertaking which uses or intends to use railway infrastructure the right to participate in the procedure conducted by a regulatory body for setting the level of charges for access to railway infrastructure by the railway infrastructure manager?
2. If the first question is answered in the negative, must Article 30(5) and (6) of Directive 2001/14/EC be interpreted as conferring on a railway undertaking which uses or intends to use railway infrastructure the right to challenge the decision of the regulatory body approving the level of charges for access to railway infrastructure set by the railway infrastructure manager?

Provisions of EU law cited

Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29), Article 4(1), Article 6(2), Article 7(3), Article 30(1), Article 30(2)(e), Article 30(3) to (6)

Provisions of national law cited

Ustawa z dnia 28 marca 2003 r. o transporcie kolejowym (Law of 28 March 2003 on Rail Transport) (Journal of Laws [Dz. U.] of 2013, item 1594), Article 13(1) and (6), Article 29(3) and (4), Article 33(1) to (8), Article 34(1), Article 35(4)

Rozporządzenie Ministra Infrastruktury z dnia 27 lutego 2009 r. w sprawie warunków dostępu i korzystania z infrastruktury kolejowej (Regulation of the Minister of Infrastructure of 27 February 2009 on the conditions for access to and use of railway infrastructure) (Journal of Laws [Dz. U] No 35, item 274, ‘the 2009 Ministerial Regulation’), Sections 6, 7, 8, 10, 16 and 17

Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Law of 14 June 1960 – Code of Administrative Procedure) (Journal of Laws [Dz.U.] of 2013, item 267, ‘the CAP’), Article 28, Article 61(1), Article 61a(1), Article 157(2)

Brief outline of the facts and procedure

- 1 ORLEN KolTrans sp. z o.o., established in Płock, conducts business activity consisting in, among other things, rail freight transport.

- 2 By decision of 29 September 2010, the Prezes Urzędu Transportu Kolejowego (President of the Office of Rail Transport; ‘the President of the ORT’) changed his earlier decision on the approval of unit rates for the basic charge and rates for additional charges for access to and use by railway undertakings of railway infrastructure owned by PKP Polskie Linie Kolejowe SA (‘PKP PLK’) during the period of validity of the 2010/2011 train timetable, approving new basic charge rates. In that decision, the regulatory body considered that the new unit rates of the basic charge proposed by PKP PLK were in line with the rules laid down in Article 33(2) to (6), Article 34, and the provisions issued on the basis of Article 35 of the Law on Rail Transport.
- 3 The infrastructure manager was the sole participant in the above procedure concerning the approval of the unit rate for the basic charge.
- 4 In connection with the rail transport services it provided, ORLEN KolTrans paid the infrastructure manager charges for the use of railway infrastructure on the basis of the unit rates for the basic charge approved by the President of the ORT in the abovementioned decision of 29 September 2010 (the basic charge is determined by multiplying the unit rate by the number of train-kilometres travelled).
- 5 The amount of charges payable to PKP PLK ultimately resulted from the agreement on the use of allocated train routes concluded between the railway undertaking and the railway infrastructure manager. By law, this agreement should specify, inter alia, conditions for making available and using railway infrastructure and the discounts and rate multipliers applied as well as the date and method of payment of charges and other liabilities (Section 20 of the 2009 Ministerial Regulation).
- 6 Although the PKP PLK manager therefore collected from the railway undertaking charges for the provision of the railway infrastructure, as specified in the agreement (Article 29(3) of the Law on Rail Transport), the amount of those charges was derived from the basic charge unit rates set by way of an administrative decision (the decision of 29 September 2010).
- 7 The charge for using the railway infrastructure is the sum of the basic charge and the additional charge. The basic charge, in turn, is calculated taking account of the distances to be travelled by trains and the unit rates set depending on the category of railway line and the type of train.
- 8 By judgment of 30 May 2013, *Commission v Poland*, C-512/10, the Court of Justice found that including costs which clearly have not been incurred directly as a result of operating the train service. in the process of calculating the rates of charges for the use of railway infrastructure is incompatible with Directive 2001/14/EC. As a result, the Court found that national provisions, in particular the 2009 Ministerial Regulation, which was the basis for the setting by the infrastructure manager of the rates of charge for the minimum access package and

their approval by the President of the ORT (the decision of 29 September 2010), did not ensure the correct transposition of provisions of EU law concerning the setting of charges for minimum access to railway infrastructure at the cost that is directly incurred as a result of operating the train service, namely, Article 7(3) of Directive 2001/14 (paragraphs 80–86 of the judgment). **[Or. 11]**

- 9 Since it considered that the rates of charge approved by the decision of the President of the ORT of 29 September 2010 included indirect costs incurred by the infrastructure manager, which is prohibited under the directive, by its letter of 7 April 2014, ORLEN KolTrans requested the annulment of the decision.
- 10 The applicant indicated that the above decision had been made in flagrant breach of the law. In the applicant's view, the decision approving the unit rates of charges for access to and use of the railway infrastructure managed by PKP PLK incorrectly included costs which were not directly incurred as a result of operating the train service.
- 11 By decision of 11 June 2014, the President of the ORT refused to initiate proceedings for the annulment of the decision of 29 September 2010. In the grounds of the decision, the President of the ORT pointed to Article 61a(1) of the CAP, stating that a railway undertaking such as ORLEN KolTrans was not a party within the meaning of Article 28 of the CAP and had no legal interest in the annulment of the decision.
- 12 The President of the ORT considered that legal interest in initiating such proceedings was determined by the existence of a substantive rule of administrative law which provides grounds for rights being granted to (or obligations being imposed on) an entity in a binding manner. Therefore, since it is not explicitly laid down in the Polish legal system that a railway undertaking has the right to challenge the unit rates for the basic charge during a procedure for their approval by the regulatory body, the President of the ORT (that is, the regulatory body) refuses to recognise the railway undertaking's right to challenge its decision approving those rates even if it turns out that the unit rates for the basic charge approved by its administrative decision are incompatible with EU law.
- 13 ORLEN KolTrans lodged a complaint against the decision of the President of the ORT of 11 June 2014 before the Sąd Okręgowy w Warszawie, Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw, Competition and Consumer Protection Court, Poland) (the referring court). The undertaking indicated that the refusal to recognise it as a party to proceedings for the annulment of the decision of 29 September 2010 meant that Polish law did not provide for an effective appeal mechanism for a railway undertaking with respect to the level or structure of railway infrastructure fees to which it is entitled under Article 30(2)(e) of Directive 2001/14.

- 14 At the same time, ORLEN KolTrans brought a claim for compensation against the Polish State, because as a result of the incorrect implementation of Directive 2001/14 by the Republic of Poland it suffered damage arising from the inflated charges it paid to the railway infrastructure manager, since those charges were calculated on the basis of the unit rate of the basic charge, whose amount, contrary to the provisions of that directive, was calculated taking into account the railway infrastructure manager's indirect costs, and not only direct costs as required by the directive.
- 15 The ordinary courts which heard claims for damages by ORLEN KolTrans and by other railway undertakings against, inter alia, the Polish State, alleging incorrect implementation of the directive, refused to uphold those claims by railway undertakings, pointing out, inter alia, that there exist valid and legally binding administrative decisions of the regulatory body (the President of the ORT) approving the level of basic charge unit rates applied by the infrastructure manager (such as the decision of 29 September 2010).
- 16 In connection with one such case brought by a railway undertaking against the Polish State for damages for incorrect implementation of Directive 2001/14, the Sąd Najwyższy (Supreme Court, Poland) referred a question for a preliminary ruling as to whether the provisions of that directive precluded a railway undertaking from claiming damages against a Member State on grounds of incorrect implementation of the directive (Case C-120/20).
- 17 At the same time, it should be borne in mind that the Court of Justice, in its judgment of 9 November 2017, *CTL Logistics v DB Netz*, C-489/15, determined that it is inadmissible for ordinary courts to review the level of charges for the use of railway infrastructure on a case-by-case basis and to amend the amount of those charges, independently of the monitoring carried out by the regulatory body referred to in Article 30 of Directive 2001/14.
- 18 By seeking annulment of the decision of 29 September 2010, the applicant in the main proceedings essentially seeks judicial review of the decision of the regulatory body approving the unit rates of the basic charge which, in its view, in the light of the Court's judgment in Case C-512/10, were determined in a manner incompatible with Directive 2001/14.

Brief summary of the reasons for the reference

- 19 Article 30(2)(e) of Directive 2001/14 indicates that an applicant is to have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning the level or structure of infrastructure fees which it is, or may be, required to pay.
- 20 In Poland, as a rule, the only party to the procedure for the approval by the regulatory body of the unit rates of the basic charge is the railway infrastructure

manager, which submits these rates for approval. Organisations representing railway undertakings may also participate in the procedure if they apply to do so. On the other hand, railway undertakings are not allowed to participate in such a procedure.

- 21 At the same time, in the view of the referring court, national law does not provide for any effective mechanism whereby a railway undertaking could challenge the level of approved unit rates for the basic charge.
- 22 The only remedy available to a railway undertaking is the right to lodge with the regulatory body a complaint against the manager concerning infrastructure charges (provided for in Article 13(1)(5)(b) of the Law on Rail Transport).
- 23 However, such a complaint cannot have the effect of invalidating the unit rates for the basic charge approved by way of an administrative decision issued by the regulatory body. Pursuant to Article 13(6) of the Law on Rail Transport, where it is found that laws, decisions or provisions relating to rail transport have been breached, the President of the ORT may issue a decision determining the scope of the breach and the deadline for remedying the irregularities, and therefore such a decision could not invalidate the unit rates of the basic charge either.
- 24 Since the regulatory body considers that only the railway infrastructure manager for which the unit rates for the basic charge are set is a party to the administrative procedure for approval of those rates, a railway undertaking is not considered a party to that procedure. Therefore, a railway undertaking cannot challenge the resulting decisions.
- 25 Under Polish law, in accordance with the principle expressed in Article 157(2) of the CAP, proceedings for the annulment of a decision are initiated on a request by a party or *ex officio*, so that a railway undertaking which was not a party to the procedure for the approval of unit rates cannot effectively request the annulment of the decision approving the unit rates for the basic charge.
- 26 Under this arrangement, the railway undertaking is deemed to have no legal interest. Legal interest is, in turn, subject to the existence of a substantive rule of administrative law which provides grounds for rights being granted to (or obligations imposed on) an entity in a binding manner. Therefore, since it is not explicitly laid down in the Polish legal system that a railway undertaking has the right to challenge the unit rates for the basic charge during a procedure for their approval by the regulatory body, the President of the ORT (that is, the regulatory body) refuses to recognise the railway undertaking's right to challenge its decision approving those rates even if it turns out that the unit rates for the basic charge approved by its administrative decision are incompatible with EU law.
- 27 Consequently, in the Polish legal order, a railway undertaking does not have effective legal means of challenging the level of unit rates for the basic charge, even where those charges are calculated in a manner which is incompatible with the provisions of Directive 2001/14, that is to say, where not only direct costs

incurred by the infrastructure manager in connection with providing access to the infrastructure but also indirect costs have been included, which the Court deemed unacceptable in Case C-512/10.

- 28 This justifies the first question referred for a preliminary ruling: Must Article 30(2)(e) of Directive 2001/14 be interpreted as conferring on a railway undertaking which uses or intends to use railway infrastructure the right to participate in the procedure conducted by a regulatory body for setting the level of unit rates for the basic charge for access to railway infrastructure by the railway infrastructure manager?
- 29 However, if it is not possible to infer from the wording of Article 30(2)(e) of Directive 2001/14 the right of the railway undertaking to participate in the procedure for the decision approving the unit rates for the basic charge, this justifies the second question referred for a preliminary ruling: Must Article 30(5) and (6) of Directive 2001/14/EC be interpreted as conferring on a railway undertaking which uses or intends to use railway infrastructure the right to challenge the decision of the regulatory body approving the level of unit rates for the basic charge for access to railway infrastructure set by the railway infrastructure manager?
- 30 The answers to the above questions will enable the referring court to decide whether the applicant in the present case has a legal interest in requesting that proceedings for the annulment of the decision approving the unit rates of the basic charge be initiated, and in particular whether it can be party to such proceedings in any event or whether it can only challenge the resulting decision if it can demonstrate that the decision approving the unit rates for the basic charge infringes its rights.
- 31 The doubts raised justify asking these questions. The Court's answer will determine whether the referring court assesses as correct the decision of the regulatory body (President of the ORT) to deny the railway undertaking the right to challenge the administrative decision approving the rates of the basic charge. A preliminary ruling is necessary to resolve the case pending before the referring court.
- 32 Although the national legislation does not provide the railway undertaking with any means of effectively challenging the unit rates for the basic charge determined by an administrative decision, the referring court has doubts as to whether the railway undertaking must nevertheless be granted the right – at the very least – to challenge that administrative decision of the regulatory body approving the unit rates for the basic charge, with the railway undertaking's legal interest deriving directly from Article 30(2) of Directive 2001/14.