



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

24 June 2021 \*

(Reference for a preliminary ruling – Rail transport – International rail freight corridors – Regulation (EU) No 913/2010 – Article 13(1) – Establishment of a one-stop shop for each freight corridor – Article 14 – Nature of the framework laid down by the executive board for the allocation of the infrastructure capacity on the freight corridor – Article 20 – Regulatory bodies – Directive 2012/34/EU – Article 27 – Procedure for submitting applications for infrastructure capacity – Role of infrastructure managers – Articles 56 and 57 – Functions of the regulatory body and cooperation between regulatory bodies)

In Case C-12/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia, Germany), made by decision of 10 December 2019, received at the Court on 13 January 2020, in the proceedings

**DB Netz AG**

v

**Bundesrepublik Deutschland,**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DB Netz AG, by H.R.J. Krüger and M. Kaufmann, Rechtsanwälte,
- the Bundesrepublik Deutschland, by C. Mögelin and J. Arnade, acting as Agents,

\* Language of the case: German.

– the European Commission, initially by W. Mölls and C. Vrignon, and subsequently by C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2021,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 13(1), Article 14(1) and (9), Article 18(c) and Article 20 of Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight (OJ 2010 L 276, p. 22), and of Article 27(1) and (2) and Article 57(1), second sentence of the first subparagraph, and point 3(a) of Annex IV to 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 corrigendum OJ 2015 L 67, p. 32).
- 2 The request has been made in proceedings between DB Netz AG and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways, Germany) ('the Federal Network Agency'), concerning the latter's objection to the proposed amendment to the conditions for submitting applications for infrastructure capacity for pre-arranged international train paths to the one-stop shop.

### **Legal context**

#### ***European Union law***

##### *Regulation No 913/2010*

- 3 Recitals 4, 7, 25 and 26 of Regulation No 913/2010 state:  
  
'(4) Although the opening of the rail freight market has made it possible for new operators to enter the rail network, market mechanisms have not been and are not sufficient to organise, regulate and secure rail freight traffic. To optimise the use of the network and ensure its reliability it is useful to introduce additional procedures to strengthen cooperation on allocation of international train paths for freight trains between infrastructure managers.  
  
...  
  
(7) This Regulation should, unless otherwise provided, be without prejudice to the rights and obligations of infrastructure managers set out in [Council] Directive 91/440/EEC [of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25)] and 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)] and, where relevant, allocation bodies as referred to in Article 14(2) of Directive [2001/14]. Those acts remain in force, including in respect of provisions which affect freight corridors.

...

- (25) In order to ensure non-discriminatory access to international rail services, it is necessary to ensure efficient coordination between the regulatory bodies with regard to the different networks covered by the freight corridor.
- (26) To facilitate access to information concerning the use of all the main infrastructure on the freight corridor and to guarantee non-discriminatory access to that corridor, the management board should draw up, regularly update and publish a document containing all of this information.'

4 Article 1(1) of that regulation provides:

'This Regulation lays down rules for the establishment and organisation of international rail corridors for competitive rail freight with a view to the development of a European rail network for competitive freight. It sets out rules for the selection, organisation, management and the indicative investment planning of freight corridors.'

5 Article 2 of that regulation provides:

'1. For the purposes of this Regulation, the definitions laid down in Article 2 of Directive [2001/14] shall apply.

2. In addition to the definitions referred to in Paragraph 1:

- (a) "freight corridor" means all designated railway lines, including railway ferry lines, on the territory of or between Member States, and, where appropriate, European third countries, linking two or more terminals, along a principal route and, where appropriate, diversionary routes and sections connecting them, including the railway infrastructure and its equipment and relevant rail services in accordance with Article 5 of Directive [2001/14];

...'

6 Article 8 of the regulation is worded as follows:

'1. For each freight corridor, Member States concerned shall establish an executive board responsible for defining the general objectives of the freight corridor, supervising and taking the measures as expressly provided for in paragraph 7 of this Article, and in Articles 9 and 11, Article 14(1) and Article 22. The executive board shall be composed of representatives of the authorities of the Member States concerned.

2. For each freight corridor, the infrastructure managers concerned and, where relevant, the allocation bodies as referred to in Article 14(2) of Directive [2001/14], shall establish a management board responsible for taking the measures as expressly provided for in paragraphs 5, 7, 8 and 9 of this Article, and in Articles 9 to 12, Article 13(1), Article 14(2), (6) and (9), Article 16(1), Article 17(1) and Articles 18 and 19 of this Regulation. The management board shall be composed of the representatives of the infrastructure managers.

3. The Member States and infrastructure managers concerned by a freight corridor shall cooperate within the boards referred to in paragraphs 1 and 2 to ensure the development of the freight corridor in accordance with its implementation plan.

4. The executive board shall take its decisions on the basis of mutual consent of the representatives of the authorities of the Member States concerned.

...

9. The management board shall coordinate in accordance with national and European deployment plans the use of interoperable IT applications or alternative solutions that may become available in the future to handle requests for international train paths and the operation of international traffic on the freight corridor.'

7 Under Article 12 of Regulation No 913/2010:

'The management board shall coordinate and ensure the publication in one place, in an appropriate manner and timeframe, of their schedule for carrying out all the works on the infrastructure and its equipment that would restrict available capacity on the freight corridor.'

8 Article 13 of that regulation provides:

'1. The management board for a freight corridor shall designate or set up a joint body for applicants to request and to receive answers, in a single place and in a single operation, regarding infrastructure capacity for freight trains crossing at least one border along the freight corridor (hereinafter referred to as a "one-stop shop").

2. The one-stop shop shall, as a coordination tool, also provide basic information concerning the allocation of the infrastructure capacity, including the information referred in Article 18. It shall display infrastructure capacity available at the time of request and its characteristics in accordance with pre-defined parameters, such as speed, length, loading gauge or axle load authorised for trains running on the freight corridor.

...'

9 Article 14 of that regulation provides:

'1. The executive board shall define the framework for the allocation of the infrastructure capacity on the freight corridor in accordance with Article 14(1) of Directive [2001/14].

2. The management board shall evaluate the need for capacity to be allocated to freight trains running on the freight corridor taking into account the transport market study referred to in Article 9(3) of this Regulation, the requests for infrastructure capacity relating to the past and present working timetables and the framework agreements.

...

6. The management board shall promote coordination of priority rules relating to capacity allocation on the freight corridor.

...

9. The management board of the freight corridor and the advisory group referred to in Article 8(7) shall put in place procedures to ensure optimal coordination of the allocation of capacity between infrastructure managers, both for requests as referred to in Article 13(1) and for requests received by infrastructure managers concerned. This shall also take account of access to terminals.

...'

10 Article 16(1) of that regulation states:

'The management board of the freight corridor shall put in place procedures for coordinating traffic management along the freight corridor. The management boards of connected freight corridors shall put in place procedures for coordinating traffic along such freight corridors.'

11 Under Article 18 of Regulation No 913/2010:

'The management board shall draw up, regularly update and publish a document containing:

(a) all the information contained in the network statement for national networks regarding the freight corridor, drawn up in accordance with the procedure set out in Article 3 of Directive [2001/14];

...

(c) the information concerning the procedures referred to in Articles 13 to 17 of this Regulation; and

...'

12 Article 20 of that regulation provides:

'1. The regulatory bodies referred to in Article 30 of Directive [2001/14] shall cooperate in monitoring the competition in the rail freight corridor. In particular, they shall ensure non-discriminatory access to the corridor and shall be the appeal bodies provided for under Article 30(2) of that Directive. They shall exchange the necessary information obtained from infrastructure managers and other relevant parties.

...

3. In the event of a complaint to a regulatory body from an applicant regarding international rail freight services, or within the framework of an own-initiative investigation by a regulatory body, this regulatory body shall consult the regulatory bodies of all other Member States through which the international train path for the freight train concerned runs and request all necessary information from them before taking its decision.

...'

*Directive 2012/34*

13 Article 3(2), (19) and (26) of Directive 2012/34 provides:

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

(2) “infrastructure manager” means any body or firm in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms;

...

(19) “applicant” means any railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as the competent authorities referred to in 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’.

14 Article 27 of that directive 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. The network statement shall be published in at least two official languages of the Union. The content of the network statement shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. That web portal shall be set up by the infrastructure managers in the framework of their cooperation in accordance with Articles 37 and 40.

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 network statement shall also contain information setting out the conditions for access to service facilities connected to the network of the infrastructure manager and for supply of services in these facilities or indicate a website where such information is made available free of charge in electronic format. The content of the network statement is laid down in Annex IV.

...’

15 Under Article 39(1) of that directive:

‘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 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.’

16 Article 40(1) of the directive provides:

‘Member States shall ensure that infrastructure managers cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network of the rail system within the Union, including under framework agreements referred to in Article 42. Infrastructure managers shall establish appropriate procedures, subject to the rules set out in this Directive, and organise train paths crossing more than one network accordingly.

Member States shall ensure that representatives of infrastructure managers whose allocation decisions have an impact on other infrastructure managers associate in order to coordinate the allocation of or to allocate all relevant infrastructure capacity at an international level, without prejudice to the specific rules contained in Union law on rail freight oriented networks. The principles and criteria for capacity allocation established under this cooperation shall be published by infrastructure managers in their network statement in accordance with paragraph 3 of Annex IV. Appropriate representatives of infrastructure managers from third countries may be associated with these procedures.’

17 Article 55(1) of Directive 2012/34 states:

‘Each Member State shall establish a single national regulatory body for the railway sector. Without prejudice to paragraph 2, this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.’

18 Under Article 56(1) and (2) of that directive:

‘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;
- (b) the criteria set out in it;
- (c) the allocation process and its result;
- (d) the charging scheme;
- (e) the level or structure of infrastructure fees which it is, or may be, required to pay;

- (f) arrangements for access in accordance with Articles 10 to 13;
- (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 or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.'

- 19 The first subparagraph of Article 57(1) of that directive is worded as follows:

'The regulatory bodies shall exchange information about their work and decision-making principles and practice and, in particular, exchange information on the main issues of their procedures and on the problems of interpreting transposed Union railway law. They shall otherwise cooperate for the purpose of coordinating their decision-making across the Union. For this purpose, they shall participate and work together in a network that convenes at regular intervals. The Commission shall be a member, coordinate and support the work of the network and make recommendations to the network, as appropriate. It shall ensure active cooperation of the appropriate regulatory bodies.'

- 20 Article 65 of that directive provides:

'[Council] Directives [91/440], 95/18/EC [of 19 June 1995 on the licensing of railway undertakings (OJ 1995 L 143, p. 70)] and [2001/14], as amended by the Directives referred to in Annex IX, Part A, are repealed with effect from 17 June 2015, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives listed in Part B of Annex IX.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex X.'

- 21 Annex IV to Directive 2012/34 sets out:

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

...

3. A section on the principles and criteria for capacity allocation. This shall set out the general capacity characteristics of the infrastructure which is available to railway undertakings ... It shall also specify the procedures and deadlines which relate to the capacity-allocation process. It shall contain specific criteria which are employed during that process, in particular:
- (a) the procedures according to which applicants may request capacity from the infrastructure manager;
  - (b) the requirements governing applicants;

...

...'



***German law***

*The AEG*

- 22 Paragraph 14(1) of the Allgemeines Eisenbahngesetz (General law on Railways, ‘the AEG’) of 27 December 1993, in the version applicable to the main proceedings, provides:

‘Railway infrastructure undertakings shall ensure non-discriminatory use of the infrastructure which they operate and shall provide without discrimination the services which they offer to the extent determined by the regulation adopted on the basis of Paragraph 26(1), points 6 and 7, and (4), point 1. ...’

- 23 Under Paragraph 14d of the AEG:

‘Public undertakings which are railway infrastructure managers shall inform the regulatory body regarding:

...

- (6) any proposed redrafting of or amendment to the network statement or the conditions of use of the service facilities, including the charging principles and amount of the charge.

...’

- 24 Paragraph 14e of that law provides:

‘(1) Upon receipt of a notice pursuant to Paragraph 14d, the regulatory body may object, within a period of

...

4. four weeks, to the revision or amendment proposed in accordance with point 6 of the first sentence of Paragraph 14d,

provided that the proposed decisions do not comply with the provisions of the railway legislation on access to the railway infrastructure.

...

- (3) If the regulatory body exercises its right to object,

...

2. in the situation referred to in subparagraph (1), point 4, the network statement or conditions for use of service facilities, including the charging principles and intended charges, shall not be applied.

...’

*The EIBV*

- 25 Paragraph 3(1) of the Eisenbahninfrastruktur-Benutzungsverordnung (Regulation on the use of railway infrastructure, ‘the EIBV’) of 3 June 2005 (BGBl. I 2005, p. 1566) provides:

‘Railway infrastructure undertakings shall allow the non-discriminatory use of the service facilities which they operate and shall provide without discrimination the associated services and the services described in point 2 of Annex 1 if they form part of their commercial activities. Railway managers shall also be required to make available the railway lines that they operate, the switching and security systems and associated tube supply installations in certain sections, to allocate train paths in accordance with this regulation and to provide the services described in Annex 1, point 1.’

- 26 Paragraph 4 of that regulation provides:

‘(1) The rail network operator shall be required to set and ... communicate the conditions for use (network statement) applicable to the supply of the services referred to in Annex 1, point 1.

At the request of the parties with access entitlement, the rail network manager shall send them, at their expense, the network statement.

(2) The network statement must contain at least the statements referred to in Annex 2 and in the other provisions of this regulation, and the general conditions of use of train paths. The list of charges shall not form part of the network statement.

...’

- 27 Under Paragraph 6(1) of that regulation:

‘Parties with access entitlement may at any time request train paths from the railway manager, unless otherwise provided in this regulation. ...’

- 28 Annex 1 to that regulation states:

‘1. The mandatory services of the railway manager shall include:

(a) the handling of requests for train paths;

...’

- 29 Annex 2 to the EIBV states:

‘The network statement referred to in Paragraph 4 shall contain the following information:

...

3. the principles and criteria governing the allocation of railway capacity.

Information must be provided on the general characteristics of railway capacity available to the parties with access entitlement and on any restrictions on use, including the need for capacity expected for maintenance purposes. Information on the course and deadlines of the procedure for allocating railway infrastructure capacity must also be provided, in particular:

- (a) the procedure for submitting applications for train paths from parties with access entitlement to the railway operator;

...'

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

- 30 DB Netz, a 100% subsidiary of the Deutsche Bahn AG group, is a public railway infrastructure company which operates the largest rail network in Germany.
- 31 As infrastructure manager, DB Netz is required, under German law, in particular Paragraph 4(1) and (2) and the third sentence of point 3(a) of Annex 2 to the EIBV, implementing Article 27 of Directive 2012/34, to draw up and publish a network statement, which includes information on the course and deadlines of the procedure for submitting applications for railway infrastructure capacity, in particular the procedure for parties with access entitlement to submit requests for train paths to the railway manager.
- 32 DB Netz is also involved in the operation of freight corridors at European level within the meaning of Article 2 of Regulation No 913/2010, and six of those corridors concern DB Netz's rail network. Pursuant to the provisions of that regulation, DB Netz is responsible, together with the other infrastructure managers concerned by each of the freight corridors in question, for setting up a management board, which takes part in the management of the freight corridor in question and which has the power to designate and create a one-stop shop for each freight corridor, allowing its users to submit their applications for infrastructure capacity in a single place and in a single operation for their cross-border freight trains. The management board establishes procedures to ensure the coordination of capacity allocation between infrastructure managers and prepares and publishes a 'Corridor Information Document (CID)' containing information on the conditions of use of the freight corridor concerned. In the operation of all freight corridors in which DB Netz is present, the procedure for submitting applications to the one-stop shop uses the electronic booking system 'Path Coordination System' ('the PCS booking system').
- 33 In 2015, the management boards of the freight corridors in which DB Netz is involved decided that applications for infrastructure capacity for pre-arranged international train paths could be submitted to the one-stop shop of each freight corridor only by means of the PCS booking system. Those rules were published in Book 4 of the CID.
- 34 On 31 August 2015, DB Netz notified the Federal Network Agency, which is competent as the national regulatory body within the meaning of Article 55 of Directive 2012/34, of a proposed amendment to its 2016 network statement. That amendment concerned, inter alia, the procedure for submitting applications for infrastructure capacity, on pre-arranged train paths in the freight corridors in accordance with Regulation No 913/2010, to the competent one-stop shop. The proposed amendment was intended, for the submission of applications for infrastructure capacity, to allow only the use of the PCS booking system, thereby removing the possibility of using an application form in the event of technical failure of that system. The

reason for the amendment was, in particular, that the rules for submitting applications, adopted and published by the management boards of the freight corridors, did not provide for the use of such a form.

- 35 By decision of 22 September 2015, the Federal Network Agency objected, on the basis of Paragraph 14e(1) of the AEG, to the proposed amendment to the 2016 network statement submitted by DB Netz and, by decision of 8 March 2016, it rejected the complaint lodged by that infrastructure manager. It based its objection on the ground that the proposed amendment, aimed at removing the possibility of using an alternative solution in the event of technical failure of the PCS booking system, was contrary to DB Netz's obligation arising from the combined application of the first sentence of Paragraph 14(1) of the AEG, and Paragraph 3(1) and point 1 of Annex 1 to the EIBV, to ensure non-discriminatory use of the railway infrastructure operated by DB Netz and the non-discriminatory provision of the mandatory services which it offers, including the handling of applications for the allocation of train paths.
- 36 On 15 March 2016, DB Netz brought an action before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany) seeking the annulment of the refusal decision of the Federal Network Agency. That court dismissed that action by judgment of 20 April 2018, following, in essence, that agency's arguments.
- 37 DB Netz brought an appeal against that judgment before the referring court, which wonders whether the Federal Network Agency was right to object to DB Netz's proposed amendment to the 2016 network statement.
- 38 The referring court considers that the Federal Network Agency had sufficient reasons to assume that the procedure for submitting applications for infrastructure capacity to the one-stop shop referred to in Article 13(1) of Regulation No 913/2010, governed by point 4.2.5.1 of the 2016 network statement, was discriminatory in the absence of an alternative solution in the event of a technical malfunction of the PCS booking system.
- 39 However, it asks, in the first place, whether that procedure may, in accordance with Paragraph 4(1) and (2) of the EIBV, in conjunction the third sentence of point 3(a) of Annex 2 to that regulation, be regulated by DB Netz in its network statement and thus be subject to the exhaustive review of the Federal Network Agency, or whether the management board responsible for the freight corridor at issue enjoys exclusive competence in the matter. In so far as Paragraph 4(1) and (2) of the EIBV, in conjunction with the third sentence of point 3(a) of Annex 2 to that regulation, is intended to implement the provisions of Article 27(1) and (2) of Directive 2012/34, in conjunction with point 3(a) of Annex IV to that directive, it is decisive whether the procedure for submitting applications for infrastructure capacity at issue in the main proceedings falls within the aforementioned provisions of that directive.
- 40 In the second place, if that procedure were, in fact, also to be regulated by DB Netz in its network statement, the referring court is uncertain whether a national regulatory body must, when reviewing such a document, in accordance with Article 27 of Directive 2012/34, comply with the provisions of Article 20 of Regulation No 913/2010, which requires cooperation between national regulatory bodies and, if so, whether that obligation of cooperation precludes any unilateral action or requires the national regulatory body to be bound at least to seek a coordinated approach. If Article 20 does not apply, the referring court wonders whether a comparable obligation of cooperation arises from the provisions of Directive 2012/34 and, in particular, from the provisions of Article 57 of that directive. In that regard, the referring court takes the view that, in

the absence of coordination in that context, conflicting requirements on the part of the national regulatory bodies could make it more difficult, if not impossible, to achieve the objective referred to in Article 13(1) of Regulation No 913/2010, namely the possibility of submitting applications for infrastructure capacity in a single place and in a single operation.

- 41 In the third place, the referring court considers that, if the management board of a freight corridor is authorised to define the procedure for submitting applications for infrastructure capacity to the one-stop shop itself, it is doubtful whether the Federal Network Agency may review DB Netz's 2016 network statement beyond material compliance with the rules adopted by that board.
- 42 In the fourth place, if the national regulatory bodies are competent to carry out such a review, the referring court considers it necessary to clarify the importance of the framework for the allocation of the infrastructure capacity on the freight corridor laid down, in accordance with Article 14(1) of Regulation No 913/2010, by the executive board of a freight corridor. It questions the interrelationship between, on the one hand, the fact that the executive boards of the freight corridors concerned have stipulated, in the present case, in Article 8(2) of their framework, that the capacity of the freight corridor concerned must be published and allocated using an international application system which must be coordinated with the other freight corridors, namely the PCS booking system, and, on the other hand, the unilateral action of the Federal Network Agency, which seeks to impose on DB Netz requirements concerning the design of the system of applications for infrastructure capacity without coordination with the regulatory bodies of the Member States concerned other than the Federal Republic of Germany. The referring court harbours doubts, in that regard, as to the legal nature and binding effect of the framework for the allocation of the infrastructure capacity on the freight corridor, within the meaning of Article 14(1) of Regulation No 913/2010, and asks whether that framework is subject to the interpretation of the national courts or of the Court of Justice.
- 43 In those circumstances, the *Obergerverwaltungsgericht für das Land Nordrhein-Westfalen* (Higher Administrative Court for the Land of North Rhine-Westphalia, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Regulation [No 913/2010], in particular with regard to the tasks assigned to the management board for a freight corridor in Article 13(1), Article 14(9) and Article 18(c) of that Regulation, to be interpreted as meaning that the management board for a freight corridor is authorised to define the procedure for submitting applications for infrastructure capacity to the one-stop shop referred to in Article 13(1) [of that regulation] itself, for example by requiring, as in the present case, the exclusive use of an electronic booking tool, or is that procedure subject to the general provisions of Article 27(1) and (2) [of Directive 2012/34] read in conjunction with point 3(a) of Annex IV to [that directive], which means that it may be regulated solely by the infrastructure managers involved in a freight corridor in their respective network statements?
- (2) If the first question is to be answered to the effect that the procedure referred to in [that question] has to be regulated solely in the network statement of infrastructure managers involved in a freight corridor, is the review of that network statement by a national regulatory body governed in this respect by Article 20 of Regulation [No 913/2010] or likewise exclusively by the provisions of Directive [2012/34] and the national legislation adopted for its transposition?

- (a) If the review is governed by Article 20 of Regulation [No 913/2010], is it compatible with the provisions of that article for a national regulatory body to object to a regulation in the network statement such as that referred to [in the first question], without acting jointly and in a substantively uniform manner with the regulatory bodies of the [Member States other than the one concerned] involved in the freight corridor or at least consulting them beforehand in order to ensure a uniform approach?
  - (b) In so far as the review is governed by the provisions of Directive [2012/34] and the national legislation adopted for its transposition, is it compatible with those provisions, in particular with the general duty of coordination laid down in the [second sentence of the first subparagraph of] Article 57(1) of that directive, for a national regulatory body to object to such a regulation, without acting jointly and in a substantively uniform manner with the regulatory bodies of the [Member States other than the one concerned] involved in the freight corridor or at least having consulted them beforehand in order to ensure a uniform approach?
- (3) If the first question is to be answered to the effect that the management board of a freight corridor is authorised to define the procedure referred to in [that question] itself, does a national regulatory body have the authority, under Article 20 of Regulation [No 913/2010] or the provisions of Directive [2012/34] and the legislation created for its transposition, to review the network statement of an infrastructure manager for more than its substantive compliance with the procedure defined by the management board and, where appropriate, to object thereto, if the network statement of an infrastructure manager contains regulations on that procedure? If this were to be answered in the affirmative, how [is the second question] to be answered with regard to this authority of the regulatory body?
- (4) In so far as the national regulatory bodies, on the basis of the questions above, are authorised to review the procedure referred to in [Question 1], is Article 14(1) of Regulation [No 913/2010] to be interpreted as meaning that the framework defined by the executive board under that provision is EU law which binds the national regulatory bodies and the national courts, has priority of application over national law and is subject to the ultimately binding interpretation of the [Court]?
- (5) If the fourth question is to be answered in the affirmative, does the designation made under Article 14(1) of Regulation [No 913/2010] by the executive boards of all of the freight corridors, pursuant to Article 8(2) of the respective framework, and according to which corridor capacity is to be published and allocated via an international application system, which must as far as possible be harmonised with the other freight corridors, preclude a decision of a national regulatory body by which an infrastructure manager involved in a freight corridor is provided, for its network statement, with stipulations for structuring that application system which are not agreed with the national regulatory bodies of the [Member States other than the one concerned] involved in the freight corridors?

## **Consideration of the questions referred**

### ***The first question***

- 44 By its first question, the referring court asks, in essence, whether Article 13(1), Article 14(9) and Article 18(c) of Regulation No 913/2010 and Article 27(1) and (2) of Directive 2012/34, read in conjunction with point 3(a) of Annex IV to that directive, must be interpreted as meaning that

the authority competent to adopt the rules applicable to the procedure for submitting applications for infrastructure capacity, including those regarding the exclusive use of a particular electronic booking system, to a one-stop shop provided for in Article 13(1) of that directive, is the management board, established in accordance with Article 8(2) of that regulation, or the infrastructure manager defined in Article 3(2) of that directive.

- 45 Since this question concerns the interpretation of the provisions of Regulation No 913/2010 and Directive 2012/34, it should be noted, as a preliminary point, that it is apparent from recital 7 of that regulation that, unless otherwise provided, that regulation must be applied without prejudice to the rights and obligations of infrastructure managers laid down in Directives 91/440 and 2001/14. Inasmuch as Directive 2012/34 repealed those two directives and given that, under Article 65 of the former, references made to those repealed directives are to be construed as references to Directive 2012/34, the provisions of Regulation No 913/2010 must accordingly be read in the light of the latter directive, unless they provide otherwise.
- 46 In order to answer the first question, it is necessary, therefore, to examine the role which Regulation No 913/2010 assigns to the management boards of freight corridors while taking account of the provisions of Directive 2012/34 relating to the tasks assigned to infrastructure managers.
- 47 In that regard, it follows from settled case-law that the provisions of EU law must be interpreted not only in the light of their wording, but also of their context and the objectives pursued by the rules of which they are part (see, to that effect, judgment of 27 January 2021, *De Ruiter*, C-361/19, EU:C:2021:71, paragraph 39 and the case-law cited).
- 48 As regards, in the first place, the wording of the relevant provisions of Regulation No 913/2010 and of Directive 2012/34, first, it is apparent from Article 8(2) of that regulation that, for each freight corridor, the infrastructure managers concerned are to establish a management board, which is composed of representatives of such managers, who are responsible for taking measures as expressly provided for, inter alia, in Article 8(9), Article 12, Article 13(1), Article 14(2), (6) and (9), Article 16(1) and Article 18 of that regulation.
- 49 Thus, first of all, according to Article 8(9) and Article 12 of Regulation No 913/2010, the management board is (i) to coordinate, in accordance with the national and European deployment plans, the use of interoperable IT applications or alternative solutions which may become available in the future to handle requests for international train paths and the operation of international traffic on the freight corridor and (ii), to coordinate and ensure the publication of the schedule for carrying out all the works on the infrastructure and its equipment that would restrict the capacity on the freight corridor.
- 50 Next, under Article 13(1) of Regulation No 913/2010, the management board is to designate or set up the one-stop shop, which is a joint body for applicants to request and to receive answers, in a single place and in a single operation, regarding infrastructure capacity for freight trains crossing at least one border along the freight corridor. In that regard, under Article 14(2), (6) and (9), and Article 16(1) of that regulation, the management board is to evaluate the need for capacity to be allocated to freight trains running on the freight corridor, to promote the coordination of priority rules relating to capacity allocation on such a corridor, to put in place procedures to ensure optimal coordination between infrastructure managers for the allocation of that capacity,

both for the requests referred to in Article 13(1) and for requests received by the infrastructure managers concerned, and to put in place procedures for coordinating traffic management along those corridors.

- 51 Lastly, it is apparent from Article 18 of Regulation No 913/2010 that the management board is to draw up, regularly update and publish a document containing, in essence, information on the conditions of use of the freight corridor including, as is apparent from points (a) and (c) of that article, all the information contained in the network statement for national networks regarding the freight corridor, drawn up in accordance with the procedure set out in Article 27 of Directive 2012/34, and information concerning the procedures referred to in Articles 13 to 17 of that regulation.
- 52 Accordingly, it follows from the wording of the provisions of Regulation No 913/2010 referred to in paragraphs 48 to 51 above, (i) that the EU legislature intended expressly to define the measures which the management board is responsible for taking and (ii), that that board has, in essence, a coordinating role relating, *inter alia*, to infrastructure capacity, the information available in that regard and certain aspects of requests for such capacity.
- 53 However, those provisions do not in any way indicate that the role of that board might go so far as to enable it to define the procedure for submitting booking applications for infrastructure capacity to the one-stop shop.
- 54 Secondly, as regards the tasks assigned to the infrastructure manager by Directive 2012/34, first, it follows from Article 27(1) of that directive that each infrastructure manager must develop and publish the national network statement and, secondly, under Article 27(2), read in conjunction with point 3(a) of Annex IV to that directive, that such a statement is to contain the procedures by which applicants may submit applications for capacity to the infrastructure manager.
- 55 It is thus apparent from the wording of those provisions of Directive 2012/34 that the adoption of the rules applicable to the procedure for submitting applications for infrastructure capacity, such as those submitted to the one-stop shop for freight trains crossing at least one border along the freight corridor, within the meaning of Article 13(1) of Regulation No 913/2010, falls within the competence of the infrastructure manager.
- 56 In the second place, an examination of the context of the relevant provisions of Regulation No 913/2010 and of Directive 2012/34 confirms the conclusions in paragraphs 52 and 55 above.
- 57 First, as indicated in recital 26 of that regulation, the requirement that the management board is to draw up, regularly update and publish the document referred to in Article 18 of that regulation is intended to facilitate access to information, contained in particular in the national network statement, relating to the use of all the main infrastructure of the freight corridor, and to guarantee non-discriminatory access to that corridor.
- 58 It follows, as the Advocate General observed, in essence, in point 71 of his Opinion, that that document is informative in nature.
- 59 Secondly, Article 56(2) of Directive 2012/34 confers on the regulatory body established in accordance with Article 55(1) of that directive, which is an independent stand-alone authority, the power to check, *inter alia*, whether the network statement, defined in Article 3(26) of that directive, contains discriminatory clauses or creates discretionary powers for the infrastructure



manager which may be used to discriminate against applicants. Accordingly, it follows from such a review of compliance with the principle of non-discrimination in the context of the network statement that it is indeed for the infrastructure manager, who must draw up and publish that statement, and not for the management board, to define the procedure by which applicants may submit applications for infrastructure capacity.

- 60 It is important, in that regard, to bear in mind that, in the context of the analysis of Article 27(1) and (2) of, and Annex IV to, Directive 2012/34, the Court has already found that any request for infrastructure capacity must, under that directive, be submitted to the infrastructure manager by a railway undertaking in accordance with the network statement drawn up by it and must comply with the principles and criteria set out in that document (see, to that effect, judgment of 28 February 2019, *SJ*, C-388/17, EU:C:2019:161, paragraph 38).
- 61 As regards, in the third place, the objective pursued by Regulation No 913/2010, read in the light of Directive 2012/34, it is clear from Article 1(1) of that regulation that it lays down rules for the establishment and organisation of international rail corridors for competitive freight with a view to the development of a European rail network for competitive freight and the rules for the selection, organisation and management of freight corridors.
- 62 In that regard, as stated in recital 4 of Regulation No 913/2010, in order to optimise use of the network and ensure its reliability, that regulation introduces additional procedures to strengthen cooperation with regard to the allocation of international train paths for freight trains between infrastructure managers.
- 63 While it is true that such cooperation between infrastructure managers in the context of a freight corridor can be guaranteed only in relation to the management board responsible for, in particular, laying down rules for the implementation of the one-stop shop for each freight corridor, it does not follow that such a management board is authorised specifically to define the procedure for submitting applications for infrastructure capacity. Such competence would risk undermining the tasks of infrastructure managers, laid down by Directive 2012/34, which would run counter to the EU legislature's intention, expressed in recital 7 of Regulation No 913/2010, to respect, unless otherwise provided, the rights and obligations which that directive confers on infrastructure managers.
- 64 In that regard, DB Netz's argument that the aforementioned objective of cooperation could be jeopardised if the infrastructure managers were authorised to regulate the procedure for submitting applications for infrastructure capacity in their network statement, because such authority would entail a risk of inconsistent rules arising from the different network statements of the national networks, must be rejected.
- 65 As the Advocate General stated in point 69 of his Opinion, the procedure provided for in the network statement, which includes, *inter alia*, the procedure for submitting applications for infrastructure capacity to the one-stop shop, accurately reflects the cooperation between the infrastructure managers, as is apparent from the provisions of Article 40(1) of Directive 2012/34. However, it should be noted, in that regard, that in order to achieve the objective of cooperation of infrastructure managers, it appears necessary to interpret the provisions of Regulation No 913/2010 regarding the role of the management board, examined in paragraphs 48 to 51 above, as meaning that it is for that board to ensure that the national network statements do not contain any contradictory rules.

- 66 It follows from all the foregoing considerations that the answer to the first question is that Article 13(1), Article 14(9) and Article 18(c) of Regulation No 913/2010 and Article 27(1) and (2) of Directive 2012/34, read in conjunction with point 3(a) of Annex IV to that directive, must be interpreted as meaning that the infrastructure manager, defined in Article 3(2) of that directive, is the competent authority for adopting, in the context of the national network statement, the rules applicable to the procedure for submitting applications for infrastructure capacity, including those regarding the exclusive use of a particular electronic booking system, to the one-stop shop provided for in Article 13(1).

### *The second question*

- 67 By its second question, the referring court asks, in essence, whether the review by a national regulatory body of the rules relating to the procedure for submitting applications for infrastructure capacity to the one-stop shop laid down in the network statement is governed by the provisions of Article 20 of Regulation No 913/2010 or by the provisions of Directive 2012/34, in particular the provisions of the first subparagraph of Article 57(1) of that directive, and whether those provisions must be interpreted as meaning that the regulatory body of a Member State is able to object to those rules without cooperating with the regulatory bodies of the other Member States involved in the freight corridor or, at least, without consulting them beforehand in order to reach a uniform approach.
- 68 It is apparent, in essence, from the wording of Article 20(1) and (3) of Regulation No 913/2010 that the regulatory bodies are to cooperate and consult each other to monitor competition in the freight corridor in order to ensure, in particular, non-discriminatory access to that corridor.
- 69 Furthermore, Article 56(2) of Directive 2012/34 provides for review of the network statement, carried out by the regulatory body on its own initiative, ‘with a view to preventing discrimination against applicants’, specifying that that body ‘shall, in particular, check whether the network statement contains discriminatory clauses’. In that regard, as it relates to all the powers conferred on them, including decision-making powers, it follows from the first subparagraph of Article 57(1) of that directive that the regulatory bodies are to cooperate in coordinating their decision-making processes across the European Union.
- 70 It follows that the review of a network statement, carried out by a regulatory body to prevent discriminatory treatment, on the one hand, may fall within the scope of the provisions both of Article 20 of Regulation No 913/2010 and of Article 56(2) of Directive 2012/34. On the other hand, both Article 20 of Regulation No 913/2010 and the first subparagraph of Article 57(1) of Directive 2012/34 require, in such a case, cooperation between the regulatory bodies. However, in a case such as that at issue in the main proceedings, where that review relates, in particular, to the rules concerning the procedure for submitting applications for infrastructure capacity on a freight corridor, the regulatory bodies must comply with the cooperation obligations specifically laid down in Article 20 of Regulation No 913/2010.
- 71 As regards the question whether, and in which circumstances, Article 20 requires the regulatory body of a Member State to carry out, alone or in cooperation with the regulatory bodies of the other Member States concerned by a freight corridor, a review of the infrastructure manager’s network statement, it follows, first of all, from the first sentence of Article 20(1) that regulatory bodies must cooperate in monitoring the competition in the freight corridor. Next, Article 20(3) provides that, in the event of a complaint regarding international rail freight services or in the context of an own initiative investigation, the regulatory body of the Member State concerned is

to consult the regulatory bodies of all other Member States crossed by the international train path for the freight train concerned and to request all necessary information from them before taking its decision.

- 72 Finally, as set out in recital 25 of Regulation No 913/2010, which echoes the second sentence of Article 20(1) of that regulation, in order to ensure non-discriminatory access to international rail services, it is necessary to ensure efficient coordination between the regulatory bodies with regard to the different networks covered by the freight corridor.
- 73 Thus, it follows from Article 20 of Regulation No 913/2010, read in the light of recital 25 of that regulation, that there exists a duty of cooperation between the regulatory bodies of the Member States which requires them to achieve, as far as possible, a uniform approach where, in the exercise of their regulatory powers, they are to adopt a decision aimed at ensuring non-discriminatory access to rail freight corridors.
- 74 In addition, it should be noted that that obligation of cooperation also contributes to ensuring the objective pursued by that regulation of strengthening the cooperation between infrastructure managers through, in particular, the establishment of management boards responsible for designating or setting up the one-stop shop. A lack of cooperation between the regulatory bodies, which are responsible, in particular, for ensuring non-discriminatory access to freight corridors, could allow different, and potentially contradictory, rules on selection and organisation to emerge relating to rail freight services for the same freight corridor, which could result in the coordination system established by the one-stop shop being called into question.
- 75 Consequently, in the present case, the Federal Network Agency cannot take a decision, such as that at issue in the main proceedings, without complying with the cooperation obligations arising from Article 20 of Regulation No 913/2010 and, in particular, without first consulting the other regulatory bodies concerned.
- 76 However, as the Advocate General pointed out, in essence, in point 85 of his Opinion, it is not apparent from any provision of Regulation No 913/2010 that the obligation of cooperation between the regulatory bodies implies that a regulatory body of a Member State is required to obtain the consent of the regulatory bodies of the other Member States concerned before adopting a decision, or that it is bound by the decisions taken by those other regulatory bodies.
- 77 It follows from the foregoing considerations that the answer to the second question is that the review by a national regulatory body of the rules relating to the procedure for submitting applications for infrastructure capacity to the one-stop shop laid down in the network statement is governed by the provisions of Article 20 of Regulation No 913/2010, and that those provisions must be interpreted as meaning that the regulatory body of a Member State cannot object to those rules without complying with the cooperation obligations arising from Article 20 and, in particular, without consulting the regulatory bodies of the other Member States involved in the freight corridor in order to achieve, as far as possible, a uniform approach.

### *The third question*

- 78 In view of the answer given to the first question, there is no need to consider the third question.

*The fourth question*

- 79 By its fourth question, the referring court asks, in essence, whether Article 14(1) of Regulation No 913/2010 must be interpreted as meaning that the framework for the allocation of the infrastructure capacity on the freight corridor laid down by the executive board pursuant to that provision constitutes an act of EU law.
- 80 In that regard, that court asks, in particular, whether that framework precludes a national regulatory body from being able to adopt a decision that imposes a system for submitting applications for infrastructure capacity to the one-stop shop which has not been coordinated with the other national regulatory bodies concerned by the freight corridor.
- 81 It should be noted that, under Article 8(1) of Regulation No 913/2010, for each freight corridor, an executive board is to be established by the Member States concerned, namely those whose territory is crossed by the freight corridor, which is responsible for defining the general objectives of the freight corridor, for supervising and for taking, inter alia, the measures expressly provided for in Article 14(1) of that regulation. The executive board is to consist of representatives of the authorities of the Member States concerned and, in accordance with Article 8(4), it is to take its decisions on the basis of mutual consent of those representatives.
- 82 Furthermore, it is apparent from the wording of Article 14(1) that the executive board is to define the framework for the allocation of the infrastructure capacity on the freight corridor concerned, in accordance with Article 14(1) of Directive 2001/14, which, in the light of what has been stated in paragraph 45 above, corresponds to Article 39(1) of Directive 2012/34.
- 83 Under the latter provision, it is the Member States which are able to lay down the framework for the allocation of infrastructure capacity, provided that the condition of management independence laid down in Article 4 of that directive is satisfied.
- 84 Thus, it follows from those provisions that, although the creation of the executive board is laid down by EU law by virtue of Article 8(1) of Regulation No 913/2010, such an executive board is established by the Member States and does not therefore constitute an institution, body, office or agency of the European Union.
- 85 The fact that the framework for the allocation of the infrastructure capacity on the freight corridor, within the meaning of Article 14(1) of Regulation No 913/2010, is adopted by the executive board means only that it is adopted by means of collective action by the infrastructure managers and, therefore, by the Member States concerned, which is intended to implement EU law, as provided for in Regulation No 913/2010 and Directive 2012/34.
- 86 Consequently, such a framework does not constitute an act of EU law and, therefore, does not have the specific characteristics of EU law.
- 87 It follows that, in the present case, as the Advocate General observed in point 96 of his Opinion, the framework laid down by the executive board for the allocation of the infrastructure capacity on the freight corridor, within the meaning of Article 14(1) of Regulation No 913/2010, does not preclude the intervention of the national regulatory body concerned, in a case such as that in the main proceedings, for the purpose of remedying any issue of discrimination in relation to the procedure for submitting applications for infrastructure capacity to the one-stop shop, as it appears in the network statement of the infrastructure manager.

- 88 In the light of the foregoing considerations, the answer to the fourth question is that Article 14(1) of Regulation No 913/2010 must be interpreted as meaning that the framework for the allocation of the infrastructure capacity on the freight corridor laid down by the executive board pursuant to that provision does not constitute an act of EU law.

*The fifth question*

- 89 In view of the answer given to the fourth question, there is no need to examine the fifth question.

**Costs**

- 90 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 13(1), Article 14(9) and Article 18(c) of Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight, and Article 27(1) and (2) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European rail area, read in conjunction with point 3(a) of Annex IV to that directive, must be interpreted as meaning that the infrastructure manager, defined in Article 3(2) of that directive, is the competent authority for adopting, in the context of the national network statement, the applicable rules for submitting applications for infrastructure capacity, including those regarding the exclusive use of a particular electronic booking system, to the one-stop shop provided for in Article 13(1).**
2. **The review by a national regulatory body of the rules relating to the procedure for submitting applications for infrastructure capacity to the one-stop shop laid down in the network statement is governed by the provisions of Article 20 of Regulation No 913/2010, and those provisions must be interpreted as meaning that the regulatory body of a Member State cannot object to those rules without complying with the cooperation obligations arising from Article 20 and, in particular, without consulting the regulatory bodies of the other Member States involved in the freight corridor in order to achieve, as far as possible, a uniform approach.**
3. **Article 14(1) of Regulation No 913/2010, must be interpreted as meaning that the framework for the allocation of the infrastructure capacity on the freight corridor laid down by the executive board pursuant to that provision does not constitute an act of EU law.**

[Signatures]