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Request for a preliminary ruling from the Bundesverwaltungsgericht (Austria) lodged on 22 August 2023 — ÖBB-Infrastruktur AG and WESTbahn Management GmbH

(Case C-538/23, ÖBB-Infrastruktur and WESTbahn Management)

(C/2023/642)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Appellants: ÖBB-Infrastruktur AG, WESTbahn Management GmbH

Respondent: Schienen-Control Kommission

Questions referred

1. Must EU law, in particular Article 32 of Directive 2012/34/EU, ([1]) be interpreted as meaning that the Member State concerned must approve market mark-ups *ex ante*, before the start (or at least before the end) of the relevant working timetable period for which the market mark-ups have been requested? Or can the Member State also approve the market mark-ups *ex post* after the end of the relevant working timetable period (possibly years later)? Must the approval of market mark-ups by the Member State in accordance with Article 32 of Directive 2012/34/EU be understood as a *legally binding* approval?

2. Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(4) thereof, be interpreted as meaning that — in *chronological order* — the market mark-ups (in the event of changes to essential components) must first be published in the network statement (if necessary subject to approval) and are to be approved by the Member State only after they have been published? Has there already been a *modification of essential elements*, for the purposes of Article 32(6) of Directive 2012/34/EU, if 'only' the level of the market mark-ups in relation to the working timetable period for the previous year is changed?

3. (If the first sentence of Question 2 is answered in the affirmative) Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(2) and (4) thereof and in conjunction with point 2 of Annex IV to Directive 2012/34/EU — read in the light of the obligation of transparency and planning security set out in recital 34 of Directive 2012/34/EU — be interpreted as meaning that *market mark-ups* may not be approved by the Member State if the levels of the market mark-ups themselves have *not* been *published* in the network statement for the relevant working timetable period (for which approval of those market mark-ups was requested), but rather, in that network statement, only a total charge per train path kilometre (as the sum of the charges for costs directly incurred as a result of operating the train service in accordance with Article 31(3) of Directive 2012/34/EU and the market mark-ups in accordance with Article 32 of Directive 2012/34/EU) was published for each market segment? Railway undertakings therefore could not find out from those network statements either the charges for 'direct costs' (within the meaning of Article 31(3) of Directive 2012/34/EU, read in conjunction with point 1 of Article 2 of Implementing Regulation (EU) 2015/909), ([2]) or the market mark-ups in accordance with Article 32 of Directive 2012/34/EU per market segment.

4. (If the first sentence of Question 2 is answered in the affirmative) Must EU law, in particular Article 32(1) and (6) of Directive 2012/34/EU in conjunction with Article 27(4) thereof — read in the light of the obligation of transparency and planning security set out in recital 34 of Directive 2012/34/EU — be interpreted as meaning that the market mark-ups published in the network statement for the relevant working timetable period have a *binding effect* for the approval by the Member State? Does it follow from that binding effect that the Member State may not approve higher market mark-ups per market segment than those published in the accompanying network statement? Or is there a binding effect only to the extent that the total charges approved (thus the charges for 'direct costs' in accordance with

([1]) 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).

([2]) Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service (OJ 2015 L 148, p. 17).

Article 31(3) of Directive 2012/34/EU in conjunction with point 1 of Article 2 of Implementing Regulation (EU) 2015/909 and market mark-ups in accordance with Article 32 of Directive 2012/34/EU) may not be higher than those published in the network statement, whereas the market mark-ups themselves may be approved at a level which is higher than that published in the network statement? Is there also a binding effect in respect of the level of the application for approval originally submitted to the Member State with regard to the market mark-ups? If so, in what sense (no increase, no further reduction permissible)? Is there any other form of binding effect?

5. Must EU law, in particular Article 32(1) of Directive 2012/34/EU, be interpreted as meaning that, for the purposes of determining whether market mark-ups are permissible in principle (apart from the market viability to be verified) — thus, for the purposes of the full recovery of the infrastructure manager's costs — it is not necessary to take as a basis an overall revenue which must be *obtained by the Member State* from the railway infrastructure manager (*'revenue target'*), consisting of the sum of the charges for the costs directly incurred as a result of operating the train service in accordance with Article 31(3) of Directive 2012/34/EU and the market mark-ups in accordance with Article 32(1) of Directive 2012/34/EU? Rather, must the costs, in order to obtain full recovery, be determined and established in order to make it possible to assess on the basis thereof whether and to what extent any market mark-ups can be approved? When determining whether market mark-ups are permissible in principle (apart from the market viability to be verified), must *State subsidies* from the Member State to the railway infrastructure undertaking also be taken into account? If so, what form should this take? Must those State subsidies, where appropriate, be deducted from the costs required for full recovery (in addition to the charges for the costs directly incurred as a result of operating the train service)? In that context, must EU law, in particular Article 32(1) of Directive 2012/34/EU in conjunction with Article 8(4) thereof, be interpreted as meaning that, in addition to the charges for the costs directly incurred as a result of operating the train service and any State subsidies to be taken into account, the Member State must determine — and include in the assessment of whether market mark-ups are permissible — *all other profits* of the railway infrastructure undertaking from other economic activities and all *non-refundable incomes received* by that undertaking *from private sources*? If so, what form should this take? Where appropriate, should they also be deducted from the costs required for full recovery? Must other *charges levied* by the railway infrastructure undertaking — such as charges for the use of passenger platforms ('station charges') and charges for the use of electrical supply equipment for traction current — as well as *other business positions* of the railway infrastructure undertaking be included in that assessment?