Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 July 2013 *

(Failure of a Member State to fulfil obligations — Transport — Development of the Community's railways — Directive 91/440/EEC — Article 6(3) and Annex II — Directive 2001/14/EC — Article 14(2) — Independence of the body to which the exercise of essential functions is entrusted)

In Case C-412/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 5 August 2011,

European Commission, represented by J.-P. Keppenne and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by C. Schiltz, acting as Agent,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet (Rapporteur), E. Levits, J.-J. Kasel and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2012,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to adopt the measures necessary to ensure that the entity entrusted with the exercise of essential functions referred to in Article 6(3) of and listed in Annex II to Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25), as amended by

* Language of the case: French.

Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) ('Directive 91/440'), and Article 14(2) 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 (OJ 2001 L 75, p. 29), as amended by Directive 2007/58, be independent of the undertaking that provides railway transport services, the Grand Duchy of Luxembourg has failed to fulfil its obligations under those provisions.

Legal context

European Union law

2 Three directives were adopted in February 2001 with a view to revitalising rail transport by gradually opening it up to competition at European level, namely, Directive 2001/12 of the European Parliament and of the Council of 26 February 2001 amending Directive 91/440 (OJ 2001 L 75, p. 1), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and Directive 2001/14 (together 'the first railway package').

Directive 91/440

3 Article 6(3) of Directive 91/440 provided:

'Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.

Member States may, however, assign to railway undertakings or any other body the collecting of the charges and the responsibility for managing the railway infrastructure, such as investment, maintenance and funding.'

4 Annex II to Directive 91/440 read as follows:

'List of essential functions referred to in Article 6(3):

— preparation and decision-making related to the licensing of railway undertakings including granting of individual licenses,

— decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths,

— decision-making related to infrastructure charging,

— monitoring observance of public service obligations required in the provision of certain services.'

Directive 2001/14

5 Article 14(1) and (2) of Directive 2001/14 stated:

‘1. Member States may establish a framework for the allocation of infrastructure capacity while respecting the management independence laid down in Article 4 of Directive [91/440]. Specific capacity-allocation rules shall be laid down. The infrastructure manager shall perform the capacity-allocation processes. In particular, the infrastructure manager shall ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.

2. Where the infrastructure manager, in its legal form, organisation or decision-making functions is not independent of any railway undertaking, the functions referred to in paragraph 1 and described in this chapter shall be performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking.’

6 Article 29 of that directive provided:

‘1. In the event of disturbance to train movements caused by technical failure or accident the infrastructure manager must take all necessary steps to restore the normal situation. To that end he shall draw up a contingency plan listing the various public bodies to be informed in the event of serious incidents or serious disturbance to train movements.

2. In an emergency and where absolutely necessary on account of a breakdown making the infrastructure temporarily unusable, the paths allocated may be withdrawn without warning for as long as is necessary to repair the system.

The infrastructure manager may, if it deems this necessary, require railway undertakings to make available to it the resources which it feels are the most appropriate to restore the situation to normal as soon as possible.

3. Member States may require railway undertakings to be involved in assuring the enforcement and monitoring of their own compliance of the safety standards and rules.’

Luxembourg law

7 The Law of 22 July 2009 on railway safety (*Mémorial* A 2009, p. 2465) relating, inter alia, to the establishment of the Administration des Chemins de Fer (‘the ACF’) provides that the latter is responsible for the essential functions of allocation of capacity (allocation of train paths) and levying of charges.

8 The Law of 11 June 1999 on the railway infrastructure and its use (*Mémorial* A 1999, p. 1794), as amended by the Law of 3 August 2010 (*Mémorial* A 2010, p. 2194), provides:

‘The task of allocating railway infrastructure capacity shall be entrusted to an allocation body whose function shall be performed by the [ACF].’

9 The Network Reference Document of 23 December 2010 (‘the NRD’) provides in Item 4.8.2, entitled ‘Traffic management in the event of disruption’:

‘Operational regulation shall be carried out by the duty office of [the Network Management Service (‘the NMS’) of the Luxembourg National Railway Company (‘the CFL’)]. Its principles and procedures shall apply to all traffic if one train is unable to keep to the timetable originally scheduled. Except in

cases of doubt, a new train path shall not be assigned for a late train that same day. The duty office shall in no circumstances assign the new path. If necessary, its role shall be limited to the function of intermediary for a new order from the UI [Infrastructure user] to the [ACF].'

10 Item 4.8.3 of the NRD provides:

'If the disruption and the corresponding corrective measures affect only one railway undertaking without interfering with the infrastructure capacity reserved by the other railway undertakings, the corrective measures shall be put in place in consultation with the railway undertaking concerned.

Where the disruption and the corresponding corrective measures affect more than one railway undertaking, the [ACF] shall seek to put corrective measures in place as early as possible and in consultation with all the railway undertakings concerned.'

11 Item 4.8.4 of the NRD provides:

'In the event of unforeseen disruption of rail traffic due to a technical failure or an accident, the infrastructure manager shall take all the measures necessary to ensure that the situation is restored to normal. In particular, it shall apply the procedure of the RGE [General Technical Operating Rules] laid down in the event of incidents and accidents.

In the event of an emergency and where absolutely necessary, in particular in the event of an accident or defect rendering the infrastructure temporarily unusable or for any other circumstances preventing the use of the infrastructure under normal safety conditions, the train paths allocated may be withdrawn without notice during the time necessary for facilities to be restored or until the cause of the stoppage of trains no longer exists.

The [ACF] shall assign alternative capacities corresponding as closely as possible to the specifications of the railway undertakings concerned.

If it considers it necessary, the infrastructure manager may require the railway undertakings to make available to it the means which it considers most appropriate in order to restore the situation to normal as soon as possible or to implement its own rescue or lifting methods. The resulting costs are to be borne by the party responsible for the disruption.'

Pre-litigation procedure

12 By letter of 26 June 2008, the Commission sent the Grand Duchy of Luxembourg a letter of formal notice to comply with the directives of the first railway package. That Member State replied to that letter on 27 August 2008.

13 By letter of 9 October 2009, the Commission sent a reasoned opinion to the Grand Duchy of Luxembourg in which it stated that the measures that that Member State had adopted in order to transpose Article 6(3) of and Annex II to Directive 91/440, and Article 14(2) of Directive 2001/14 were insufficient as regards the independence of bodies to which essential functions are entrusted. In that reasoned opinion, the Commission also complained that that Member State had failed to take the measures necessary to fulfil its obligations relating to charging for access to the railway infrastructures under Article 11 of Directive 2001/14 and Article 10(7) of Directive 91/440. Furthermore, it alleged that the Grand Duchy of Luxembourg had failed to fulfil the obligations imposed on Member States by Article 30(1) and (4) and (5) of Directive 2001/14 concerning the rail regulatory body.

14 By letters of 24 December 2009 and 29 March 2010, the Grand Duchy of Luxembourg replied to the reasoned opinion by sending the Commission the text of the Grand Ducal Regulation of 27 February 2010 on the performance scheme for the rail network.

15 By letter of 15 April 2010, the Commission sent a request for information to the Grand Duchy of Luxembourg, to which the latter replied on 26 April and 16 August 2010.

16 By letter of 25 November 2010, the Commission sent an additional reasoned opinion to the Grand Duchy of Luxembourg by which, in the light of developments in the national regulatory framework since the reasoned opinion was sent on 9 October 2009, the Commission restricted the scope of the failure to fulfil obligations to Article 6(3) of and Annex II to Directive 91/440 and Article 14(2) of Directive 2001/14 relating to the independence of the entity responsible for essential functions, namely, the ACF. The Commission therefore called on the Grand Duchy of Luxembourg to take the measures necessary to fulfil its obligations within two months from the receipt of the further reasoned opinion.

17 By letter of 3 February 2011, the Grand Duchy of Luxembourg replied to the further reasoned opinion.

18 Not being satisfied with the Grand Duchy of Luxembourg's reply, the Commission decided to bring this action.

The action

Arguments of the parties

19 The Commission claims that Directive 91/440 requires the functions of allocating railway capacity, in particular, to be undertaken by independent bodies. Annex II, second indent, to that directive provides that essential functions include 'decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths'. Therefore, Annex II does not distinguish between different means of allocating train paths. In so far as the organisation of train paths falls within the operational regulation of traffic and is closely linked to it, operational regulation is included in the essential functions and should therefore be carried out by an entity independent from the railway undertaking.

20 According to the Commission, although the ACF which undertakes the allocation of train paths is in fact an entity independent of the CFL, the fact remains that certain essential functions regarding that allocation are entrusted to the latter.

21 The Commission takes the view, in the light of the information provided by the Grand Duchy of Luxembourg that, in the event of disruption of traffic, the allocation of train paths is still carried out by a department of the CFL, namely, the SGR, which is not independent of the parties that operate rail transport services.

22 The Commission takes the view that, in the event of disruption of traffic, the normal timetable set by the ACF can no longer be observed, given that the times laid down in the timetable have already passed and it becomes necessary to reallocate timetables for operators awaiting their turn. It takes the view that such re-assignment necessarily constitutes allocation of train paths. However, under Luxembourg law, this can be done only by the traffic management carried out by the CFL, thereby giving the CFL a role in railway capacity allocation, contrary to the requirements laid down in Directive 2001/14.

23 The Commission considers that the performance of the essential function of allocating train paths requires the CFL to be subject to the requirements of independence laid down by the first railway package. However, no measure to ensure such independence has been implemented within the CFL to separate, from the point of view of law, organisation or decision-making, the parties responsible for the essential functions from those which manage rail transport services. Those functions should therefore be transferred to the ACF.

24 The Commission submits that Article 29 of Directive 2001/14 is not a *lex specialis* derogating from the general rule. According to Article 14(2) of that directive, the obligation of independence which is imposed on the allocating entity is applicable to all the functions referred to in Article 14(1) and described in Chapter III of that directive, including Article 29 thereof.

25 In its reply, the Commission claims that the amendments introduced by the NDR, adopted after the expiry of the period prescribed in the reasoned opinion, are not sufficient to put an end to the failure to fulfil obligations.

26 In its defence, the Luxembourg Government takes the view that, even though the national legislation in force was consistent with the wording and the spirit of Directive 2001/14, it was nevertheless adapted after the present action was brought in such a way as to eliminate any doubt as to possible non-conformity with European Union law. Thus, the network statement was amended to the effect that, in the event of disruption, the reallocation of train paths is also transferred to the ACF, the SGR no longer being involved, which guarantees fair and non-discriminatory access to the infrastructure.

27 In its rejoinder, that Member State claims that the network statement was amended again, with effect from 1 January 2012, and that it now satisfies the Commission's requirements, by providing that, in the event of unforeseen disruption, new train paths are to be allocated by the ACF.

Findings of the Court

28 By its single complaint, the Commission alleges that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 6(3) of Directive 91/440, read in conjunction with Annex II thereto, and Article 14(2) of Directive 2001/14 as, in Luxembourg, although the ACF is a body that is independent of the CFL, which, in turn, manages the infrastructure and operates the rail services, the CFL is nonetheless responsible for certain essential functions relating to the allocation of train paths, the latter are still responsible for certain essential functions regarding the allocation of train paths given that, in the event of traffic disruption, the reallocation of train paths is entrusted to a department of the CFL, namely, the SGR, which is not independent in its legal form, organisation or decision-making functions.

29 As a preliminary point, it must be observed that the Grand Duchy of Luxembourg contends that the transposition of Directive 2001/14 has been fully carried out since the adoption of the NDR which entered into force on 1 October 2011 and was amended on 1 January 2012.

30 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, in particular, Case C-48/10 *Commission* v *Spain* [2010] ECR I-151, paragraph 30, and Case C-206/10 *Commission* v *Germany* [2011] ECR I-3573, paragraph 25).

31 Therefore, since the NDR and the amendments to it were adopted after the period prescribed by the Commission in its additional reasoned opinion of 25 November 2010 had expired, they cannot be taken into account in the examination by the Court of the merits of the present action for failure to fulfil obligations.

32 As to the substance of the case, it must be recalled that Directive 91/440 initiated the liberalisation of rail transport by seeking to ensure fair and non-discriminatory access to the infrastructure for rail undertakings. In order to ensure such access, the first paragraph of Article 6(3) of Directive 91/440 provides that Member States must take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services and that, regardless of the organisational structures, this objective must be shown to have been achieved.

33 Under Annex II to Directive 91/440 the preparation and decision-making related to the licensing of railway undertakings, decision-making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths, decision-making related to infrastructure charging and monitoring observance of public service obligations required in the provision of certain services are essential functions within the meaning of Article 6(3) thereof.

34 In that connection, it must be recalled that, in the event of disruption to the service or danger, the adoption of measures necessary for restoring normal operating conditions, including the withdrawal of train paths, is not a matter of train path allocation (see, Case C-473/10 *Commission* v *Hungary* [2013] ECR, paragraphs 56 and 59).

35 Article 29 of Directive 2001/14 provides for the adoption of the measures necessary to address a situation in which train movements have been disrupted as a result of technical failure or accident and, where absolutely necessary, an emergency on account of a breakdown making the infrastructure temporarily unusable (*Commission* v *Hungary*, paragraph 57).

36 It must be stated that that provision concerns specific measures which must be taken when train movements have been disrupted in order to restore, for safety reasons, normal operating conditions, which is not the case with the other provisions in Chapter III of Directive 2001/14 which relate to the establishment of the working timetable and the ad hoc allocation of individual train paths. Measures adopted under Article 29 of that directive cannot therefore be regarded as directly concerning the essential function of allocating capacity or train paths for the purpose of Article 14(2) thereof, a function which must be entrusted to an independent allocation body. Rather, Article 29 deals with ad hoc measures which must be adopted in an emergency to deal with a specific situation and ensure that rights to capacity in the form of train paths may in fact be exercised by the operator holding such rights, in accordance with the working timetable (*Commission* v *Hungary*, paragraph 59).

37 Therefore, the adoption of such measures falls within traffic management and is not subject to the requirement of independence, so that an infrastructure manager which is simultaneously a railway undertaking may be entrusted with such functions.

38 However, as the Advocate General observed, in point 24 of his Opinion, which refers to points 67 and 44 respectively of his Opinion in *Commission* v *Hungary* and Case C-627/10 *Commission* v *Slovenia* [2013] ECR, although the withdrawal of train paths in the event of disruption of traffic is not regarded as an essential function, their re-allocation must be regarded as part of essential functions which may be exercised only by an independent manager or allocation body since, unlike traffic management, which does not involve taking decisions within the meaning of Annex II to Directive 91/440, the reallocation of train paths entails adopting decisions relating to train paths.

39 In the present case, in Luxembourg the allocation of rights to specific capacity in the form of train paths is an essential function entrusted exclusively to an allocation body, namely, the ACF. Under the relevant provisions of Luxembourg law, in the event of traffic disruption, or where absolutely necessary in an emergency or for other circumstances preventing the use of the infrastructure under normal safety conditions, the infrastructure manager, the CFL, is to adopt the measures necessary to restore

normal operation and the train paths allocated may also be withdrawn during the time necessary to repair the system or until the cause of the disruption is removed. In that case, it is for the ACF to reallocate train paths.

40 Furthermore, item 4.8.2.of the NDR states that if one train cannot keep to the timetable originally scheduled, the duty office of the SGR is not to reallocate a train path in any circumstances.

41 Therefore, it is clear from that legislation that no reallocation of train paths is made and that, if that proves necessary, it is done by the ACF.

42 In those circumstances, it cannot be held that Luxembourg legislation on railways is incompatible with the requirements of Article 6(3) of Directive 91/440 and Article 14(2) of Directive 2001/14, in that it allows the SGR, which is part of the CFL, to adopt the measures necessary to restore normal traffic in the event of disruption of traffic or danger.

43 In the light of the above considerations, the Commission's action must be dismissed.

Costs

44 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Grand Duchy of Luxembourg has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]