

JUDGMENT OF THE COURT (Sixth Chamber)
17 September 1998 *

In Case C-412/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Korkein Hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court brought by

Kainuun Liikenne Oy,

Oy Pohjolan Liikenne Ab,

on the interpretation of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1), in particular Article 1(3) in conjunction with Article 4 thereof,

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G. F. Mancini, P. J. G. Kapteyn (Rapporteur) and G. Hirsch, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Finnish.

after considering the written observations submitted on behalf of:

- Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab, by Ari Heinilä, lawyer practising in Helsinki,
- the Finnish Government, by Holger Rotkirch, Ambassador, Head of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent,
- the Belgian Government, by Jan Devadder, General Adviser in the Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent,
- the Commission of the European Communities, by Allan Rosas, Principal Legal Adviser, and Laura Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab, represented by Pekka Aalto, legal officer of Linja-autoliitto, the Finnish Government, represented by Tuula Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by Allan Rosas and Laura Pignataro, at the hearing on 29 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 March 1998,

gives the following

Judgment

1 By order of 13 December 1996, received at the Court on 23 December 1996, the Korkein Hallinto-oikeus (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1) (hereinafter 'the Regulation'), in particular Article 1(3) in conjunction with Article 4.

2 Those questions were raised in proceedings in which Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab, transport undertakings, challenged the decision of the Oulun Lääninhallitus (Oulu Provincial Administration, hereinafter 'the Lääninhallitus') refusing to grant their request for partial termination of their obligation to provide passenger transport on the route for which they hold a licence.

Legislative background

3 The Regulation aims to eliminate disparities resulting from obligations inherent in the concept of a public service which are imposed on transport undertakings by Member States and liable to cause substantial distortion in the conditions of competition, while recognising that it is essential in certain cases to maintain such obligations in order to ensure the provision of adequate transport services.

4 Under Article 1(3) of the Regulation, the competent authorities of the Member States are thus to terminate all obligations inherent in the concept of a public service, as defined in the Regulation, imposed on transport by rail, road and inland waterway.

5 However, under Article 1(4) of the Regulation, the competent authorities of the Member States may conclude public service contracts, in accordance with the conditions and details of operation laid down in Section V of the Regulation, with a transport undertaking in order to ensure adequate transport services which take into account in particular social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger.

6 Article 3 of the Regulation provides:

‘1. Where the competent authorities of the Member States decide to maintain, in whole or in part, a public service obligation, and where this can be done in more than one way, each capable of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent authorities shall select the way least costly to the community.

2. The adequacy of transport services shall be assessed having regard to:

(a) the public interest;

(b) the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration;

(c) the transport rates and conditions which can be quoted to users.'

- 7 Under Article 4(1) of the Regulation, it is for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them.
- 8 Article 5 of the Regulation provides *inter alia* that an obligation to operate or to carry imposes economic disadvantages where the reduction in the financial burden which would be possible as a result of the total or partial termination of the obligation in respect of an operation or a group of operations affected by that obligation exceeds the reduction in revenue resulting from that termination.
- 9 Article 6(2) of the Regulation further provides that decisions to maintain or terminate a public service obligation or part thereof are to provide for compensation to be granted in respect of the financial burdens resulting therefrom, the amount of compensation being determined in accordance with the common procedures laid down by the Regulation.
- 10 Under Article 7 of the Regulation, there may be attached to any decision to maintain an obligation conditions designed to improve the yield of the operations affected by the obligation in question.
- 11 The Regulation entered into force in Finland on 1 January 1994 on the accession of the Republic of Finland to the European Economic Area.

The main proceedings

- 12 On 21 December 1993 the Finnish Ministry of Transport granted Kainuun Liikenne and Pohjolan Liikenne a scheduled service licence for the period from 1 January 1994 to 31 December 2003 for the Kajaani-Rukatunturi route (about 275 kilometres). That licence entitles them to transport passengers by bus on that route in accordance with specified timetables.

- 13 Following the accession of the Republic of Finland to the European Economic Area and the entry into force of the Regulation in Finland, the Ministry of Transport requested undertakings engaged in road transport by bus to make applications to the competent administrative authorities by 1 September 1994 concerning the routes to be operated from June 1995. The applications were to request the withdrawal of services which the undertakings were unwilling to operate on passenger revenue alone.

- 14 Kainuun Liikenne and Pohjolan Liikenne applied for termination in part of their obligation to operate the Kajaani-Rukatunturi route, in such a way as to limit it to the Kajaani-Peranka and Kajaani-Suomussalmi sections. According to the application, the entire service made a loss. They stated, however, that they were prepared to continue operating the route and to negotiate with the Lääninhallitus for a public service contract making public funds available for the section of the route for which they had applied for the transport obligation to be terminated.

- 15 By decision of 9 January 1995 the Lääninhallitus rejected the application, on the ground that Kainuun Liikenne and Pohjolan Liikenne had not shown in the manner prescribed in Article 5 of the Regulation that by cutting the workings in question back to Peranka and Suomussalmi they could achieve an economically better result than by continuing to operate under the previous conditions. According to the

Lääninhallitus, they were entitled to discontinue the operations in question completely. Termination in part of the operating obligation, on the other hand, was not the correct approach in the present case, as the section concerned was to be regarded as an integral part of the Kajaani-Rukatunturi route.

- 16 Kainuun Liikenne and Pohjolan Liikenne thereupon appealed to the Korkein Hallinto-oikeus for the decision of the Lääninhallitus to be set aside. In support of their appeal, they referred to the provisions of the Regulation as showing that the Lääninhallitus was not entitled to refuse to allow them to withdraw the route in part.
- 17 According to the Korkein Hallinto-oikeus, Kainuun Liikenne and Pohjolan Liikenne are to be regarded as having shown, by means of the calculations they have submitted in accordance with Article 5(2) of the Regulation, that the section of the route which they have applied to withdraw entails an economic disadvantage for them within the meaning of Article 4 of the Regulation, since the reduction in the financial burden as a result of the partial termination exceeds the reduction in revenue resulting from that termination.
- 18 That court further states that where a transport undertaking wishes to reduce a service based on a licence in force, the procedure under the national legislation consists of first revoking the operating licence on application by the transport undertaking concerned and then issuing a new licence for the reduced service. That procedure also makes it possible, before the new licence is granted for the reduced service, to call for tenders for the old service, if it is thought necessary to maintain it. The national legislation also entitles the competent authorities to revoke a licence on its own initiative under the conditions laid down in Paragraph 20 of Law No 662/1994 on passenger transport.
- 19 The court observes, finally, that to enable new undertakings to gain access to the sector, organise transport rationally and maintain adequate transport services with as little public subsidy as possible, and to arrange effective competition for the

contracted services, it may be necessary, having regard to the situation in Finland, to consider that the competent authorities, without being precluded by Community law, have either the power to reject an application for partial termination of a public service obligation which relates to a very small part, from the point of view of organisation of the transport, of the undertaking's operating obligation, or else the possibility of revoking on their own initiative, in accordance with national law, the operator's licence of an undertaking which has applied for partial termination of its operating obligation where revocation of the licence is necessary for rationalisation of the service.

20 Those were the circumstances in which the Korkein Hallinto-oikeus stayed proceedings and referred the following questions to the Court for a preliminary ruling:

1. Is the regulation on public service obligations (Regulation (EEC) No 1191/69 as amended by Regulation (EEC) No 1893/91), in particular Article 4 in conjunction with Article 1(3), to be interpreted as meaning that it entitles a transport undertaking to have a part, of whatever size, of its operating obligation terminated, for example, only a certain part of one route operated?

2. If the answer to the first question is wholly or conditionally in the affirmative, in which case the Korkein Hallinto-oikeus may remit the case to the Lääninhallitus for a fresh decision, in order to reach a final decision in the case the question arises whether it also follows, from the right given to transport undertakings in the regulation on public service obligations to have a service obligation partially terminated, that the authorities' power under national law to revoke a bus operator's licence for the purpose of reasonable reorganisation of transport is precluded or restricted where the need to reorganise results from a partial termination.'

Preliminary point

- 21 Since Kainuun Liikenne and Pohjolan Liikenne consider that the national court's account of the national legislation is incorrect, they formulate additional questions which they claim the Court should also rule on, in order to take due account of their point of view.
- 22 It should be recalled that, according to the Court's case-law, it is for the national court to assess the scope of the national provisions and the manner in which they must be applied (see, in particular, Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR I-2201, paragraph 20).
- 23 As regards the additional questions proposed, it should be observed that under Article 177 of the Treaty it is for the national court, not the parties to the main action, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor (see, in particular, Case 44/65 *Hessische Knappschaft v Singer* [1965] ECR 965, at 970).
- 24 Moreover, to answer the additional questions mentioned by Kainuun Liikenne and Pohjolan Liikenne in their observations would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the EC Statute of the Court of Justice, bearing in mind that under that provision only the order of the referring court is notified to the interested parties (see, in particular, Case C-352/95 *Phytheron International v Bourdon* [1997] ECR I-1729, paragraph 14).

The first question

- 25 By its first question, read in the light of the second question, the national court essentially asks whether the Regulation, in particular Article 1(3) in conjunction with Article 4 thereof, entitles a transport undertaking to obtain partial termination of its public service obligation.
- 26 It should be noted that under Article 4(1) of the Regulation a transport undertaking may apply for the termination of all or any part of a public service obligation, but that no provision of that regulation obliges the Member States to grant that application, even if the undertaking shows that maintaining it involves economic disadvantages within the meaning of Article 5 of the Regulation.
- 27 On the contrary, it follows from Article 1(4) and Article 3 of the Regulation that the competent authorities of the Member States are entitled to maintain in whole or in part a public service obligation which they consider necessary to ensure the provision of adequate transport services.
- 28 That interpretation is supported, as the Advocate General observes in points 40 to 45 of his Opinion, by both the objective and the general scheme of the Regulation.
- 29 Consequently, the Regulation does not entitle a transport undertaking to obtain partial termination of its public service obligation.

30 However, as the Advocate General observes in points 48 to 51 of his Opinion, a decision to maintain public service obligations is subject to certain rules, in particular those in Articles 3, 6(2) and 7 of the Regulation.

31 Moreover, as stated in paragraph 27 above, the maintenance in whole or in part of a public service obligation is permitted solely in order to ensure the provision of adequate transport services.

32 The concept of ensuring the provision of adequate transport services is not, however, defined in the Regulation, which merely provides certain factors for assessing it.

33 Thus the second recital in the preamble to the Regulation states that 'the adequacy of transport services must be assessed in the light of the state of supply and demand in the transport sector and of the needs of the community'.

34 It must also be noted that Article 3(2) of the Regulation provides that the adequacy of transport services is to be assessed by reference to the public interest, the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users. Where there are several ways of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent authorities must, under Article 3(1) of the Regulation, select the way least costly to the community.

35 It follows that, where the requirements of Article 3 of the Regulation are complied with, the competent authorities of the Member States have a wide discretion in

assessing whether ensuring 'the provision of adequate transport services' requires a public service obligation to be maintained.

- 36 The answer to the first question must therefore be that the Regulation, in particular Article 1(3) and Article 4 thereof, must be construed as not obliging the Member States to grant an application by a transport undertaking for partial termination of its public service obligation, even if that undertaking shows that maintaining the obligation involves economic disadvantages for it. However, the only ground for refusing such an application is the need to ensure adequate transport services. That concept is to be assessed, in accordance with Article 3 of the Regulation, by reference to the public interest, the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users. Where there are several ways of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent authorities are to select the way least costly to the community.

The second question

- 37 In view of the answer to the first question, there is no need to answer the second question.

Costs

- 38 The costs incurred by the Finnish and Belgian Governments and by the Commission of the European Communities, which have submitted observations to the

Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Korkein Hallinto-oikeus by order of 13 December 1996, hereby rules:

Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991, in particular Article 1(3) and Article 4 thereof, must be construed as not obliging the Member States to grant an application by a transport undertaking for partial termination of its public service obligation, even if that undertaking shows that maintaining the obligation involves economic disadvantages for it. However, the only ground for refusing such an application is the need to ensure adequate transport services. That concept is to be assessed, in accordance with Article 3 of Regulation No 1191/69, by reference to the public interest, the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users. Where there are several ways of ensuring, while satisfying

similar conditions, the provision of adequate transport services, the competent authorities are to select the way least costly to the community.

Ragnemalm

Schintgen

Mancini

Kapteyn

Hirsch

Delivered in open court in Luxembourg on 17 September 1998.

R. Grass

H. Ragnemalm

Registrar

President of the Sixth Chamber