Case C-222/21

Request for a preliminary ruling

Date lodged:

22 March 2021

Referring court:

Obvodní soud pro Prahu 1 (Czech Republic)

Date of the decision to refer:

1 October 2020

Applicant:

České dráhy, a.s.

Defendants:

Univerzita Pardubice and 103 other defendants

ORDER

The Obvodní soud pro Prahu 1 (District Court Prague 1, Czech Republic) has ruled […] in the case of the

Applicant: **České dráhy, a.s.,**

[…] Prague 1

On an application pursuant to Part V of the o. s. ř. (‘CCP’)

As follows:

[…] [stayed proceedings]

[…] The District Court Prague 1 hereby submits the following questions to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1) Does national regulation in Part Five of Zákon č. 99/1963 Sb., občanský soudní řád (Law 99/1963, Code of Civil Procedure) (‘the Code of Civil Procedure’ or ‘CCP’) meet the requirements for judicial

review of a decision of a regulatory body, pursuant to Article 56(10) 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')?

2) If the response to the first question is in the affirmative, is it in accordance with Article 56(6) of Directive 2012/34 for decisions of the regulatory body to be replaced by judgments of individual courts of general jurisdiction on the merits of the case concerning the level of infrastructure charges in proceedings to which the applicants and the infrastructure manager are parties, but which excludes the regulatory body as a party?

3) If the response to the first question is in the affirmative, do the requirements of the establishment of a single national regulatory body for the railway sector, pursuant to Article 55(1) of Directive 2012/34; of the functions of a regulatory body pursuant to Article 56(2), (11), and (12) thereof; and of cooperation of regulatory bodies pursuant to Article 57(2) thereof, admit the possibility that the decisions of a regulatory body on the merits of the case can be substituted by judgments of individual courts of general jurisdiction, which are not bound by the regulatory body's findings of fact?

[…] [national proceedings]

Prague, 1 October 2020

[…]

[OR.2] **DISTRICT COURT PRAGUE 1**

[…]

[…] [address of the referring court, reference number, address of the Court of Justice of the European Union, name of court assistant]

24 March 2021

[…] **[OR.3]** […] **[OR.4]** […] [names and identification number of the Applicant and of the 104 Defendants]

Dear Madams, Dear Sirs,

Pursuant to your request of 4 March 2021 for a brief summary of the nature and course of the proceedings conducted by the District Court Prague 1 […], in which a preliminary question arose that was subsequently, on 2 March 2021, submitted to the European Court of Justice, ideally spanning one A4 page, please be informed that, due to the issue at hand, the number of parties, and the extensive nature of their submissions, the court has been forced to refer, in terms of the circumstances of the submission of the preliminary question, to the relevant submission from the file, which is being sent as an attachment to this e-mail.

The **foundation of the case at hand** is the following:

In its application of 21 October 2019, the Applicant, České dráhy, a.s (‘Czech Rail’), sought the replacement of **statement 2 of the operative part** of the decision of the Úřad pro přístup k dopravní infrastruktuře (‘Transport Infrastructure Access Authority’) of 5 March 2019 […], with the following statement ‘Article II and Article III(1) and (2) of Annex 1 to the 2019 Statement are not contrary to the Zákon o drahách (“Law on Rail Systems”)’ and the replacement of **the statement in the same decision pertaining to Article IV of Annex 1 to the 2019 Statement** with the following statement: ‘Article IV of Annex 1 to the 2019 Statement is contrary to Paragraph 33(3)(k) of the Law on Rail Systems. The Authority sets Univerzita Pardubice, Dopravní fakulta Jana Pernera, a deadline of 90 days from the date on which this decision becomes effective, after the expiration of which Article II, Article III(1) and (2), and Article IV of Annex 1 to the 2019 Statement cannot be applied.’ .

On 13 August 2020, the Transport Infrastructure Access Authority applied for the **submission of a reference for a preliminary ruling**, with the following **justification**:

In administrative proceedings […], in which the Transport Infrastructure Access Authority assessed, *ex officio*, pursuant to Paragraph 34e of the Law on Rail Systems, the compliance of the Prohlášení o dráze celostátní a o veřejně přístupných vlečkách provozovaných společností České dráhy a. s., platné pro jízdní řád 2018/19 (Statement on a National Rail and Publicly Accessible Sidings operated by České dráhy a. s., applicable for the 2018/19 timetable; 'the 2019 Network Statement') (*a network statement* as defined by Article 27 of Directive 2012/34) with the Law on Rail Systems, it issued a decision on 5 March 2019 […]. **[OR.5]** The infrastructure manager is České dráhy, a.s. ('the manager'), whereas the rail capacity allocator is Univerzita Pardubice, Dopravní fakulta Jana Pernera ('the allocator'). The manager challenged the decision by an administrative appeal submitted to the Authority Chairman. In his decision concerning the administrative appeal, of 20 August 2020 […], the Authority Chairman upheld the first instance decision of the Authority.

In administrative proceedings the Authority examined, ex officio, compliance of Annex 1 to the 2019 Network Statement '*Návrh ujednání o sankčních platbách za narušení provozování drážní dopravy, včetně nestranného způsobu mimosoudního řešení sporů týkajících se narušení provozování drážní dopravy na dráze*' ('Proposed agreement on penalty payments for the disruption of rail transport operation, including an impartial out-of-court method of resolution of disputes pertaining to disruption of rail transport operation on the railway.') These are provisions on penalties pursuant to Article 35 of Directive 2012/34. They constitute a part of the determination of infrastructure charges and a charging scheme regulated in Chapter IV Section 2 of Directive 2012/34. They were transposed into Czech law in Paragraph 33(3)(k) of the Law on Rail Systems.

The Authority ruled that penalties unrelated to disruptions to the operation of rail transport do not belong in the agreement on financial penalties pursuant to Paragraph 33(3)(k) of the Law on Rail Systems, and hence, Article II, Article III(1) and (2), and Article IV of Annex 1 to the 2019 Statement were contrary to Paragraph 33(3)(k) of the Law on Rail Systems.

A party to the original administrative proceedings before the Authority and the infrastructure manager, České dráhy, a. s., brought an action before the District Court Prague 1, pursuant to Part Five of the Code of Civil Procedure, asking the Court to rehear the matter, replacing the Authority's decision to that extent with its own judgment, pursuant to Paragraph 250j of the Code of Civil Procedure.

Pursuant to Article 56(10) of Directive 2012/34, Member States shall ensure that decisions taken by the regulatory body are subject to judicial review. Judicial proceedings pursuant to Part Five CCP do not, however […] [typing error], constitute judicial review of a decision of a regulatory body.

The court hears a matter decided in administrative proceedings totally anew, is entitled to rule regardless of previous decisions of the regulatory body, and is not obliged to consider its arguments. The court does not have the option to dismiss

the decision of the regulatory body and send it back to that body for reconsideration. The court may only dismiss the application or decide itself, replacing the decision of the regulatory body. The regulatory body has only minimal possibilities to defend its decision before the courts.

Those conclusions were also confirmed by judgment of the Nejvyšší správní soud ('Supreme Administrative Court') of 21 June 2007, ref No. 1 As 53/2006: *'Courts deciding pursuant to Part Five CCP do not review the decision of an administrative body, they replace its decision – de-facto entering into the position of the decision-making body.'*

There are a total of 86 courts in the Czech Republic competent to hear actions submitted pursuant to Part Five CCP. Territorial jurisdiction of courts is determined on the basis of the place of the registered office of parties to the proceedings. There is a realistic possibility that individual civil courts will reach entirely different decisions on the compliance of a network statement with the Law on Rail Systems.

For that reason, individual decisions of independent civil courts which, as the case may have it, may not be harmonised with case-law of higher courts, may replace the uniformity of supervision carried out by a regulatory body.

With a view to the regulation of judicial proceedings in Part Five CCP described above, each individual civil court in the Czech Republic essentially plays an independent role as a regulatory body for the railway sector. That is contrary to Article 55(1) of Directive 2012/34, pursuant to which each Member State shall establish a single national regulatory body for the railway sector.

The administrative judiciary fully complies with the requirements of judicial review of decisions of a regulatory body, pursuant to Article 56(10) of Directive 2012/34. A single administrative court would always have competence to hear actions challenging decisions of the regulatory body. Proceedings pursuant to the soudní řád správní (Code of Administrative Procedure) are proceedings in cassation. The court may annul a decision due to its unlawfulness or due to errors in the proceedings. The regulatory body will then decide the matter again, being bound by the legal opinion of the administrative court.

[OR.6] Directive 2012/34 was only transposed into the Law on Rail Systems following the decision of the Supreme Administrative Court. Furthermore, Zákon č. 320/2016 Sb., o Úřadu pro přístup k dopravní infrastructure (Law 320/2016, 'Law on the Transport Infrastructure Access Authority') was adopted, which established the regulatory body that took over the function of the regulatory body from the Drážní úřad (Railway Authority).

The review of compliance [with] the Law on Rail Systems was also adapted by the transposition of Directive 2012/34 such that the regulatory authority only assesses the legality of a network statement, but does not replace it with specific text. The regulatory body can examine network statements afresh and ex officio.

Furthermore, a decision of the Court of Justice of the European Union was rendered pertaining to a similar matter, which can be applied to the case at hand: judgment of the Court of Justice (Fifth Chamber) of 9 November 2017, *CTL Logistics GmbH* v. *DB Netz AG.*, C-489/15, EU:C:2017:834.

For the sake of completeness, the Authority adds that Directive 2012/34 replaced a previous Directive 2001/14 and regulates network statements and their review by regulatory bodies similarly. Articles 55 and 56 of Directive 2012/34 significantly expanded and tightened the requirements of regulatory bodies as compared to Articles 30 and 31 of Directive 2001/14. Emphasis is newly placed on the existence of a single regulatory body.

It is the opinion of the Authority that the CJEU judgment in *CTL Logistics* is fully applicable to the proceedings in question, due to which judicial review of the Authority's proceedings pursuant to Part Five of the Code of Civil Procedure contravenes the purpose of Directive 2012/34, which excludes the application of national regulation pursuant to which proceedings of a regulatory body pertaining to network statements are subject to judicial review pursuant to Part Five of the Code of Civil Procedure.

Furthermore, the Code of Civil Procedure permits the possibility of proceedings being concluded by a court settlement of the parties, pursuant to Paragraph 99 CCP. If the court approved the settlement, it would essentially mean that an agreement between applicants and the infrastructure manager would decide whether a network statement is in line with the law.

The conclusion of a settlement would not be compliant with Article 56 of Directive 2012/34, which states that appeals against decisions adopted by an infrastructure manager or a railway undertaking or a service facility operator that pertain to a network statement and the criteria set therein are to be adjudicated on by the regulatory body. Furthermore, Directive 2012/34 states that a decision of the regulatory body are binding on all parties to which the decision pertains and is not subject to review by another administrative instance.

Decisions of the Authority assessing compliance of a network statement with the Law on Rail Systems, pursuant to Paragraph 34e of the Law on Rail Systems, would be rendered meaningless, because the parties to the proceedings could circumvent the Authority at any point and enter into a court settlement, and in that case, the position of the Authority would not be of any consequence. The final arbiter of the legality of a network statement would ultimately not be the Authority but the capacity allocators and applicants for capacity who would agree with one another whether a network statement is or is not compliant with the law.

Pursuant to Article 56(10) of Directive 2012/34, decisions of a regulatory body are subject to judicial review. That provision can by no means be interpreted such that, instead of reviewing the steps or decisions of the regulatory body, the courts will in fact substitute its function.

Such privatisation of the regulatory activities of the Authority runs contrary to the principle of affording protection to the weaker contractual party, when the Authority, as part of its regulatory activity, should ensure that a railway infrastructure manager does not abuse its natural monopoly in relation to individual railway enterprises.

In the case of judicial review of steps taken by the Authority ex officio, as in the present case, a situation could occur where the Authority decides against the will of both the applicants and the infrastructure manager and capacity allocator. Given that, in that case, there would be no party to the proceedings **[OR.7]** countering the Applicant, the Applicant would be in a procedurally very advantageous position, with no defendant, and the regulatory body could be circumvented.

The case before the court pertains to the determination of infrastructure charges and a charging scheme regulated in Chapter IV Section 2 of Directive 2012/34.

Pursuant to Article 56(6), '*The regulatory body shall ensure that charges set by the infrastructure manager comply with Section 2 of Chapter IV and are non-discriminatory. Negotiations between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Chapter.'*

In proceedings pursuant to Part Five CCP, the entire case is reheard, including the level of charges pursuant to Article 56(6) of Directive 2012/34, but without the supervision of the regulatory body and without it having the possibility to intervene. The Authority is of the opinion that hearing the same case before a court of general jurisdiction, without the involvement of the regulatory body, is contrary to the provisions of the Directive.

And finally, the application of Part Five of the Code of Civil Procedure is not in line with Directive 2012/34 also because administrative courts have competence to perform judicial review of the Authority's decisions in certain cases and civil courts in others. This concerns, in particular, this case of unlawfully set prices – fees, for the application of which the infrastructure manager is accused of a misdemeanour. The Authority's ruling on a potential misdemeanour will be reviewed by an administrative court, if an action is filed. Compliance of these prices in the network statement with the law will, however, if relevant in this case, be reviewed and re-decided by a civil court. Judicial review of procedures and decisions of the regulatory body in different types of proceedings pursuant to Article 56(1) of Directive 2012/34 will differ depending on which court is competent to hear the type of proceedings concerned.

Judicial review performed by different courts in different types of judicial proceedings will result in fragmented regulatory practice, which goes against the purpose of Article 55(1) of Directive 2012/34. That provision stipulates that each

Member State shall establish a single national regulatory body for the railway sector. The outcome may be the coexistence of two uncoordinated decision-making processes, which is clearly contrary to the goal pursued by Article 56 of Directive 2012/34.

Civil courts rendering decisions pursuant to Part Five CCP do not meet some of the requirements imposed by Directive 2012/34 on the decision-making of a regulatory body. These courts are not obliged to publish their decisions, as is required by Article 56(11) of Directive 2012/34. Pursuant to Paragraph 158 CCP, a court's judgement in civil judicial proceedings is only served on the parties to the proceedings. If the Authority is not admitted as a party to the proceedings, there is no explicit statutory obligation to send to the regulatory body judgements in written form that replace its decisions.

Civil courts do not have authority pursuant to Article 56(2) of Directive 2012/34 to monitor the competitive situation in the rail services markets and the activities of infrastructure mangers in relation to the rules set out in a network statement in order to prevent discrimination among applicants. Hence, their decisions cannot replace the decisions of a regulatory body.

As regards settlement, civil courts cannot ensure that negotiations between applicants and the infrastructure manager concerning the level of infrastructure charges are carried out under the supervision of the regulatory body, as is required by Article 56(6) of Directive 2012/34. Those fees are set out in the network statement.

Civil courts do not have the power to carry out audits or initiate external audits with infrastructure managers, operators of service facilities and, where relevant, railway undertakings, to verify compliance with accounting separation provisions, as required by Article 56(12) of Directive 2012/34. The need to carry out an audit may equally arise even during proceedings before a court. **[OR.8]**

Civil courts do not have the power to cooperate with regulatory bodies for the purposes of mutual assistance in their market monitoring tasks and handling complaints (including review of network statements) or investigations, as required by Article 57(2) of Directive 2012/34.

The decision of the Supreme Administrative Court noted above, of 7 May 2014, ref. no. 1 As 28/2014 – 62, states, among other things, in paragraph 29, that *Directive 2001/14/EC requires, in Article 30(6), that decisions taken by the regulatory body which, in the Czech Republic, is the Drážní úřad (the Railway Authority), must be subject to review. The Directive does not, however, regulate the material competence of courts of individual Member States, so it is entirely up to the Member States to determine which court will have material jurisdiction to review decisions of the regulatory authority. In the Czech Republic, the requirement of review is met both by proceedings pursuant to Paragraph 65 et seq. of the Code of Administrative Procedure and proceedings pursuant to Part*

Five of the Code of Civil Procedure, which must be considered to be essentially of equal standing in this regard. Given that national legislation is decisive for determining the material jurisdiction of the court in the case at hand, and no interpretation or assessment of the applicability of Directive 2001/14/EC or any other European Union legislation is required, the Supreme Administrative Court did not submit a reference for a preliminary ruling to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Since then, however, not only the above-mentioned requirements of a regulatory body have changed, but also the above-mentioned judgment in *CTL Logistics* has been delivered. Directive 2012/34 does not regulate the material jurisdiction of a court, but it does regulate the decision-making procedure. It no longer holds fully true that both judicial procedures comply with the review requirement in the Czech Republic. The Authority is of the opinion that proceedings before civil courts are non-compliant with Directive 2012/34. For that reason, the Authority proposes that the court submit a question to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union.

In summary, the Transport Infrastructure Access Authority finds the current national regulation of judicial review of the Authority's decisions concerning compliance of network statements with the Law on the Rail Systems pursuant to Part Five CCP to be contrary to Directive 2012/34 for the following reasons:

a. Since the decision of the Supreme Administrative Court, both legal regulation and the case-law have changed, making it necessary to submit a question for a preliminary ruling;

b. Contrary to Article 56(10) of Directive 2012/34, it does not constitute judicial review of the Authority's decision, but rather, a new decision on the same matter;

c. Courts of general jurisdiction replace the Authority's decisions with their judgments, thereby acting contrary to Article 55(1) of the Directive, pursuant to which a single regulatory body for the railway sector is to be established;

d. Decision-making of a total of 86 competent courts of general jurisdiction in the Czech Republic would replace the uniformity of control performed by a competent authority, with the exception of potential subsequent review by courts deciding about actions challenging the decisions of that authority; the outcome would be the coexistence of two uncoordinated decision-making processes, which would clearly contravene the goal pursued by Article 55 and Article 56 of Directive 2012/34;

e. The possibility of a court settlement between the applicants and the infrastructure manager renders the role of the regulatory body entirely meaningless, which is entirely contrary to the purpose of Directive 2012/34;

f. The regulatory body does not have even a minimal possibility to defend its decision in civil judicial proceedings, and court decisions replacing decisions of the Authority may be made irrespective of the activities of the regulatory body;

g. The requirement of Article 56(6) of Directive 2012/34 will not be met, according to which negotiations between applicants and an infrastructure manager concerning the level of infrastructure charges must be carried out under the supervision of the regulatory body;

h. Civil courts do not meet the requirements of Article 56(2), (6), (11), and (12) and of Article 57(2) of Directive 2012/34. **[OR.9]**

With respect to other supporting information, we refer to the court file that is currently being delivered to you.

[…] [name of court assistant, referring court]