Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 March 2024*

(Reference for a preliminary ruling – Rail transport – Directive 2012/34/EU – Access to railway infrastructure – Charges – Article 56 – Single national regulatory body for the railway sector – Powers – Review of the infrastructure charges whose period of application has expired – Power to declare invalidity with effect *ex tunc* and to order the reimbursement of charges)

In Case C-582/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany), made by decision of 1 September 2022, received at the Court on 2 September 2022, corrected by decision of 27 June 2023, received at the Court on 29 June 2023, in the proceedings

Die Länderbahn GmbH,

Prignitzer Eisenbahn GmbH,

Ostdeutsche Eisenbahn GmbH

v

Bundesrepublik Deutschland,

intervening party:

DB Netz AG,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot (Rapporteur), S. Rodin and L.S. Rossi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 15 June 2023,

* Language of the case: German.

after considering the observations submitted on behalf of:

– Prignitzer Eisenbahn GmbH, Ostdeutsche Eisenbahn GmbH and Ostseeland Verkehrs GmbH, by B. Uhlenhut, Rechtsanwalt,

– the Bundesrepublik Deutschland, by J. Becker, U. Geers, J. Kirchhartz, C. Mögelin and V. Schmidt, acting as Agents,

– DB Netz AG, by H. Krüger, Rechtsanwalt,

– the Lithuanian Government, by K. Dieninis, S. Grigonis and V. Kazlauskaitė-Švenčionienė, acting as Agents,

– the Austrian Government, by G. Kunnert and R. Schuster, acting as Agents,

– the Polish Government, by B. Majczyna and M. Rzotkiewicz, acting as Agents,

– the Norwegian Government, by V. Hauan and K. Møse, acting as Agents,

– the European Commission, by P. Messina and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2023,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 56(1), (6) and (9) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32), and, in the alternative, of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.

2 The request has been made in proceedings between, on the one hand, Die Länderbahn GmbH, Prignitzer Eisenbahn GmbH, Ostdeutsche Eisenbahn GmbH and Ostseeland Verkehrs GmbH and, on the other, the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks, Germany; 'the Bundesnetzagentur') concerning the review of the lawfulness of infrastructure charges levied by DB Netz AG in the framework of working timetables which applied from December 2002 to December 2011.

Legal context

European Union law

Directive 2001/14/EC

3 Under Article 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 and safety certification (OJ 2001 L 75, p. 29):

‘For the purpose of this Directive:

…

(j) “network statement” means the statement which sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity allocation schemes. It shall also contain such other information as is required to enable application for infrastructure capacity;

…

(m) “working timetable” means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force.’

4 Article 3 of that directive, entitled ‘Network statement’, provides:

‘1. The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement …

2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings. It shall contain information setting out the conditions for access to the relevant railway infrastructure. The content of the network statement is laid down in Annex I.

3. The network statement shall be kept up to date and modified as necessary.

4. The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.’

5 Article 30 of that directive, entitled ‘Regulatory body’, provides:

‘…

2. 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, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:

(a) the network statement;

…

(d) the charging scheme;

(e) level or structure of infrastructure charges which it is, or may be, required to pay;

…

3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. …

…

5. 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.

Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision.

…

6. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.'

6 Annex I to the same directive, relating to the 'Contents of the network statement', is worded as follows:

'The network statement referred to in Article 3 shall contain the following information:

…

2. A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges that apply to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and, where applicable, scales used for the application of Article 7(4) and (5) and Articles 8 and 9. It shall contain information on changes in charges already decided upon or foreseen.

…'

7 Annex III to Directive 2001/14 provides in point 1:

'The working timetable shall be established once per calendar year.'

Directive 2012/34

8 Recitals 42 and 76 of Directive 2012/34 state:

'(42) The charging and capacity-allocation schemes should permit equal and non-discriminatory access for all undertakings and should attempt, as far as possible, to meet the needs of all users and traffic types in a fair and non-discriminatory manner. Such schemes should allow fair competition in the provision of railway services.

…

‘(76) The efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of the rules set out in this Directive and acts as an appeal body, without prejudice to the possibility of judicial review. Such a regulatory body should be able to enforce its information requests and decisions by means of appropriate penalties.’

9 Article 3 of that directive, entitled ‘Definitions’, provides:

‘For the purpose of this Directive, the following definitions apply:

(1) “railway undertaking” means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only;

(2) “infrastructure manager” means any body or firm responsible for the operation, maintenance and renewal of railway infrastructure on a network, as well as responsible for participating in its development as determined by the Member State within the framework of its general policy on development and financing of infrastructure;

…

(19) “applicant” means a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007 [of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 (OJ 2007 L 315, p. 1)] and shippers, freight forwarders and combined transport operators, with a public-service or commercial interest in procuring infrastructure capacity;

…

(26) “network statement” means the statement which sets out in detail the general rules, deadlines, procedures and criteria for charging and capacity-allocation schemes, including such other information as is required to enable applications for infrastructure capacity;

…

(28) “ working timetable” means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force.

…’

10 Article 27 of that directive, which appears in Section 1 of Chapter IV thereof, which contains the rules on the 'levying of charges for the use of railway infrastructure and allocation of railway infrastructure capacity', entitled 'Network statement' provides:

'1. The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement which shall be obtainable against payment of a fee which shall not exceed the cost of publication of that statement. …

2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings, and contain information setting out the conditions for access to the relevant railway infrastructure. …The content of the network statement is laid down in Annex IV.

3. The network statement shall be kept up to date and modified as necessary.

4. The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.'

11 Section 2 of Chapter IV of that same directive relates to 'infrastructure and services charges'.

12 Under Article 56 of Directive 2012/34, entitled 'Functions of the regulatory body':

'1. Without prejudice to Article 46(6), an applicant shall have the right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking or the operator of a service facility concerning:

(a) the network statement in its provisional and final versions;

…

(d) the charging scheme;

(e) the level or structure of infrastructure charges which it is, or may be, required to pay;

…

(g) access to and charging for services in accordance with Article 13.

2. 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 and shall, in particular, control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses …

…

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. …

…

9. The regulatory body shall consider any complaints and, as appropriate, shall ask for relevant information and initiate consultations with all relevant parties, within 1 month from the receipt of the complaint. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within 6 weeks from receipt of all relevant information. Without prejudice to the powers of the national competition authorities for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to points (a) to (g) of paragraph 1.

A decision of the regulatory body shall be binding on all parties covered by that decision, and shall not be subject to the control of another administrative instance. The regulatory body shall be able to enforce its decisions with the appropriate penalties, including fines.

…

10. Member States shall ensure that decisions taken by the regulatory body are subject to judicial review. The appeal may have suspensive effect on the decision of the regulatory body only when the immediate effect of the regulatory body's decision may cause irretrievable or manifestly excessive damages for the appellant. This provision is without prejudice to the powers of the court hearing the appeal as conferred by constitutional law, where applicable.

…'

13 Annex IV to that directive, relating to the 'Contents of the network statement', is worded as follows:

'The network statement referred to in Article 27 shall contain the following information:

…

2. A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges as well as other relevant information on access applying to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and, where applicable, scales used for the application of Articles 31 to 36, as regards both costs and charges. It shall contain information on changes in charges already decided upon or foreseen in the next five years, if available.

…'

14 Annex VII to that directive provides in its point 1 that 'the working timetable shall be established once per calendar year'.

German law

15 Paragraph 66 of the Eisenbahnregulierungsgesetz (National Law on railway regulation) of 29 August 2016 (BGBl. I, p. 2082), in its version applicable to the dispute in the main proceedings ('the ERegG'), entitled '[T]he regulatory authority and its functions', provides in its subparagraphs 1, 3 and 4:

'(1) Where the holder of an access permit considers that it has been discriminated against or that its rights have been otherwise infringed by the decisions of a railway infrastructure manager, it shall be entitled to appeal to the regulatory authority …

…

(3) If no agreement concerning access or concerning a framework contract is reached, the decisions of the railway infrastructure manager may be reviewed by the regulatory authority, on application by an access permit holder or of its own motion. The application must be lodged within a period during which the offer to conclude agreements under the second sentence of Article 13(1) or the third sentence of Article 54 may be accepted.

(4) The following may, inter alia, be reviewed by the regulatory authority on application or of its own motion:

…

5. the charging scheme;

6. the amount or structure of infrastructure charges which access permit holders must or should pay;

7. the amount and structure of any other charges which access permit holders must or should pay;

…'

16 Paragraph 67 of the ERegG, entitled 'Powers of the regulatory authority, supervision of the transport market, rules on enforcement', provides in its subparagraph 1:

'The regulatory authority may adopt, with respect to railways and other persons subject to this Law, the measures necessary to eliminate or prevent infringements of this Law or EU acts that are directly applicable within the scope of this Law. Where the supervisory authority implements its orders, the amount of the penalty may reach EUR 500 000, by way of derogation from Paragraph 11(3) of the Verwaltungs-Vollstreckungsgesetz (Administrative Enforcement Law).'

17 Paragraph 68, entitled 'Decisions of the regulatory authority', is worded as follows:

'(1) The regulatory authority shall examine a complaint within one month of receipt of that complaint. To that end, it shall request the interested parties to provide the information needed for the adoption of decisions and shall hold conversations with all interested parties. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within 6 weeks from receipt of all relevant information. Without prejudice to the powers of the competent

authorities, the regulatory authority shall decide of its own motion on the appropriate measures to prevent discrimination and distortion of the market.

'(2) Where, in the situation referred to in subparagraphs 1 and 3 of Paragraph 66, the decision of a railway infrastructure manager affects the holder of a right of access to the railway infrastructure:

1. the regulatory authority shall order the railway infrastructure manager to amend the decision, or

2. the regulatory authority shall decide on the validity of contracts or charges, declare contracts ineffective and set contractual conditions or charges.

The decision referred to in the first sentence may also refer to the network statement or the conditions of use of the service facilities.

(3) The regulatory authority may, with prospective effect, require the railway infrastructure manager to amend the measures provided for in Paragraph 66(4), or to declare that they have expired, to the extent that they are incompatible with the provisions of this Law or with the EU acts that are directly applicable within the scope of this Law.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 The applicants in the main proceedings are or were railway undertakings, which provide or provided, in Germany, transport services at regional level, using the railway infrastructure belonging to DB Netz, the intervener in the main proceedings.

19 The latter is part of the Deutsche Bahn AG group. It operates the largest railway network in Germany and, in that capacity, levies infrastructure charges. Those charges are calculated individually for each railway undertaking on the basis of tariffs set by DB Netz in the network statement which it publishes. Those tariffs are valid during each working timetable period, that is to say, one year.

20 The applicants in the main proceedings argued that the tariffs set by DB Netz, which applied, respectively, during the periods of validity of the working timetable for the years 2002/2003 until 2010/2011 were, in part, unlawful, because they included a 'regional factor' which was discriminatory to undertakings operating regional lines. Accordingly, they either paid the charges claimed by DB Netz subject to reservations or reduced them or withheld payment.

21 Those same tariffs had been the subject of several *ex ante* reviews by the Federal Network Agency, the single national regulatory body for the railway sector in Germany. German law provided, in fact, for the prior review of tariff principles and granted a right to object to that body, which the latter did not, however, use in this case. Furthermore, since 2008, the Federal Network Agency has carried out various reviews of the 'regional factors' which had been part of DB Netz's tariffs since 1 January 2003.

22 By decision of 5 March 2010, the Federal Network Agency declared invalid the network statement made by DB Netz for the working timetable for the year 2010/2011, the entry into force of which was scheduled for 12 December 2010, in so far as it provided for the application of such a 'regional factor'. It is apparent from that decision that it was for the civil courts to rule on the reimbursement of any overpaid charges by application of that factor.

23 DB Netz objected to that decision which was subsequently withdrawn by the Federal Network Agency upon the conclusion of a public law contract with DB Netz. That contract provided for the application of a reduced regional factor during the validity period of the working timetable for the year 2010/2011 and thereafter the removal of that factor from the entry into force of the working timetable for the year 2011/2012.

24 Several railway undertakings, including the applicants in the main proceedings as regards some of the disputed charges, applied to the civil courts for the reimbursement of infrastructure charges allegedly overpaid to DB Netz. In order to rule on those applications, those courts carried out, as a general rule, a case-by-case examination of the equity of those charges. That approach was validated by the Bundesgerichtshof (Federal Court of Justice, Germany) in a judgment of 18 October 2011 (KZR 18/10).

25 However, by its judgment of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834), the Court held that Directive 2001/14, which preceded Directive 2012/34, precluded the application of national legislation providing for a review of the equity of charges for the use of railway infrastructure, on a case-by-case basis, by the ordinary court. In particular, it is apparent from paragraph 97 of that judgment that the reimbursement of charges by applying the provisions of civil law can be envisaged only if, in accordance with the provisions of national law, the unlawfulness of the charge in the light of the legislation concerning access to the railway infrastructure has first been found by the regulatory body or by a court which has reviewed that body's decision and in so far as that application for reimbursement may be challenged before the national civil courts rather than by appeal provided for by that legislation.

26 After the delivery of the judgment of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834), the applicants in the main proceedings, relying on Paragraphs 66 and 68 of the ERegG, applied to the Federal Network Agency, first, to declare invalid the infrastructure charges levied by DB Netz during the periods of validity of the working timetable for the years 2002/2003 until 2010/2011 and, secondly, to order the latter to reimburse them the overpaid charges.

27 Those applications were rejected by decisions of the Federal Network Agency of 11 October 2019, 3 July 2020 and 11 December 2020, on the grounds that they were inadmissible in the absence of a legal basis which would have allowed an *ex post* review of the charges at issue. In support of those decisions, the Federal Network Agency argued that the railway undertakings had the opportunity to challenge the charges during their respective periods of validity.

28 By appeals lodged on 6 and 9 November 2019, the applicants in the main proceedings applied to the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany), the referring court, to declare that the Federal Network Agency was required to conduct an *ex post* review of the charges at issue, levied by DB Netz, to declare, where appropriate, their invalidity with effect *ex tunc* and to rule on the reimbursement obligation borne by DB Netz.

29 In order to be able to rule over the disputes brought before it, the referring court considers that it is appropriate to interpret, in particular Article 56(1), (6) and (9) of Directive 2012/34.

30 It considers that the appeal provided for in paragraph 1 of that article only targets harm which has already occurred and which results from current or past infringements of the applicable regulatory framework. By contrast, the preventive action of the regulatory body is subject to separate rules, provided for in paragraph 2 of that article. Furthermore, it follows from paragraphs 6 and 9 of that same article that the regulatory body has a wide margin of appreciation. Thus, when receiving a complaint, it may 'take action to remedy the situation' and decide on its own initiative 'on appropriate measures to correct discrimination [against applicants]'.

31 That interpretation of Article 56 of Directive 2012/34 is supported by the objectives pursued by the latter. It is apparent from recitals 42 and 76 that Directive 2012/34 aims, in particular, to ensure non-discriminatory access for railway undertakings to the infrastructure and that it is for the regulatory body to ensure that that objective is achieved.

32 The referring court emphasises in this regard that, in its view, the prior review procedure which was provided for by German law and which enabled the regulatory body to rule on the infrastructure charging principles before their entry into force could not compensate for the absence of *ex post* review.

33 Furthermore, that court considers that the judgment of 9 November 2017, *CTL Logistics* (C-489/15, EU:C:2017:834), confirms the existence of a right to 'reimbursement' of charges unduly levied in the past, while making its exercise subject to a prior finding of the unlawful nature of those charges by the regulatory body. Consequently, if that body were not competent to examine charges whose period of application has expired, railway undertakings would be deprived of their right to an effective remedy and, at the same time, the infrastructure manager would continue to benefit from unlawful charges.

34 In contrast, the referring court doubts that EU law requires that that body may itself decide on the amounts of charges to be reimbursed or order their reimbursement. Despite the regulatory framework, the relationship between railway undertakings and infrastructure managers is contractual in nature and naturally falls within the jurisdiction of civil courts.

35 For all practical purposes, the referring court emphasises that, in order to resolve the disputes brought before it, it is not necessary to determine whether Paragraph 66 et seq. of the ERegG, which constitute the basis of the applicants' claims in the main proceedings, must be interpreted in accordance with EU law or if, in the light of the judgment of 8 July 2021, *Koleje Mazowieckie* (C-120/20, EU:C:2021:553), Article 56 of Directive 2012/34 is directly applicable.

36 In those circumstances, the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 56(1), (6) and (9) of Directive 2012/34 be interpreted as meaning that a charging scheme is capable of forming the subject matter of a complaint even where the period during which the charge to be reviewed was applicable has already expired (complaint against an "old charge")?

(2) If Question 1 is answered in the affirmative, must Article 56(1), (6) and (9) of Directive 2012/34 be interpreted as meaning that, in the case of an *ex post* review of old charges, the regulatory body may declare them to be invalid with effect *ex tunc*?

(3) If Questions 1 and 2 are answered in the affirmative, does the interpretation of Article 56(1), (6) and (9) of Directive 2012/34 permit national legislation which excludes the possibility of an *ex post* review of old charges with effect *ex tunc*?

(4) If Questions 1 and 2 are answered in the affirmative, must Article 56(9) of Directive 2012/34 be interpreted as meaning that, with regard to legal consequences, the competent regulatory body's remedial action which is provided for in that provision also includes, in principle, the possibility to order the infrastructure manager to reimburse charges which had been levied unlawfully, even though claims for reimbursement between the railway undertakings and the infrastructure manager can be enforced by way of civil proceedings?

(5) If Questions 1 and 2 are answered in the negative, does a right to complain against old charges arise in any event from the first paragraph of Article 47 of the Charter of Fundamental Rights and the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) in so far as, where the regulatory body has not decided on the complaint, reimbursement of unlawful old charges under the rules of national civil law is precluded in accordance with the Court's case-law in *CTL Logistics* (judgment of 9 November 2017, C-489/15, EU:C:2017:834)?'

Procedure before the Court

37 By letter received by the Court on 29 June 2023, that is to say after the end of the written and oral procedures, the referring court informed the Court that, by decision of 27 June 2023, it had closed the proceedings pending before it with regard to Ostseeland Verkehrs GmbH, on the grounds that the latter had withdrawn its appeal.

Consideration of the questions referred

Preliminary observations

38 As a preliminary point, it should be noted that the questions asked relate to Directive 2012/34 whereas the infrastructure charges at issue in the main proceedings were set and levied under the directive which preceded it, namely Directive 2001/14. By contrast, it was only after the expiry of the deadline for transposition of Directive 2012/34 that the applicants in the main proceedings referred the matter to the regulatory body of the German railway sector, namely the Federal Network Agency, applying, in particular, for a declaration of the unlawfulness of those charges.

39 That being the case, as the Advocate General noted, in essence, in point 25 of his Opinion, in the present case, it is not necessary to determine whether there is reason to apply Directive 2012/34 or Directive 2001/14. The rules referred to by the referring court, namely those provided for in Article 56(1), (6) and (9) of Directive 2012/34 correspond, in essence, to the rules which appeared in Article 30(2), (3) and (5) of Directive 2001/14 (see, to that effect, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraph 64). It follows that, in principle, their interpretation must be the same and that, consequently, the Court's case-law relating to the interpretation of those provisions of Directive 2001/14 applies *mutatis mutandis* to the equivalent provisions of Directive 2012/34.

40 In those circumstances, the questions referred must be answered by referring, like the referring court, to Directive 2012/34.

The first and the third questions

41 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 56(1), (6) and (9) of Directive 2012/34 must be interpreted as precluding a Member State's legislation, which excludes any power of the regulatory body, before which a claim is made based on paragraph 1 of that provision, from reviewing the lawfulness of the infrastructure charges whose period of application has expired and to declare their invalidity with effect *ex tunc*.

42 In this regard, it should be noted that, like Directive 2001/14 which preceded it (see, to that effect, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraph 59 and the case-law cited), Directive 2012/34 is intended to ensure non-discriminatory access to the railway infrastructure, in particular by requiring, as is apparent from its recital 42, that charging and capacity allocation schemes allow for fair competition in the provision of railway services.

43 As is apparent from the Court's case-law, the exclusive competence of the regulatory body to hear any dispute falling within Article 56(1) of Directive 2012/34 is justified by those very objectives and implies the specific powers conferred on it under paragraphs 1, 6 and 9 of that article (see by analogy, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraph 60).

44 In particular, under Article 56(9) of Directive 2012/34, when such a body receives a complaint, it is for it to adopt the necessary measures in order to remedy the situation, without prejudice of its power to take, if necessary *ex officio*, appropriate measures to correct any discrimination against 'applicants', within the meaning of Article 3(19) of that directive, namely, in particular, railway undertakings, any distortion of the market for railway services and any other undesirable development in that market (see, to that effect, judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraphs 55, 56 and 61).

45 It is also apparent from that Article 56(9) that the effects of decisions adopted by the regulatory body are not limited solely to the parties to a dispute before it, but are binding on all relevant parties in the rail sector, whether transport undertakings or infrastructure managers. Thus, that body is able to ensure equal access to infrastructure for all undertakings concerned and the maintenance of fair competition in the sector of the provision of railway services (see, by analogy, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraph 66 and the case-law cited).

46 In those circumstances, where an appeal has been brought before it by a railway undertaking, the regulatory body, whose task it is to ensure that both infrastructure managers and railway service operators comply with their respective obligations, is required to examine, in the words of Article 56(1) of Directive 2012/34, unfair or discriminatory treatment and any other harm, which includes issues relating both to the levying of infrastructure or service charges (see, by analogy, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraph 73).

47 As noted by the Advocate General in point 66 of his Opinion, the ability of railway undertakings to appeal to the regulatory body is the counterpart of that body's power to ascertain whether or not decisions of the infrastructure manager concerning charges are lawful, which is confirmed by Article 56(6) of Directive 2012/34 in so far as it provides that the regulatory body is to ensure that charges set by the infrastructure manager comply with Section 2 of Chapter IV of that directive, governing infrastructure and services charges, and are non-discriminatory.

48 It follows that the regulatory body, when an appeal has been brought before it on the basis of Article 56(1) of Directive 2012/34, cannot validly decline its competence to rule on the lawfulness of infrastructure charges levied in the past (see, by analogy, judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832, paragraphs 74 and 87).

49 In particular, the power of such a body to review the lawfulness of infrastructure charges cannot depend on the fact that proceedings were brought before it before or after the expiration of the respective periods of application of those charges.

50 First, it is apparent from the very wording of Article 56(1), (6) and (9) of Directive 2012/34 that the powers attributed to the regulatory body are in no way linked to those periods of application.

51 That finding is supported by the fact that Directive 2012/34 does not determine those periods nor does it limit the applicability of infrastructure charges or the underlying pricing systems to a certain duration. In particular, like Article 3 of Directive 2001/14, read together with Article 2(j) thereof and with Annex I thereto, Article 27 of Directive 2012/34, read together with Article 3(26) thereof and with Annex IV thereto, merely provides for the obligation of the infrastructure manager to publish a network statement which sets, in particular, the conditions of access to railway infrastructure, including charging principles, tariffs and charges, without limiting the period of validity of that statement.

52 Nor can a limitation on the duration of validity of the charges or the underlying charging schemes be inferred from the rules relating to the annual working timetable. Under Article 3(28) of Directive 2012/34, read together with Annex VII thereto, as was the case under Article 2(m) of Directive 2001/14, read together with its Annex III, the working timetable admittedly only has a period of validity limited to one year. That timetable, however, merely records 'the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure' and does not relate to tariffs and charges.

53 Secondly, an interpretation of Article 56(1), (6) and (9) of Directive 2012/34, according to which infrastructure charges already levied by an infrastructure manager may only be contested for the duration of the validity of the underlying tariff would undermine the effectiveness of the review system established by that provision and, therefore, the achievement of the objectives pursued by that directive.

54 Such an interpretation would hinder the mission of the regulatory body consisting of ensuring, as is apparent from paragraphs 42 to 47 of this judgment, equal access to infrastructure for all undertakings concerned and ensuring the maintenance of fair competition in the sector of the provision of railway services. It would also be likely to unduly restrict the right of railway undertakings to challenge infrastructure charges before the regulatory body and, where appropriate, to submit the decision taken by that body for judicial review by referring the matter to the court competent for this purpose, enshrined in Article 56(1), (9) and (10) of Directive 2012/34 (see, by analogy, judgment of 8 July 2021, *Koleje Mazowieckie*, C-120/20, EU:C:2021:553, paragraph 57).

55 Furthermore, the power of the regulatory body to ascertain the lawfulness of infrastructure charges levied in the past, regardless of whether their respective periods of application have already expired, necessarily implies, as the Advocate General pointed out in points 44, 45, 47 and 48 of his Opinion, that that body can find, if necessary, the invalidity of those charges with effect *ex tunc*.

56 In particular, limiting the power of the regulatory body to the adoption of decisions with effect only for the future would be likely to largely deprive the review of infrastructure charges levied in the past of its purpose and would thus undermine the effective effect of Article 56(1), (6) and (9) of Directive 2012/34.

57 In those circumstances, it must be stated that those provisions preclude a Member State's legislation which provides that the regulatory body is not competent to review the lawfulness of infrastructure charges whose period of application has expired nor to declare, where applicable, their invalidity with effect *ex tunc*.

58 It is apparent from the order for reference, and it was confirmed at the hearing before the Court that, in the present case, such a limitation of the power of the German supervisory body is likely to result from Paragraph 68(3) of the ERegG.

59 In that regard, it must be borne in mind that the principle of the primacy of EU law requires, inter alia, national courts, in order to ensure the effectiveness of all provisions of EU law, to interpret, to the greatest extent possible, their national law in conformity with EU law (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 35 and the case-law cited).

60 The obligation to interpret national law in a manner consistent with EU law cannot, however, serve as a basis for an interpretation of national law *contra legem* (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 36 and the case-law cited).

61 It should also be borne in mind that the principle of primacy places the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law under a duty, where it is unable to interpret national legislation in compliance with the requirements of EU law, to give full effect to the requirements of that law in the dispute before it, if necessary disapplying of its own motion any national legislation or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect, and it is not necessary for that court to request or await the prior setting aside of such national legislation or practice by legislative or other constitutional means (judgments of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 58 and 61, and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 37).

62 As regards the right of administrative and judicial appeal of railway undertakings, provided for in Article 56(1), (9) and (10) of Directive 2012/34, those provisions are unconditional and sufficiently precise and, therefore, have direct effect. It follows that they are binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply them (see, to that effect, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraph 33, and of 8 July 2021, *Koleje Mazowieckie*, C-120/20, EU:C:2021:553, paragraph 58).

63 Consequently, it is not only for the referring court but also, where appropriate, for the Federal Network Agency to interpret, as far as possible, Paragraph 68(3) of the ERegG in a manner in conformity with Article 56(1), (9) and (10) of Directive 2012/34 and, in the event that such an interpretation should be considered *contra legem*, to exclude that provision from German law in order to allow railway undertakings to exercise their right to challenge the lawfulness of infrastructure charges levied in the past.

64 It is important, once again, to point out that neither Article 56(1), (9) and (10) of Directive 2012/34, nor any other provision of that directive provide for a time limit at the end of which undertakings can no longer dispute the lawfulness of infrastructure charges.

65 In those circumstances, as the Advocate General noted, in essence, in point 36 of his Opinion, it is for each Member State, in accordance with the principle of procedural autonomy, to set the temporal limitations on appeals by which applicants, including railway undertakings, apply to the regulatory body, under Article 56(1) of Directive 2012/34, to review the lawfulness of decisions taken by the infrastructure manager as regards, in particular, the charging scheme and the level or structure of infrastructure charges, subject to compliance with the principles of equivalence and effectiveness (see, by analogy, judgments of 28 November 2000, *Roquette Frères*, C-88/99, EU:C:2000:652, paragraphs 20 and 21, and of 19 December 2019, *Cargill Deutschland*, C-360/18, EU:C:2019:1124, paragraph 46).

66 Furthermore, it should be noted that the objectives pursued by Directive 2012/34 must be achieved, in national law, in compliance with the requirements of the principle of legal certainty, which implies, with regard to those temporal limits, that the Member States have the obligation to put in place a system of deadlines that is sufficiently precise, clear and foreseeable to enable interested parties to ascertain their rights and obligations (see, by analogy, judgment of 18 October 2012, *Pelati*, C-603/10, EU:C:2012:639, paragraph 36 and the case-law cited).

67 It was argued in the written observations submitted to the Court and at the hearing on 15 June 2023 that German law does not provide for a specific time limit for lodging appeals pursuant to Article 56(1) of Directive 2012/34. However, it is not for the Court to rule on the interpretation of German law. It is for the referring court to identify the limitation and foreclosure rules provided for by that law, which are likely to apply to the applicants' claims in the main proceedings, to ascertain that those rules provide for a sufficiently precise, clear and foreseeable system of time limits, as well as to determine whether those applications were submitted within the prescribed time limits.

68 In the light of all of the foregoing considerations, it is appropriate to answer the first to third questions that Article 56(1), (6) and (9) of Directive 2012/34 must be interpreted as precluding a Member State's legislation which excludes any power of the regulatory body, before which a claim is made based on paragraph 1 of that article, from reviewing the lawfulness of the infrastructure charges whose period of application has expired and to declare their invalidity with effect *ex tunc*.

The fourth question

69 By its fourth question, the referring court asks, in essence, whether Article 56(9) of Directive 2012/34 must be interpreted as meaning that it requires the supervisory body to be able to order the reimbursement of infrastructure charges when national law confers that competence on civil courts.

70 In that regard, it is appropriate to recall, as is apparent from paragraph 44 of this judgment that, under Article 56(9) of Directive 2012/34, when such a body receives a complaint, it is for it to adopt the necessary measures in order to remedy the situation, without prejudice of its power to take, if necessary of its own motion, appropriate measures to correct any discrimination against applicants, namely, in particular, railway undertakings, any distortion of the market for railway services and any other undesirable development in that market.

71 It follows from the answer to the first to third questions that that provision requires that the regulatory body be competent in particular to declare the invalidity of infrastructure charges with effect *ex tunc*. However, the situation is different with regard to the reimbursement of such charges.

72 As noted by the Advocate General in points 73 and 75 of his Opinion, following an analysis of the wording of Article 56(9) of Directive 2012/34, that provision does not impose on Member States to confer upon the regulatory body alone the power to order the reimbursement of charges for the use of infrastructure, but allows them, within the scope of their procedural autonomy, to design other systems which imply, for example, that civil courts hear applications for reimbursement separately.

73 The effectiveness of Article 56(9) of Directive 2012/34 also does not require that the regulatory body be able, in any event, to decide alone on the reimbursement of infrastructure charges which it found to be unlawful.

74 First, when that body declares the invalidity of the tariffs and infrastructure charges applied by an infrastructure manager, the binding effect of its decisions with regard to all the parties concerned in the railway sector, recalled in paragraph 45 of this judgment, allows the latter to ascertain with certainty their rights and obligations. In those circumstances, in order to enable undertakings which claim to have been the subject of discrimination to assert their rights and thus ensure the effective elimination of distortions of competition, it does not appear essential for that body to also determine the exact amounts of charges unduly paid with a view to ordering their reimbursement.

75 Secondly, Article 56(9) of Directive 2012/34 certainly requires the regulatory body to rule on all complaints within a particularly short period. However, if, for reasons of legal certainty in particular, that body must rule as quickly as possible on the lawfulness of the contested infrastructure charges, irrespective of whether they are currently in force or whether their period of application has expired, those reasons do not require that, after the adoption of a decision finding the charges at issue to be invalid, the amounts to be reimbursed, plus interest where applicable, be determined within the same period.

76 That interpretation of Article 56(9) of Directive 2012/34 has already been confirmed by the Court which ruled that it is open to Member States to provide that the decision on the reimbursement of overpaid infrastructure charges is not for the regulatory body, but for the civil courts which rule, in application of civil law, provided, however, that that body has ruled beforehand on the unlawful nature of those charges (see, to that effect, judgment of 9 November 2017, *CTL Logistics*, C-489/15, EU:C:2017:834, paragraph 97).

77 In that regard, it should also be pointed out, as the Advocate General did in point 75 of his Opinion, that when the Member States determine, in their national law, the remedies allowing an infrastructure manager to be forced to reimburse overpaid infrastructure charges and, in particular when they choose to confer, for this purpose, exclusive jurisdiction on civil courts, they are required to respect the principles of equivalence and effectiveness.

78 In the light of all of the foregoing considerations, the answer to the fourth question must be that Article 56(9) of Directive 2012/34 must be interpreted as meaning that it does not require the regulatory body to be able to order itself the reimbursement of infrastructure charges when national law, subject to compliance with the principles of equivalence and effectiveness, confers that power to civil courts.

The fifth question

79 In the light of the answer to the first to third questions, there is no longer any need to answer the fifth question, which was only asked in the event that the Court had answered the first and second questions in the negative.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 56(1), (6) and (9) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area**

   must be interpreted as precluding a Member State's legislation which excludes any power of the regulatory body, before which a claim is made based on paragraph 1 of that article, from reviewing the lawfulness of the infrastructure charges whose period of application has expired and to declare their invalidity with effect *ex tunc*.

2. **Article 56(9) of Directive 2012/34**

   must be interpreted as meaning that it does not require the regulatory body to be able to order itself the reimbursement of infrastructure charges when national law, subject to compliance with the principles of equivalence and effectiveness, confers that power to civil courts.

[Signatures]