Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 March 2023 [1]

Case C-671/21

'Gargždų geležinkelis' UAB
Other parties to the proceedings:
Lietuvos transporto saugos administracija,
Lietuvos Respublikos ryšių reguliavimo tarnyba,
'LTG Infra' AB

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania))

(Preliminary ruling procedure – Rail transport – Directive 2012/34/EU – Allocation of infrastructure capacity – Scheduling – Article 45 – Coordination process – Article 46 – Congested infrastructure – Priority criteria – Article 47 – National legislation establishing the projected intensity of use of the infrastructure as a priority criterion – Fair and non-discriminatory allocation)

1. This reference for a preliminary ruling arises from a dispute relating to the interpretation of several provisions of Directive 2012/34/EU, [2] read in conjunction with the national rules governing the allocation of capacity for the use of public railway infrastructure.

2. The dispute essentially concerns: (a) the priority criteria applicable, under Lithuanian legislation, to requests from undertakings seeking to use the railway infrastructure, in particular where it is congested; and (b) the prior coordination process which the infrastructure manager must undertake.

I. Legal framework

A. European Union law. Directive 2012/34

3. Article 39 ('Capacity allocation') states:

'1. Member States may lay down a framework for the allocation of infrastructure capacity subject to the condition of management independence laid down in Article 4. Specific capacity-allocation

[1] Original language: Spanish.

[2] 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).

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 in a fair and non-discriminatory manner and in accordance with Union law.

…'.

4. Article 44 ('Applications') states:

'1. Applicants may apply under public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure ….

…'.

5. Article 45 ('Scheduling') provides:

'1. The infrastructure manager shall, as far as possible, meet all requests for infrastructure capacity including requests for train paths crossing more than one network, and shall, as far as possible, take account of all constraints on applicants, including the economic effect on their business.

2. The infrastructure manager may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49.

3. The infrastructure manager shall consult interested parties about the draft working timetable and allow them at least one month to present their views ….

4. The infrastructure manager shall take appropriate measures to deal with any concerns that are expressed'.

6. Under Article 46 ('Coordination process'):

'1. During the scheduling process referred to in Article 45, where the infrastructure manager encounters conflicts between different requests, it shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.

2. Where a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

3. The infrastructure manager shall attempt, through consultation with the appropriate applicants, to resolve any conflicts. Such consultation shall be based on the disclosure of the following information within a reasonable time, free of charge and in written or electronic form:

…

4. The principles governing the coordination process shall be set out in the network statement. These shall, in particular, reflect the difficulty of arranging international train paths and the effect that modification may have on other infrastructure managers.

5. Where requests for infrastructure capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination.

6. Without prejudice to the current appeal procedures and to Article 56, in the event of disputes relating to the allocation of infrastructure capacity, a dispute resolution system shall be made available in order to resolve such disputes promptly. This system shall be set out in the network statement. If this system is applied, a decision shall be reached within a time limit of 10 working days.'

7. Pursuant to Article 47 ('Congested infrastructure'):

'1. Where, after coordination of the requested train paths and consultation with applicants, it is not possible to satisfy requests for infrastructure capacity adequately, the infrastructure manager shall immediately declare that section of infrastructure on which this has occurred to be congested. This shall also be done for infrastructure which can be expected to suffer from insufficient capacity in the near future.

…

3. Where charges in accordance with Article 31(4) have not been levied or have not achieved a satisfactory result and the infrastructure has been declared to be congested, the infrastructure manager may, in addition, employ priority criteria to allocate infrastructure capacity.

4. The priority criteria shall take account of the importance of a service to society relative to any other service which will consequently be excluded.

In order to guarantee the development of adequate transport services within this framework, in particular to comply with public-service requirements or to promote the development of national and international rail freight, Member States may take any measures necessary, under non-discriminatory conditions, to ensure that such services are given priority when infrastructure capacity is allocated.

…

6. The procedures to be followed and the criteria to be used where infrastructure is congested shall be set out in the network statement.'

8. Pursuant to Article 52 ('Use of train paths'):

'1. In the network statement, the infrastructure manager shall specify conditions whereby it will take account of previous levels of utilisation of train paths in determining priorities for the allocation process.

2. For congested infrastructure in particular, the infrastructure manager shall require the surrender of a train path which, over a period of at least one month, has been used less than a threshold quota to be laid down in the network statement, unless this was due to non-economic reasons beyond the applicant's control.'

B. Lithuanian law. Lietuvos Respublikos Vyriausybės 2004 m. gegužės 19 d. nutarimas Nr. 611 'Dėl viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių patvirtinimo'[3]

9. Paragraph 28 states:

'Where possible, the public railway infrastructure manager shall, in order to reconcile applications for allocation relating to the same capacity, propose to applicants … capacity other than that referred to in their applications. In the event that applicants … reject the alternative capacity proposed by the public infrastructure manager or in the absence of such capacity, the public infrastructure manager shall apply the priority rule, whereby the capacity in question shall be allocated to the applicant who will use it to provide passenger and freight services on international routes; if the capacity will not be used to provide passenger and freight services on international routes, it shall be allocated to the applicant who will use it to provide passenger and freight services on local routes; if the capacity will not be used to provide passenger and freight services on international or local routes, it shall be allocated to the applicant … who will use it on the highest number of days; if the capacity is intended to be used on the same number of days, it shall be allocated to the applicant … who has requested to be allocated the highest possible number of journeys on the relevant route.'

II. Facts, dispute and questions referred for a preliminary ruling

10. On 3 April 2019, Gargždų geležinkelis UAB ('Gargždų geležinkelis') applied for an allocation of railway infrastructure capacity for freight trains for the period from 2019 to 2020.

11. On 3 May 2019, the Lietuvos transporto saugos administracija (Lithuanian Transport Safety Administration) forwarded that application to the public infrastructure manager for assessment.[4]

12. On 10 July 2019, the infrastructure manager provided the Transport Safety Administration with the draft working timetable. It added that it was not possible to include in the timetable all the capacity requested by applicants (including Gargždų geležinkelis) due to limited capacity at certain elements of the railway infrastructure, since some of those requests were mutually incompatible.

13. On 17 July 2019, Gargždų geležinkelis submitted to the infrastructure manager and the Transport Safety Administration that any congestion of the infrastructure was artificial, since the working timetable included requests from various applicants for the carriage of the same goods.

14. On 3 August 2019, the infrastructure manager replied to Gargždų geležinkelis that, due to the differences in the allocation of that capacity on a section of the public railway infrastructure, a coordination process had been initiated. It stated that the applications for capacity allocation do not contain information on the goods to be transported.

15. On 23 September 2019, the infrastructure manager informed Gargždų geležinkelis that the statement that a section of the public railway infrastructure was congested was based on the actual capacity of the section, on the basis of the analysis of the allocation applications for the

[3] Rules on the allocation of public railway infrastructure capacity, approved by Decision No 611 of the Government of the Republic of Lithuania of 19 May 2004 ('the Allocation Rules').

[4] In Lithuania, this is the Lietuvos geležinkeliai Geležinkelių infrastruktūros direkcija AB (Railway Infrastructure Directorate of the public limited company 'Lietuvos geležinkeliai'; 'the infrastructure manager').

duration of the working timetable. It also indicated that, since one of the applicants had refused to participate in the coordination process, the infrastructure manager could not propose other capacity than that referred to in its application.

16. On 24 September 2019, the infrastructure manager informed the Transport Safety Administration that, between 27 August and 23 September 2019, it had set up a coordination process at the end of which it was unable to satisfy all the applications. Consequently, it had stated that the public railway infrastructure was congested in the sections specified for the 2019 period for which the working timetable is in force.

17. On 30 September 2019, Gargždų geležinkelis referred the matter to the Transport Safety Administration to review the actions of the infrastructure manager.

18. On 15 October 2019, the Transport Safety Administration found that, in examining and coordinating the applications, the infrastructure manager had acted in compliance with the requirements of the legislation in force at that time and had neither infringed Gargždų geležinkelis' rights nor prejudiced its legitimate interests.

19. On 17 October 2019, the Director of the Transport Safety Administration decided not to grant Gargždų geležinkelis the capacity requested, since that capacity had already been allocated to other undertakings pursuant to the priority rule laid down in paragraph 28 of the Allocation Rules. It also stated that it was not possible to offer alternative capacity, since the element of public railway infrastructure was congested.

20. On 12 November 2019, Gargždų geležinkelis brought a complaint against that decision before the President of the regulatory body, who issued a decision rejecting the complaint on 13 February 2020.

21. Gargždų geležinkelis brought an action against that decision before the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court, Lithuania), which was dismissed by a judgment of 22 October 2020.

22. Gargždų geležinkelis brought an appeal against the judgment of 22 October 2020 before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).

23. In the first place, that court has doubts regarding the national rules governing the allocation of infrastructure capacity. In particular, it asks whether the third and fourth priority rules laid down in paragraph 28 of the Allocation Rules are compatible with Directive 2012/34.

24. Those rules establish as the priority criterion for the allocation of infrastructure capacity the intensity of the use of the network, a factor that could infringe the principle of non-discrimination, in so far as it confers an unfair advantage on the incumbent operator. That was stated in the judgment of the Court of Justice of 28 February 2013[5] in relation to Directive 2001/14/EC,[6] which was repealed and replaced by Directive 2012/34.

[5] *Commission* v *Spain* (C-483/10, EU:C:2013:114; 'the judgment in *Commission* v *Spain*').

[6] 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).

25. In the second place, that court asks whether the application of the priority criteria is subject to the requirement that the infrastructure be declared congested or, on the contrary, as might be inferred from Article 45(2) of Directive 2012/34, the infrastructure manager may also apply them within the scheduling and coordination process.

26. In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) referred the following questions to the Court of Justice for a preliminary ruling:

'Must the first and second sentences of Article 47(4) of [Directive 2012/34] be interpreted as unambiguously prohibiting the establishment of a national legal regulation which provides that, in the event of congested infrastructure, the intensity of the use of railway infrastructure can be taken into account at the time of capacity allocation? Does it have a bearing on this assessment whether the railway infrastructure utilisation rate is linked to the actual utilisation of that infrastructure in the past or to the planned utilisation during the period for which the relevant timetable is in force? Do the provisions of Articles 45 and 46 of [Directive 2012/34], which confer a broad discretion on the public infrastructure manager or on the entity making decisions on the capacity to coordinate the requested capacity, and the implementation of those provisions in national law have any significance for that assessment? Does the fact that infrastructure is identified as congested in a particular case due to the capacity applied for by two or more railway undertakings in respect of the carriage of the same freight have any significance for that assessment?

Does the provision of Article 45(2) of [Directive 2012/34] … mean that the infrastructure manager may also apply a national priority rule in cases where infrastructure is not identified as congested? To what extent (on the basis of which criteria) must the infrastructure manager, prior to identifying infrastructure as congested, *coordinate the requested train paths and consult with applicants* on the basis of the first sentence of Article 47(1) of [Directive 2012/34]? Should that consultation with applicants cover the assessment as to whether two or more applicants have submitted competing requests for the carriage of the same freight (goods)?'

III. Procedure before the Court of Justice

27. The request for a preliminary ruling was lodged at the Court on 9 November 2021.

28. Written observations were submitted by Gargždų geležinkelis, the Lithuanian Government and the European Commission.

29. It was not considered necessary to hold a hearing.

IV. Assessment

A. Preliminary considerations

30. For a better understanding of the dispute, it is appropriate to set out, in summary form, the rules governing the actions of the infrastructure manager when allocating the capacity to use elements of the railway infrastructure. [7]

31. Directive 2012/34 contains provisions applicable to the management of railway infrastructure, on the one hand, and the activities of railway undertakings, on the other. The latter provisions include those laying down the legal rules for obtaining licences and the allocation of infrastructure capacity to railway undertakings, which are required to pay infrastructure charges for its use.

32. Naturally, rail infrastructure has a limited capacity, [8] because it is a 'natural monopoly', [9] the deployment of which it would make no sense to increase. Rather than defining railway infrastructure, Directive 2012/34 prefers to describe the elements of which it is composed, and those are set out in Annex I thereto. [10] The concept of network is linked to railway infrastructure: the rail network is 'the entire railway infrastructure managed by an infrastructure manager'. [11]

33. Railway infrastructure (which is linked to the concept of train path) [12] is managed by the infrastructure manager, which is responsible for its operation, maintenance and renewal. Undertakings which have first obtained a licence designating them as railway undertakings must apply to the infrastructure manager for the right to use a certain infrastructure capacity.

34. The procedure for allocating railway infrastructure capacity is preceded by what is known as the 'network statement', in which the infrastructure manager sets out the general rules, time limits, procedures and criteria governing the allocation of capacity. Directive 2012/34 leaves the specification of a wide range of matters in that connection to the discretion of the infrastructure manager. [13]

7 The following points (31 to 41) reproduce, in some cases with minor variations, points 51 to 63 of my Opinion in Case C-388/17, *SJ* (EU:C:2018:738).

8 Recital 58 of Directive 2012/34 states that 'The charging and capacity-allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and, ultimately, the scarcity of capacity'.

9 Recital 71 of Directive 2012/34.

10 Those include the physical base required to establish the rail network and the rail service, such as ground area, track and track bed, passenger and goods platforms, four-foot way and walkways, enclosures, protections, engineering structures (bridges and tunnels), level crossings, superstructure, access way for passengers and goods, safety, signalling and telecommunications installations on the open track, in stations and in marshalling yards, lighting installations, plants for transforming and carrying electric power for train haulage, and buildings used by the infrastructure department.

11 Article 3(25) of Directive 2012/34.

12 'Infrastructure capacity' means 'the potential to schedule train paths requested for an element of infrastructure for a certain period' (Article 3(24) and (27).

13 For example, the laying down of rules for the determination of charges (Article 29(3)), the setting of requirements to be met by applicants (Article 41(2)), the establishment of the principles governing the coordination process and the dispute resolution system (Article 46(4) and (6)), and, finally, in relation to congested infrastructure, the procedures to be followed and the criteria to be used and the setting of the minimum use quota (Article 47(6) and Article 52(2)).

35. The basic principle is that the infrastructure manager must, as far as possible, meet all the requests for infrastructure capacity it receives. If that is not possible, it must apply other allocation criteria.[14] It must also prepare the draft working timetable and send it to the interested parties so that they may present their views.

36. The entirety of the decisions taken[15] on the award of infrastructure capacity enables the working timetable to be finalised through the planning of train and rolling stock movements on the infrastructure during the period that timetable is in force. Paragraph 2 of Annex VII to Directive 2012/34 provides for the situation where the working timetable is changed or adjusted, which gives an idea of its flexibility and adaptability to changing circumstances.

37. The infrastructure manager operates on the basis of a situation which offers limited options (in terms of space and time) for meeting the requests of undertakings. Given that routes are restricted to where the railway tracks are laid and are dependent on the performance of service facilities, the infrastructure manager must of necessity coordinate the transport services provided by all railway undertakings.

38. The freedom of railway undertakings to offer the public the routes which they prefer and the train timetables which best suit them is compatible with the fact that those offers are subject to the coordination decisions of the infrastructure manager. It is the infrastructure manager, therefore, which ultimately 'lays down' (even when it is meeting requests from undertakings) the so-called 'operating conditions' of the service.

39. Directive 2012/34 includes many cases in which the infrastructure manager is granted powers in relation to those conditions. The definitions laid down in Article 3, relating to 'alternative route', 'viable alternative' and 'congested infrastructure', are echoed later in the rules pursuant to which the infrastructure manager may – and must – be involved in setting the conditions for use of the rail network where these concern the 'capacity to be made available', the 'routes to be served' and the 'frequency of the service', in order to prevent duplication and congestion.[16]

40. The network statement, which has to be published by the infrastructure manager, also enables the infrastructure manager to modify aspects which cannot be determined *a priori*. The infrastructure manager may also allocate capacity which differs from that requested, which shows that the degree of latitude of undertakings providing rail transport services is restricted by finite possibilities, inherent in the scarcity of available resources, which the infrastructure manager must manage.

41. In short, the need to manage and allocate limited rail resources means that the infrastructure manager must have the power to impose on undertakings which use those resources conditions governing the provision of their services, as regards the capacity to be made available, the routes to be served and the frequency of services.

[14] When the infrastructure manager identifies conflicts between different requests, it must attempt, through coordination of the requests, to ensure the best possible matching of all requirements and has the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

[15] Although the directive does not refer explicitly to decisions on the allocation of infrastructure capacity, the adoption of such decisions is implied. Article 46(6) provides for a dispute resolution system (without prejudice to the relevant appeal procedure under Article 56).

[16] Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ 2016 L 352, p. 1) confirms that approach. Recital 28 of that directive states that 'Member States may attach specific conditions to the right of access to the infrastructure in order to allow for the implementation of an integrated timetable scheme for domestic passenger services by rail'.

42. The infrastructure manager has a central role as the person responsible for the operation, maintenance and renewal of the physical network enabling rail transport. Pursuant to Article 39(1) of Directive 2012/34, the infrastructure manager is to ensure 'that infrastructure capacity is allocated in a fair and non-discriminatory manner'.

43. On the other side of that relationship are the railway undertakings authorised [17] to operate in the sector, which must apply for recognition of the right to use a certain amount of infrastructure capacity in order to provide their transport services. [18]

44. Article 13(1) of Directive 2012/34 obliges infrastructure managers to supply to all railway undertakings, in a non-discriminatory manner, the minimum access package laid down in point 1 of Annex II.

45. The aim of the process laid down in Directive 2012/34 for the allocation of infrastructure capacity is to ensure that railway undertakings actually have the capacity granted, in accordance with the terms of reference provided for in Article 10(1) thereof. [19]

46. That process extends from the network statement to the approval of the working timetable. [20] Its intermediate steps are defined in Section 3 of Chapter IV of Directive 2012/34 and include:

– applications for infrastructure capacity by one or more applicants (railway undertakings);

– the scheduling phase, after the submission of applications by applicants;

– the coordination phase, which starts when the infrastructure manager encounters conflicts between different requests;

– the congested infrastructure statement, which comes into play where coordination is not possible. Where that is the case, the infrastructure manager is to apply priority criteria for the allocation.

47. I consider it more appropriate, when examining the questions referred, to follow the chronological sequence of the steps taken to allocate capacity. I will therefore begin with the coordination process and then focus on the rules applicable to congested infrastructure.

[17] Under Article 17(4) of Directive 2012/34, 'no undertaking shall be permitted to provide the rail transport services covered by this Chapter unless it has been granted the appropriate licence for the services to be provided'.

[18] According to the same Article 17(4) of Directive 2012/34, 'such a licence shall not, in itself, entitle the holder to access the railway infrastructure'.

[19] 'Railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right to access to the railway infrastructure in all Member States for the purpose of operating all types of rail freight services'. Article 10(2) of Directive 2012/34 concerns passenger services.

[20] The working timetable contains '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' (Article 3(28) of Directive 2012/34).

B. Second question referred

48. By the series of questions raised in the second question referred, the referring court asks, in essence, whether, before declaring the railway infrastructure to be congested, the infrastructure manager:

– may apply a national priority rule;

– must coordinate the train paths requested and consult the applicants;

– must assess any overlap between goods which two or more applicants intend to carry.

49. In that series of questions, material aspects (capacity allocation rules) intersect with formal aspects (scheduling and coordination processes). I will begin by analysing the latter.

1. Scheduling and coordination processes: Articles 45 and 46 of Directive 2012/34

50. In the context of scheduling, 'the infrastructure manager shall, as far as possible, meet all requests for infrastructure capacity'.[21] Where the infrastructure manager encounters conflicting requests, 'it shall attempt, through *coordination* of the requests, to ensure the best possible matching of all requirements'.[22]

51. Coordination[23] therefore plays a key role in the allocation of infrastructure capacity between conflicting applications. In carrying out that task of coordination, the principles of which are to be set out in the network statement,[24] Article 46 of Directive 2012/34:

– gives the infrastructure manager the right, 'within reasonable limits, to propose infrastructure capacity that differs from that which was requested' (paragraph 2);

– provides for consultation of applicants who are to be provided with information on the content of applications from other applicants, without revealing their identity. The purpose of the consultation is to enable the infrastructure manager to settle any conflicts that may arise (paragraph 3);

– establishes that 'a dispute resolution system shall be made available in order to resolve … promptly' any disputes concerning the allocation of infrastructure capacity (paragraph 6).

52. It is apparent from all those provisions that, in the coordination process, railway undertakings and the infrastructure manager are required to play an active part in order to reach a reasonable solution. On the basis of knowledge of each applicant's requests and existing capacity constraints, the infrastructure manager is to ensure that all applicants have the opportunity to provide their services, even if some sacrifice is necessary.

[21] Article 45(1) of Directive 2012/34.

[22] Article 46(1) of Directive 2012/34. Similarly, Article 46(5): 'Where requests for infrastructure capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination'.

[23] Defined in Article 3(22) of Directive 2012/34 as 'the process through which the infrastructure manager and applicants will attempt to resolve situations in which there are conflicting applications for infrastructure capacity'.

[24] Article 46(4) of and point 3 of Annex IV to Directive 2012/34. In accordance with the latter, the information to be contained in the network statement is to include: '(d) the principles governing the coordination process and the dispute resolution system made available as part of this process'.

53. In my view, the role of the infrastructure manager goes beyond that of a mere mediator who seeks to bring the opposing parties to an agreement. As I have already stated, Directive 2012/34 confers on it decision-making powers. In particular, Article 46(3) empowers the infrastructure manager to *resolve* any conflicts that may arise between applicants.

54. It may be inferred from the information in the order for reference and in the observations of the parties that the coordination process carried out in this case is not entirely consistent with the requirements of Article 46 of Directive 2012/34,[25] but that is something that only the referring court is in a position to determine, given its proximity to the facts.

2. Priority in the scheduling and coordination processes?

55. Article 45(2) of the directive provides that the infrastructure manager 'may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49'.

56. The interpretation of that provision is not easy, in so far as Article 47 governs the declaration of congested sections of infrastructure and Article 49 refers to specialised infrastructure (not relevant to the present case).

57. In my view, the reference made to Article 47 in Article 45 allows priority criteria favourable to certain services, which Article 47 envisages for allocating congested infrastructure capacity, to be applied *mutatis mutandis* to (prior) scheduling and coordination processes.

58. I share that assessment with the Lithuanian Government and I disagree with the Commission, which considers that Articles 45 and 46 do not provide for the application of priority rules limited to Article 47. The Commission argues that this would follow from the judgment in *SJ*, paragraphs 39 and 40,[26] but my reading of those paragraphs differs from its own.

59. In that judgment, the Court of Justice, after reviewing the essentials of the scheduling and coordination processes, stressed that 'Article 47 of Directive 2012/34 lays down provisions for the event that the railway infrastructure is congested, in the context of which the infrastructure manager may establish prioritising criteria'. It did not attempt to examine (because it was not necessary in that case) whether those criteria could be used in the scheduling and coordination processes.

60. Articles 45 and 46 of Directive 2012/34 confer on the infrastructure manager, as I have also stated, a broad discretion in deciding on applications for allocation. To that end, there is nothing to prevent it from announcing beforehand (in the network statement) which reasonable, objective and non-discriminatory criteria it will use for scheduling and, where appropriate, for coordinating conflicting applications. To the same extent, it may give priority to some services over others, if the public interest so requires.

61. As the Lithuanian Government submits, this encourages the transparency of the process, with applicants knowing in advance what they will face when their applications need to be coordinated.

[25] This process appears to have been confined to an exchange of correspondence, with no trace of an attempt to resolve the dispute. Paragraph 15 of the order for reference refers to the powerlessness of the infrastructure manager in view of the fact that an applicant refused to participate in the coordination process. This is also clear from the observations of Gargždų geležinkelis (paragraphs 68 to 70). It would be illogical for the coordination process to be doomed to failure because one applicant refuses to take part in it.

[26] Judgment of 28 February 2019 (C-388/17, EU:C:2019:161).

62. It is a different matter if the priority rules include intensity of use as a decisive criterion. Below, I will examine the extent to which that criterion amounts to favouring the incumbent operator, meaning that its application would frustrate one of the essential objectives of Directive 2012/34, namely to open up the rail market to competition.

3. Nature of the goods transported

63. Like the Lithuanian Government and the Commission, I take the view that the type of goods transported is not a relevant factor in the process for coordinating applications for the allocation of capacity that are found to be conflicting.

64. In Directive 2012/34, the specific features of the nature of the goods are taken into account for setting mark-ups, but not in the coordination process. Under the fourth subparagraph of Article 32(1) thereof, infrastructure managers may distinguish market segments according to commodity transported.

65. Moreover, the indication of the type of goods that a railway undertaking intends to transport does not necessarily need to be included in applications for capacity allocation. In fact, according to Gargždų geležinkelis,[27] its application concerned freight transport trains, without any specification of the goods which it intended to transport (which seems logical, since it is a variable that depends on the specific market requirements).[28]

C. First question referred

66. By the series of questions raised in the first question referred, the referring court seeks, in essence, to ascertain whether, when an infrastructure has been declared congested, Article 47(4) of Directive 2012/34 allows the adoption of priority allocation criteria taking into account the past or future intensity of the use of that infrastructure by a railway undertaking.

67. The positions of the parties involved in the dispute are divergent in that regard: Gargždų geležinkelis submits that there is discrimination against operators entering the market, which the Lithuanian Government disputes. The Commission, for its part, contends that the criterion, even if it were valid in the abstract, would be permissible only if it did not result in a restriction of competition or favour the retention of capacity.

68. In my view, the judgment in *Commission* v *Spain* provides the guidance necessary to answer that series of questions. In that judgment, the Court of Justice:

– stated that pursuant to 'Article 14 of Directive 2001/14, … in paragraph 1 thereof [now Article 39(1) of Directive 2012/34] … in particular, the infrastructure manager shall ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with [EU] law';

[27] Paragraphs 15 and 16 of its written observations.

[28] If the 'licence' is 'authorisation issued by a licensing authority to an undertaking, by which its capacity to provide rail transport services as a railway undertaking is recognised' and a railway undertaking's principal activity must be 'to provide services for the transport of goods and/or passengers by rail', the request for capacity allocation must specify the service proposed (passengers or goods), but not necessarily the type of goods transported.

– stated 'that the criterion based on actual use of the network, as criterion for the allocation of infrastructure capacity, is discriminatory in so far as it leads, where there is more than one application for the same train path or the network is congested, to advantages being maintained for the incumbent users and access to the most attractive train paths being denied to new entrants'. [29]

69. It is true that, in that case, the intensity of use referred to past use, whereas this dispute concerns projections for the future. However, I am of the opinion that this fact has no bearing on the outcome.

70. That is because, in order to be convincing and realistic, projections of future infrastructure capacity needs must be supported by objective data on utilisation in the recent past (or present). Since only incumbent operators are in a position to offer such assessments, any other operator seeking to enter the market will be in an inferior position: it will not be able to rely on the services it has already provided (or will be able to do so only to a limited extent).

71. In actual fact, the acceptance of that criterion could give rise to a vicious circle in which the incumbent operator would obtain successive capacity allocations, circumventing the provisions of Article 38(2) of Directive 2012/34 ('the right to use specific infrastructure capacity in the form of a train path may be granted to applicants for a maximum duration of one working timetable period'). [30]

72. Even if unequal treatment were to be justified by another objective of Directive 2012/34, such as that of ensuring more efficient use of infrastructure, 'in order to attain that objective, there is no need whatsoever for the measure in question to discriminate between network operators or to deny access to new entrants to the network'. [31]

73. The facts described in the order for reference and in the observations of the parties appear to show that such discrimination, to the detriment of the new entrant, has occurred de facto. Although, once again, it is for the referring court to verify this, there is every reason to believe that, with the application of the third and fourth rules in paragraph 28 of the Allocation Rules, the new entrant's applications to access the infrastructure are systematically rejected in favour of the publicly owned incumbent operator. Furthermore, it is argued that the latter applies for capacity which, once obtained, it then does not use [32] and refuses to participate in the coordination process.

[29] Judgment in *Commission* v *Spain* (paragraphs 94 and 95). That case-law also precludes Article 52 ('Use of train paths'), where it refers to the priorities of the allocation process, from being understood as meaning that the levels of prior utilisation of train paths may constitute an advantage. In particular, Article 52(2) leans in the opposite direction, since, for congested infrastructure, it links the imposed surrender of train paths to their under-utilisation.

[30] Judgment in *Commission* v *Spain*, paragraphs 91 and 92. In paragraph 98 thereof, the Court of Justice emphasised the existence of 'specific provisions designed to provide incentives for the efficient use of infrastructure capacity while at the same time ensuring fair and non-discriminatory access to the rail network'. In his Opinion, Advocate General Jääskinen pointed out that 'favouring the incumbent operator does not appear among the measures provided for by the directive in order to promote efficient use of the network' (C-483/10, EU:C:2012:524, paragraph 97).

[31] Judgment in *Commission* v *Spain*, paragraph 97.

[32] Gargždų geležinkelis refers to a report by the Lithuanian Court of Auditors (audit report No VA 2018 P 20 1 12, of 12 December 2018) which, it argues, shows that the public operator does not use 39% of the reserved capacity.

V. Conclusion

74. In the light of the foregoing, I propose that the Court of Justice reply to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) in the following terms:

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 meaning that

– Article 46 thereof requires the existence of coordination and dispute resolution processes enabling the infrastructure manager, within reasonable limits, to decide itself to allocate railway infrastructure capacity to applicants and, after consultation with those applicants, to reconcile conflicting requests;

– Article 45(2) thereof, read in conjunction with Article 47 thereof, allows the infrastructure manager to give priority to specific services, within the scheduling and coordination processes, provided that it does so on the basis of objective, transparent, reasonable, proportionate and non-discriminatory criteria;

– Article 47(4) thereof precludes national legislation which establishes as a priority criterion for the allocation of infrastructure capacity, where that infrastructure is congested, the past or future intensity of utilisation of the rail network by an incumbent operator, with the result that new entrants are prevented from accessing that infrastructure.