Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 7 April 2022[1]

Case C-721/20

DB Station & Service AG
v
ODEG Ostdeutsche Eisenbahn GmbH

(Request for a preliminary ruling from the Kammergericht Berlin (Higher Regional Court, Berlin, Germany))

(Reference for a preliminary ruling – Rail transport – Article 102 TFEU – Abuse of a dominant position – Directive 2001/14/EC – Article 30 – Railway regulatory body – Review of charges in the light of competition law – Relationship between the jurisdiction of the civil courts and the competences of the regulatory body)

I. Introduction

1. The present case concerns the clash between, on the one hand, the outcome of the line of authority laid down in the judgment of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834;'the judgment in *CTL Logistics*'), confirmed by the judgment of 8 July 2021, *Koleje Mazowieckie* (C-120/20, EU:C:2021:553; 'the judgment in *Koleje Mazowieckie*'), establishing the requirement that, before any judicial action is taken, disputes relating to railway charges must be submitted to the regulatory body established by Article 30 of Directive 2001/14/EC[2] and, on the other hand, the doctrine of the direct effect of Article 102 TFEU,[3] according to which the national courts have jurisdiction to examine directly conduct of the infrastructure manager in determining those charges which may constitute an abuse within the meaning of that provision.

2. More specifically the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) asks in essence whether, and if so in what circumstances, the civil courts may review the amount of charges for access to the railway infrastructure by reference to Article 102 TFEU.

1 Original language: French.

2 Directive 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).

3 Judgments of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, EU:C:1974:6, paragraphs 14 to 16), and of 28 March 2019, *Cogeco Communications* (C-637/17, EU:C:2019:263, paragraph 38).

3. That question has been referred in proceedings between ODEG Ostdeutsche Eisenbahn GmbH ('ODEG'), a German railway company, and DB Station & Service AG, which operates around 5 400 railway stations and hubs in Germany, concerning the reimbursement of charges paid by ODEG to use the stations and hubs [4] operated by DB Station & Service during the period between November 2006 and December 2010.

II. The dispute in the main proceedings, the procedure before the Court and the questions referred for a preliminary ruling

4. DB Station & Service, a subsidiary of Deutsche Bahn AG (the incumbent operator in Germany), operates railway stations and hubs in that Member State. The conditions of use of those installations are determined in framework contracts which it enters into with railway undertakings. Each specific use of those installations is then governed by a separate contract. The amount of the charges is determined according to a station price list drawn up by DB Station & Service, for each category and for each *Land*.

5. ODEG is a railway undertaking which uses DB Station & Service's infrastructure in the course of its short-distance passenger rail transport business. [5] The two undertakings entered into a framework contract for that purpose.

6. On 1 January 2005, DB Station & Service introduced a new price list, designated by the initials 'SPS 05'. In ODEG's case, that list resulted in an increase in the infrastructure charges, which it paid, subject to reservations, as it did not consent to the increase.

7. By decision of 10 December 2009, the Bundesnetzagentur (Federal Network Agency, Germany), in its capacity as the competent regulatory body, declared the SPS 05 invalid but maintained its effects until 1 May 2010, so that a new tariff could be applied from that date. In that decision, that agency invited complainants to bring proceedings before the civil courts in order to obtain reimbursement of the additional amounts already paid. [6]

8. DB Station & Service challenged that decision. On 23 March 2010, the Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court, North Rhine-Westphalia, Germany) recognised the suspensory effect of that action. At the time of the request for a preliminary ruling in the present case, that court had not yet adjudicated on the substance of the action.

9. By a number of actions brought before the Landgericht Berlin (Regional Court, Berlin, Germany), ODEG claimed reimbursement of the amount of the charges paid between November 2006 and December 2010, in so far as the amount exceeded the amount that would have been payable under the price list previously in force, namely the SPS 99. The Landgericht Berlin (Regional Court, Berlin) allowed those actions on grounds of fairness, on the basis of

[4] Paragraph 2 of Annex II to Directive 2001/14 includes track access to services facilities and supply of services relating, in particular, to passenger stations, their buildings and other facilities.

[5] It is apparent from the information before the Court that the destinations offered by ODEG are confined to Germany. However, that does not necessarily preclude the application of Article 102 TFEU. In that regard, see Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101, p. 81).

[6] Decision on the station prices of DB Station & Service AG of the Federal Network Agency, 10 December 2009, Case No 705-07-038, p. 22.

Paragraph 315 of the Burgerliches Gesetzbuch (Civil Code; 'the BGB'),[7] which allows the court to restore contractual equilibrium. DB Station & Service appealed before the Kammergericht Berlin (Higher Regional Court, Berlin), which joined the various cases by order of 30 November 2015.

10. In the meantime, following a request for a preliminary ruling, and in the context of a similar dispute before the civil courts, the Court ruled, in the judgment in *CTL Logistics*, that a review of the fairness of train path charges by the ordinary courts cannot be carried out independently of the monitoring carried out by the competent regulatory body, in so far as monitoring of the calculation methods and the amount of the charges under Directive 2001/14 falls within the exclusive competences of the railway regulatory body established by Article 30 of that directive.[8]

11. Following that judgment, claims for reimbursement were again lodged with the Federal Network Agency. By decision of 11 October 2019, that agency rejected as inadmissible the actions brought by a number of railway undertakings seeking an a posteriori review of the legality of SPS 05 with a view to obtaining reimbursement of the excess amount of the charges on the ground that such claims were now time barred.[9] That decision was the subject of an appeal which, at the time when the request for a preliminary ruling in the present case was referred, was still pending before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany).

12. The Kammergericht Berlin (Higher Regional Court, Berlin) considers that the outcome of the dispute before it depends on the interpretation of Directive 2001/14, which is applicable *ratione temporis* and *ratione materiae*.

13. In particular, that court wonders whether the principles stated in the judgment in *CTL Logistics* are applicable *mutatis mutandis* to the review of those charges in the light of Article 102 TFEU and national competition law, which prohibit abuse of a dominant position. In fact, following the decision in that case, it is on that legal basis that the dispute in the main proceedings now relies in the appeal.

14. The referring court observes that several German civil courts have answered that question in the affirmative. They have considered that the principles established in the judgment in *CTL Logistics* prevent them from adjudicating in actions for reimbursement until such time as the competent regulatory body has adopted a final decision in that respect. Conversely, in a judgment of 29 October 2019, known as 'Trassenentgelte' (rail path charges),[10] the Bundesgerichtshof (Federal Court of Justice, Germany) declared that Article 102 TFEU may be applied by the civil courts without a final decision of the regulatory body being required.

15. According to the referring court, there are good reasons to depart from the position supported by the German supreme civil court.

7 Paragraph 315 of the BGB, entitled 'Specification of performance by one party', provides, in subparagraphs 1 and 3:
'(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it shall be assumed that the specification is to be made *ex aequo et bono*.
…
(3) Where the specification is to be made *ex aequo et bono*, the specification made shall be binding on the other party only if it is equitable. If it is not equitable, the specification shall be made by judicial decision …'

8 Judgment in *CTL Logistics*, paragraphs 84 and 86.

9 Decision No BK10-19-0011 E of the Federal Network Agency, 11 October 2019.

10 KZR 39/19, DE:BGH:2019:291019UKZR39.19.0.

16. First of all, while the judgment in *CTL Logistics* concerned the incompatibility of the review of equity provided for by German civil law with Directive 2001/14, its grounds might be transposed to the application of competition law by the civil courts. The intervention of the civil courts, independently of the regulatory body, might create an unequal situation by allowing some railway undertakings to pay lower infrastructure charges. Such an advantage would be contrary to the central objective of Directive 2001/14, which is to ensure non-discriminatory access to railway infrastructure and thus to permit fair competition. The review carried out by the civil courts would constitute, moreover, an interference with the exclusive competences of the regulatory body.

17. Furthermore, although, in accordance with the Court's case-law, the national courts were required to apply Article 102 TFEU directly, the Court has not yet settled the question whether that obligation also applies in a case in which a regulatory body, whose decisions are subject to judicial review, is responsible for monitoring charges.

18. Last, by its judgment of 1 September 2020, known as 'Stationspreissystem II',[11] the Bundesgerichtshof (Federal Court of Justice) held that Article 30(3) of Directive 2001/14 does not confer competence on the regulatory body to adjudicate on charges which have already been paid, still less to order reimbursement of such charges. That court inferred that review of abuse under Article 102 TFEU does not interfere with the competences of the regulatory body, since that review is limited to awarding damages in respect of undertakings' past conduct.

19. Nonetheless, the referring court considers that that analysis of EU law is flawed. First, there is nothing in Directive 2001/14 to substantiate the interpretation according to which the regulatory body decides only *pro futuro*. Second, Article 102 TFEU permits the adoption of decisions declaring measures void or ordering conduct to be brought to an end. Furthermore, even the reimbursement of charges levied in the past might give rise to distortions of competition and interfere with the objectives of Directive 2001/14. According to the referring court, those considerations show that the Bundesgerichtshof (Federal Court of Justice) ought to have requested the Court to give a preliminary ruling in that respect.

20. It was in those circumstances that the Kammergericht Berlin (Higher Regional Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with [Directive 2001/14], including its provisions on the management independence of the infrastructure undertaking (Article 4), the principles of charging (Articles 7 to 12) and the tasks of the regulatory body (Article 30), for national civil courts to review the charges levied in the light of the criteria laid down in Article 102 TFEU and/or in national competition law on a case-by-case basis independently of the monitoring carried out by the regulatory body?

(2) If [the first question] is answered in the affirmative: Are the national civil courts permitted and required to conduct an assessment of abusive practices in the light of the criteria laid down in Article 102 TFEU and/or in national competition law, even where the rail transport undertakings have the possibility to request the competent regulatory body to review the

[11] KZR 12/15, DE:BGH:2020:010920UKZR12.15.0.

fairness of the charges paid? Must the national civil courts await a decision in the matter by the national regulatory body and, where applicable, if it is contested before the national courts, for that decision to become enforceable?'

21. Written observations have been lodged by DB Station & Service, ODEG and the European Commission.

III. Analysis

22. By its two questions, which I shall examine together, the referring court asks, in essence, whether Directive 2001/14 must be interpreted as meaning that, irrespective of the monitoring carried out by the regulatory body, the civil courts have jurisdiction to hear and determine, in the light of Article 102 TFEU, claims by a railway undertaking for reimbursement of the excess amount unduly paid by way of charges.

23. The main reason why the referring court is uncertain about its jurisdiction in the main proceedings lies in the interpretation provided by the Court in the case of *CTL Logistics* and confirmed in the case of *Koleje Mazowieckie* ('the line of authority'), according to which Directive 2001/14 confers exclusive competence on the regulatory body for the charges fixed by the rail network manager, thus preventing the national civil courts from adjudicating on the legality of those charges.

24. The question raised by the present case can be answered in a number of ways. The first possibility consists in applying the line of authority to the question of the jurisdiction of the national courts to hear and determine actions brought on the basis of Article 102 TFEU. The application of that line of authority would lead to the conclusion that the national courts cannot adjudicate on the validity of railway charges because to do so would encroach on the exclusive competence of the regulatory body. As I shall explain (A), I do not consider such a solution to be consistent with the case-law on the jurisdiction of the courts that results from the direct effect of Article 102 TFEU.

25. The second possibility entails taking the view that the national courts adjudicating on the basis of Article 102 TFEU have independent jurisdiction to adjudicate on the charge. In order to arrive at such a conclusion, it would be necessary to be able to distinguish the facts of the present case from those of the cases of *CTL Logistics* and *Koleje Mazowieckie*. As I shall explain, I am of the view that such a distinction is not reasonably possible (B). I shall therefore suggest that the Court reconsider that line of authority (C). Last, I shall address the second part of the referring court's questions (D).

A. Transposing the existing line of authority where Article 102 TFEU is invoked

26. In the line of authority in question, the Court considered that the regulatory body established pursuant to Article 30 of Directive 2001/14 has exclusive competence to adjudicate on the charges imposed by the infrastructure manager. It therefore concluded that the direct application by the national court of the railway legislation relating to charges would encroach on the exclusive competence of the regulatory body. [12]

[12] See, to that effect, the judgment in *CTL Logistics*, paragraphs 84 and 86, and the judgment in *Koleje Mazowieckie*, paragraphs 53 and 54.

27. If the interpretation resulting from that line of authority is transposed to the case where Article 102 TFEU is invoked, the inevitable conclusion is that the civil court adjudicating on the basis of that article is also unable to rule on the validity of the charges determined by the infrastructure manager. DB Station & Service seems to agree with that solution.

28. The determination of whether a charge was actually imposed by the network manager in breach of the rules governing those charges, set out in Chapter II of Directive 2001/14, is a necessary step in arriving at the decision relating to compensation for the (presumed) charges that have been unduly paid. To require a national court hearing a claim for compensation to ask that part of its reasoning relating to its decision be resolved by a different authority seems to run counter to settled case-law on the direct effect of Article 102 TFEU. [13] According to that case-law, reproduced by the legislature in Article 6 of Regulation (EC) No 1/2003, [14] the national courts have the competence to apply Articles 81 and 82 EC (now Articles 101 and 102 TFEU) independently of and in parallel to the Commission and the national competition authorities.

29. It would be possible to envisage a system in which an independent regulatory body had the competence to resolve disputes between the network manager and the railway operators relating to charges and to grant effective remedies. [15] In such a case, the imposition of a procedural requirement that an attempt must be made to resolve a dispute before such a regulatory body before the matter is brought before the courts would, in my view, not necessarily be contrary to the concept of direct effect of Article 102 TFEU. Such solutions exist in numerous fields of the legal systems of the Member States and also in that of the European Union. [16]

30. In most of those cases, however, the authority to which the claimant must make application before bringing the matter before a court has the competence to grant that claimant the right which he or she claims.

31. That does not seem to be the case here.

32. The regulatory body has a limited competence of review, which does not extend to a general competence to settle disputes. [17] In any event, it seems that the regulatory body cannot hear and determine pecuniary claims, such as claims for damages. [18]

33. That is the first reason why I believe that the transposition of the line of authority would not be consistent with the direct effect of Article 102 TFEU.

[13] See footnote 3 to this Opinion.

[14] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1).

[15] In the electricity or telecommunications sectors, the respective instruments provide that the national regulatory authorities are to be responsible for ensuring the resolution of disputes between undertakings (see Article 5(1)(b) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36), and Article 59(3)(e), (5)(b) and (6)(c) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125)).

[16] That is the position in Article 91(2) of the Staff Regulations of Officials of the European Union, which provides that an appeal to the competent Courts of the European Union is to lie only if the appointing authority has previously had a complaint submitted to it. See, on that point, my Opinion in *Commission* v *Missir Mamachi di Lusignano* (C-54/20 P, EU:C:2021:1025).

[17] The competences of the regulatory body are governed by Article 30 of Directive 2001/14.

[18] See the decision cited in footnote 6 to this Opinion. Thus, the regulatory body appears to have such a view of its own competences, since it is common ground that it had invited the railway undertakings to bring proceedings before the civil courts with respect to the pecuniary part of their claims.

34. The second reason why it is not desirable that judicial review on the basis of Article 102 TFEU should be subject to the prior final decision of the regulatory body (which also includes the courts with jurisdiction to review that decision) is that, in circumstances such as those of the present case, it might entail a breach of the right to effective judicial protection.

35. Admittedly, Article 30(5) of Directive 2001/14 provides that 'the regulatory body shall be required to decide on any complaints and take action to remedy the situation *within a maximum period of two months* from receipt of all information'.[19] However, it must be stated that that period has been significantly exceeded, and that proceedings initiated more than 10 years ago have still not been terminated.

36. I understand the need to preserve the effectiveness of the regulatory body's role as regulator. However, the requirements that result from effective judicial protection within a reasonable time[20] are equally pressing, and argue in favour of the parallel recognition[21] of the jurisdiction of the national courts in circumstances such as those at issue in the main proceedings.

37. Having regard to all of those considerations, I am of the opinion that the interpretation of Directive 2001/14 that follows from the judgments in *CTL Logistics* and *Koleje Mazowieckie* should not be transposed to the circumstances at issue in the main proceedings and that it is not desirable to extend that interpretation.

B. Distinguishing the existing line of authority from the case-law that established the direct effect of Article 102 TFEU

38. According to the second solution, Directive 2001/14 must be interpreted as not precluding a decision of a national court adjudicating on the basis of Article 102 TFEU on the validity or invalidity of railway charges.

39. ODEG and the Commission appear to support that position.

40. However, that solution makes it necessary to distinguish the present case from the circumstances underlying the cases of *CTL Logistics* and *Koleje Mazowieckie*.

41. In fact, if a new case seems, as regards the legally relevant facts, to be essentially similar to the case in which a rule was established, it is necessary, in principle, to apply that rule in the new case. If the intention is nonetheless to avoid the application of that rule, it is necessary to find a point of difference that would justify distinguishing the former case from the latter.[22]

42. In this instance, the railway operator (ODEG) claimed, in judicial proceedings, compensation for the charges which it paid to the network operator but which it considered not to be payable, because they were imposed in breach of the applicable law. At first instance, ODEG claimed reimbursement of the difference between the old charge and what in its view was the invalid new

[19] Emphasis added.

[20] See, to that effect, judgment of 10 February 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period)* (C-219/20, EU:C:2022:89, paragraph 45 and the case-law cited).

[21] Such parallel recognition also makes it possible to avoid judicial review constituting, conversely, the only remedy.

[22] See Tridimas, T., 'Precedent and the Court of Justice, A Jurisprudence of Doubt?' in Dickinson, J., Eleftheriadis, P. (eds), *Philosophical Foundations of EU Law*, OUP, Oxford, 2012, pp. 307 to 330; Jacobs, M., *Precedents and Case-Based Reasoning in the European Court of Justice*, CUP, Cambridge, 2014, p. 127 et seq.

charge.[23] The basis of such an action – Paragraph 315 of the BGB – was replaced by Article 102 TFEU on appeal (following the judgment in *CTL Logistics* and the amendments of the German legislation[24]) and the subject matter of the claim now consists in a claim for compensation (instead of a claim for reimbursement). All other things being equal, the *substance* of the claim submitted by the applicant in the main proceedings, namely reimbursement of the excess amount, did not change between first instance and appeal. Only the provision relied on in support of that claim changed, as Article 102 TFEU had in the meantime replaced Paragraph 315 of the BGB.

43. The claim brought by the applicant in the case of *CTL Logistics* was also based on Paragraph 315 of the BGB and concerned reimbursement of the difference between the old charge and the new charge (introduced in 2005), because the latter charge was considered unfair. In the case of *Koleje Mazowieckie*, the claim was of the same type. The applicant claimed damages, from both the State and the network manager, for having authorised the imposition of the price which was alleged to be contrary to the principles of Directive 2001/14. The basis of that claim was the liability of the State for damage resulting from the breach of the obligations placed on it by EU law ever since the cases of *Francovich and Others*[25] and *Brasserie du pêcheur and Factortame*.[26] The Polish legislation applicable in the case of *Koleje Mazowieckie* established even stricter liability than the corresponding European concept.

44. In the three cases, independently of the legal basis of the action, the national courts were dealing with claims for restitution or compensation which required that they rule on the validity of the charges provided for in the contract for the use of the railway network.

45. Furthermore, notwithstanding the way in which the charges were contested, the legislation on competition in the railway sector was applicable.

46. For those reasons, in my view, the case at issue in the main proceedings is not distinguished on the basis of circumstances that were relevant for the interpretation of Directive 2001/14 in the line of authority. That is because, irrespective of the angle from which the problem is approached, the three cases ultimately concern a claim for pecuniary compensation by reference to the excess amount of charges unduly paid. In all the cases in question, moreover, the merits of that claim depended on whether the charge was imposed in accordance with Directive 2001/14.

47. Given the similarity of the relevant circumstances, what other factors might justify distinguishing the case at issue in order to maintain the previous line of authority?

48. The judgment in *CTL Logistics* might be justified for reasons specific to that case. The national court had jurisdiction, on the basis of Paragraph 315 of the BGB, to adjudicate *ex aequo et bono* and to determine itself whether the fee was fair.

49. The Court explained in that judgment that, by insisting exclusively on the economic rationality of the individual contract, Paragraph 315 of the BGB disregarded the fact that only charges set on the basis of uniform criteria can guarantee the charging policy prescribed by

[23] It should be borne in mind that the regulatory body decided that the 2005 tariff was indeed contrary to the requirements of Directive 2001/14. However, that decision was challenged by DB Station & Service and the final judicial decision is still awaited. In that regard, see point 8 of this Opinion.

[24] See, in that regard, point 13 of this Opinion.

[25] Judgment of 19 November 1991 (C-6/90 and C-9/90, EU:C:1991:428).

[26] Judgment of 5 March 1996 (C-46/93 and C-48/93, EU:C:1996:79).

Directive 2001/14.[27] Accordingly, it might have been possible to claim that that specific procedure envisaged by national law jeopardised the effectiveness of that directive by conferring jurisdiction on the national courts to decide what the fair amounts of the charges would be in individual cases. Such a power might be considered incompatible[28] with the system for determining the charges for using the railway network provided for in that directive and placed under the control of the regulatory body.

50. That potentially excessive power of the national courts under Paragraph 315 of the BGB in comparison to that of the regulatory body under Directive 2001/14 has however been eliminated by the German legislature, which precluded the application of Paragraph 315 of the BGB to agreements between the network manager and operators in the railway sector.[29]

51. If, consequently, the case of *CTL Logistics* were confined to the specific situation of courts which adjudicate *ex aequo et bono* and have jurisdiction to establish an equitable charge in specific cases, that could allow the circumstances of the case in *CTL Logistics* to be distinguished from those of the present case.

52. However, not only do the grounds of the judgment in *CTL Logistics* tend to suggest a more general application, but, in addition, the limitation of the line of authority seems to me to have become difficult to conceive since the judgment in *Koleje Mazowieckie* was delivered. The latter decision reiterated the position initiated in the judgment in *CTL Logistics* that only the regulatory body can invalidate the charges and extended it to the context of judicial proceedings seeking to establish State liability for an incorrect transposition of Directive 2001/14.

53. In *Koleje Mazowieckie*, the national court was required to determine whether the transposition into national law of Directive 2001/14, which permitted the setting of the charge which the applicant considered to be illegal, was consistent with that directive.[30] Although the context was distinct from that of the judgment in *CTL Logistics*, the Court considered that that case-law was fully applicable to the case in question.[31] The reason was that the first main justification for not recognising the national court's jurisdiction to rule on the validity of the charges was the same, namely the possible divergences between the decisions of the national courts.[32]

54. And yet that possibility of divergences in the decision on the compatibility of the charges with Directive 2001/14 also exists in the cases that were decided on the basis of Article 102 TFEU.

[27] Judgment in *CTL Logistics*, paragraph 74. However, I am not convinced by that argument, since the civil court adjudicating on price fairness could not have disregarded the charge setting principles prescribed by Directive 2001/14. See, to that effect, the Opinion of Advocate General Mengozzi in *CTL Logistics*, (C-489/15, EU:C:2016:901, points 39 to 41).

[28] Although it must not be forgotten that that jurisdiction is limited by the national court's obligation to apply Directive 2001/14. In that regard, see point 71 of this Opinion.

[29] That legislative amendment was introduced after much academic and political controversy in Germany. It is apparent from point 13 of the Opinion of Advocate General Mengozzi in *CTL Logistics* (C-489/15, EU:C:2016:901) that 'the domestic debate generated by this line of case-law seems to have taken on the proportions of a full-blown institutional conflict, as is apparent not least from the disagreement expressed by the Bundesrat (Federal Council, Germany) with the proposal contained in the draft law amending the legislation governing railways and transposing Directive [2001/14], to make express provision for the non-application of Paragraph 315 of the BGB in the field to which that legislation applies'. Ultimately, it seems (because the German Government has not participated in the present proceedings) that the German legislature indeed intervened to declare that Paragraph 315 of the BGB does not apply to a situation such as that at issue in the main proceedings (point 14 of that Opinion).

[30] The national court was supposed to decide on the validity of the charge by reference to the judgment of the Court finding that Poland had failed to fulfil its obligation when transposing Directive 2001/14 (judgment of 30 May 2013, *Commission* v *Poland* (C-512/10, EU:C:2013:338)).

[31] Judgment in *Koleje Mazowieckie*, paragraph 52.

[32] On that argument, see point 64 et seq. of this Opinion.

55. The second justification in the preceding line of authority was that national courts resolve individual cases, which could therefore just as easily lead to a situation in which an operator which was successful would necessarily gain an advantage over its competitors which have not brought such an action. [33]

56. There again, that objection applies just as much to all disputes in which the national courts make a determination on the basis of Article 102 TFEU.

57. It therefore does not seem possible to regard the present case as different from the cases in the preceding line of authority on the ground that the main justifications proposed in those cases are not applicable in this case.

58. Last, the judgment in *Koleje Mazowieckie* restricted the possibility of distinguishing the judgment in *CTL Logistics* on the basis of a logic of the hierarchy of norms. Although it might be asserted that the present case is distinguished on the basis of the superiority of Article 102 TFEU as the legal basis on which the national court is requested to rule on the validity of the charges, the liability of a Member State at issue in *Koleje Mazowieckie* also results from primary law, namely from the direct effect of EU law and the obligation of sincere cooperation.

59. It therefore seems difficult to distinguish the present case from the preceding line of authority on the basis of the circumstances in which the various cases arose and the rights which the parties were attempting to enforce. It is also difficult to distinguish the present case on the basis of the inapplicability of the same justifications for the interpretation of Directive 2001/14 as meaning that it confers exclusive competence on the regulatory body to determine the validity of the charges. Nor, last, can the distinction be based on the hierarchy of norms empowering national courts to decide on the validity of the charges.

60. That brings me to the third solution.

C. Reconsideration of the existing line of authority

61. The line of authority resulting from the judgments in *CTL Logistics* and *Koleje Mazowieckie* must not be transposed to the circumstances of the present case, nor is it possible to distinguish that line of authority from the circumstances of the present case.

62. All things considered, it therefore seems necessary to me to suggest a third solution to the Court, namely that it should reconsider that line of authority not only when Article 102 TFEU is invoked, but also, in the interest of homogeneity, and in accordance with Article 30(2) of Directive 2001/14, irrespective of the basis serving as the legal basis of the claim of the 'applicant' within the meaning of that provision.

63. In my view, there is no reason why Directive 2001/14 should be interpreted as granting the regulatory body exclusive competence to assess the validity of the charges. That is so because EU law contains mechanisms designed to prevent the risk of divergences (1) and because such exclusivity of competence does not seem to follow from the system envisaged by Directive 2001/14 (2).

[33] Judgments in *CTL Logistics*, paragraph 95, and in *Koleje Mazowieckie*, paragraph 51.

1. Prevention of the risks of divergences

64. The main justification proposed by the Court in the case of *CTL Logistics*, and reiterated in the case of *Koleje Mazowieckie*, was the risk of divergences in the interpretation of the rail charges that might result from the different decisions of the national civil courts. A possible divergence was considered to be contrary to the purpose of Directive 2001/14 and to the reasons underlying the establishment of the regulatory body.

65. Certain national decisions to which the referring court makes reference adopted that argument, which the referring court also endorses, and which is also supported by DB Station & Service in the observations which it has submitted to the Court. All have accepted that line of argument and have transposed it to situations in which the decisions are to be taken on the basis of Article 102 TFEU.

66. Is that risk of divergences really so significant and is it any different in the situation in which a court's jurisdiction is based on Paragraph 315 of the BGB, on the liability of the Member State or on Article 102 TFEU?

67. While the possibility that such divergences will occur in the interpretation of the specific provisions and their application to each particular case cannot be entirely precluded, it must be borne in mind that the possible occurrence of divergences is part of the regional integration process, such as is present within the European Union.

68. The question is therefore not whether divergences may occur, but whether there are procedures for monitoring or coordination that ensure that those possible divergences are not perpetuated and do not multiply.

69. In that regard, the obligation placed on the national courts to apply EU law, in conjunction with the reference for a preliminary ruling established by Article 267 TFEU, is envisaged by the Treaties to safeguard the necessary uniformity of EU law. The present case and, previously, the judgments in *CTL Logistics* and *Koleje Mazowieckie* perfectly illustrate the effectiveness of the Article 267 TFEU mechanism, since requests for a preliminary ruling were made in those cases.

70. The risk that the involvement of the civil courts may be the source of possible divergences therefore seems to me to be exaggerated: those courts are required to apply all the rules of EU law, including Directive 2001/14.

71. Furthermore, in the application of the national provisions, even those resulting from branches of the law such as civil law, those legal rules are never autonomous. National courts, even civil courts, should thus interpret the national legislation in a manner consistent with the requirements of EU law.

72. Whether it is a matter of ruling on the fairness of the charges,[34] or on the incorrect transposition of Directive 2001/14 which allowed the charge to be determined by contract at a level that is contrary to the provisions of that directive, or again on the abuse of a dominant position in the form of the imposition of excessive charges, those courts cannot avoid the application of that directive. The principles determining the establishment of the charge, set out in Chapter II of that directive, cannot be circumvented in any of the procedures in which

[34] See, on that point, Opinion of Advocate General Mengozzi in *CTL Logistics* (C-489/15, EU:C:2016:901, points 39 to 41).

national courts (whether civil or other) are requested to rule on the validity of the charges.[35] In the event of doubt as to the interpretation of those principles, the competent courts may, or at last instance must, request a preliminary ruling from the Court.

73. Consequently, EU law provides mechanisms to avoid divergences in the interpretation of the relevant legislation, even where it is applied in parallel by national courts and the regulatory body established by that legislation.

2. The existence of parallel competences

74. As regards the application of the general and sectoral legislation in competition matters, it should be borne in mind that Article 10(7) of Directive 91/440/EEC,[36] in the consolidated version that results from Directive 2001/12/EC,[37] provides that, 'without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body established pursuant to Article 30 of [Directive 2001/14] *or any other body enjoying the same degree of independence* shall monitor the competition in the rail services markets'.[38]

75. An analogous allocation of competences is found in Article 56(2) of Directive 2012/34/EU,[39] which states that 'without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets'.

76. Thus, competence in the application of competition rules in the sector is held not only by that regulatory body, but also by all the 'institutions with responsibility in that area', such as the national competition authorities and the national courts. Such competence held by those authorities is itself without prejudice to the Commission's competence under Article 11(6) of Regulation No 1/2003, which provides that the national authorities may relinquish competence in favour of the Commission.

77. That allocation of competences in the application of the sectoral rules and the more general rules relating to competition, has been mentioned on a number of occasions in connection with the telecommunications sector,[40] or the air transport sector,[41] and also seems to be accepted in connection with the postal sector.[42]

[35] See also, concerning whether sectoral regulation should be taken into account in the application of the general rules on competition, judgments of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 224), and of 25 March 2021, *Deutsche Telekom* v *Commission* (C-152/19 P, EU:C:2021:238, paragraph 57).

[36] Council Directive of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25).

[37] Directive of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440 (OJ 2001 L 75, p. 1).

[38] Emphasis added.

[39] Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

[40] Judgments of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062), and of 25 July 2018, *Orange Polska* v *Commission* (C-123/16 P, EU:C:2018:590).

[41] Judgments of 30 April 1986, *Asjes and Others* (209/84 to 213/84, EU:C:1986:188), and of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904, paragraph 45 and the case-law cited).

[42] Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2, p. 6 et seq.).

78. Therefore, the regulatory body, within the meaning of Article 30(2) of Directive 2001/14 has, in my view, parallel, and not exclusive, competences [43] to apply the rules of the rail sector or the general rules relating to competition, including the rules on the setting of charges.

79. It is therefore incorrect, as stated in paragraph 84 of the judgment in *CTL Logistics*, that the civil courts, dealing with a claim for reimbursement of the charges, cannot apply the railway legislation or other rules without encroaching on the competences of the railway regulatory body. [44]

80. In the field of competition, the existence of parallel and complementary competences of the regulatory body and the courts of the Member States is supported by Article 6 of Regulation No 1/2003 which expressly provides that the national courts are to have the competence to apply Articles 81 and 82 EC, now Articles 101 and 102 TFEU. In the same vein, the adoption of Directive 2014/104/EU [45] follows a similar logic of the effective and decentralised application of EU competition law which is also within the jurisdiction of the national courts.

81. Last, and not least, the very wording of Directive 2001/14 does not suggest any intention on the part of the European legislature to confer on the railway regulatory body exclusive competence with respect to decisions on the validity of the charges.

82. Article 30(2) of Directive 2001/14 provides that 'an applicant *shall 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'. [46] That assertion thus provides for only an option to appeal to the regulatory body. [47]

83. By comparison with other sectors, it should also be noted that, in the communications sector, recital 69 of Directive 2018/1972 states that, in the event of a dispute, an aggrieved party 'should be able' to bring the matter before the sectoral authority.

84. It follows from that examination that the rail sector regulatory body, as provided for in Directive 2001/14, and subsequently in Directive 2012/34, does not have exclusive competence to rule on the validity of railway charges.

[43] See Idot, L., 'Règles de concurrence et régulations sectorielles', in van Damme, J. and van der Mensbrugghe, F., *La régulation des services publics en Europe*, ASPE Europe, Paris, 2000, pp. 377 to 415.

[44] Nor can it be considered that the application of the general or sectoral competition rules by a national court encroaches on the competences and discretion of the regulatory body, which remain intact. Nor do those rules, taken together, adversely affect the independence of that body, as provided for in Article 30 of Directive 2001/14, since its competences flow specifically from such a legal framework. The same applies to the independence of the infrastructure manager, guaranteed in Article 4 of that directive (see, to that effect, judgment of 3 October 2013, *Commission* v *Italy* (C-369/11, EU:C:2013:636, paragraph 43 and the case-law cited)).

[45] Directive of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

[46] Emphasis added.

[47] The Spanish-, German- and French-language versions use the modal verb 'may'. The Croatian-, English- and Italian-language versions assert the existence of a right. While the different language versions to which I have just referred establish, in one way or another, an option or a right, none of them suggest a mandatory or exclusive competence. Thus, the different language versions support the view that Directive 2001/14 confers on the regulatory body established by Article 30 of that directive an optional competence to settle disputes. Such an understanding of the competence of the regulatory body to settle disputes is found in Directive 2012/34, which in the meantime has replaced Directive 2001/14, since Article 56(1) of Directive 2012/34, which corresponds to the former Article 30 of Directive 2001/14, is couched in identical terms to those of its predecessor.

D. Must the national court await the final decision of the regulatory body?

85. The referring court has also asked whether, on the assumption that the national courts have jurisdiction that enables them to adjudicate on the dispute on the basis of Article 102 TFEU, independently of the regulatory body, it is nonetheless required to await the final decision of the regulatory body.

86. Notwithstanding the answers given above, and without contradicting them, it is *conceivable* that the proceedings before the national courts may be stayed where the courts are aware that parallel proceedings are pending before the regulatory body, in order to maintain the utility of the latter proceedings. [48]

87. However, in circumstances such as those at issue in the main proceedings, it is common ground that the proceedings before the regulatory body have already lasted many years. [49] It is also likely, as the referring court seems to suggest, that those proceedings, or the pursuit of remedies against the decision taken in those proceedings, will not come to an end in the immediate future.

88. In such circumstances, the national court before which a direct action seeking a declaration that conduct constitutes an abuse has been brought must therefore consider whether a stay of proceedings will make it impossible for the applicant to exercise his or her right to obtain a solution to his or her dispute and his or her right to compensation within a reasonable time. [50]

89. Still in such a case, and in order to ensure that the reasonable time in which judgment is given is not exceeded, the right to effective judicial protection may preclude a stay of the judicial proceedings until such time as a decision of the regulatory body becomes final and the available remedies have been exercised.

90. Consequently, I consider that EU law does not impose any obligation on national courts dealing with an application on the basis of Article 102 TFEU to await a decision of the regulatory body. I am also of the view that those courts court may decide to stay the proceedings in order to await that decision if that does not jeopardise the rights to effective judicial protection of the parties to the proceedings.

IV. Conclusion

91. Having regard to all of the foregoing considerations, I propose that the Court should answer the questions for a preliminary ruling referred by the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) as follows:

(1) 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 must be interpreted as meaning that it does not preclude, independently of the monitoring carried out by the regulatory body, the jurisdiction of civil courts to determine, under Article 102 TFEU, claims lodged by a railway undertaking relating to reimbursement of the excess amount paid by way of charges.

[48] See, by analogy, Article 16 of Regulation No 1/2003.

[49] See points 7 to 11 of this Opinion.

[50] See the references cited in footnote 20 to this Opinion.

(2) EU law does not impose any obligation for national courts dealing with a claim submitted, on the basis of Article 102 TFEU, by a rail transport undertaking to review the sufficiency of the amount of the charges paid, to await a decision of the regulatory body established by Article 30 of Directive 2001/14 and, where that decision is challenged before a court, its definitive nature. Nor, subject to compliance with the right to effective judicial protection, does it preclude those national courts from deciding to await that decision.