Reports of Cases

OPINION OF ADVOCATE GENERAL
M. CAMPOS SÁNCHEZ-BORDONA
delivered on 19 September 2018 [1]

Case C-388/17

Konkurrensverket
v
SJ AB

(Request for a preliminary ruling from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden))

(Preliminary ruling — Public contracts in the rail transport sector — Activities relating to the provision or operation of networks — Definition of network — Award of a train-cleaning contract by a railway undertaking wholly owned by the State — No prior call for tenders)

1. SJ AB ('SJ') is a public limited company which provides rail passenger services and which is wholly owned by the Swedish State. In 2012, SJ concluded two contracts for the cleaning of its trains without having first issued a public call for tenders in respect of those contracts; that conduct is considered by the Konkurrensverket (Competition Authority, Sweden) to be contrary to Directive 2004/17/EC. [2]

2. The dispute between the public undertaking and the Konkurrensverket concerns the interpretation of Article 5(1) of Directive 2004/17. In particular, the referring court, which has to adjudicate on that dispute, seeks clarification of terms used in that article, the interpretation of which will enable it to determine whether a public undertaking providing rail transport services falls within the scope of that directive.

3. In that connection, there are two matters at issue:

— First, the definition of rail transport 'network' for the purposes of that provision.

— Second, in cases where a network exists, the meaning of the phrase 'the provision or operation of networks' used in that provision.

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

I. Legislative framework

A. EU law

1. Directive 2004/17

4. In accordance with Article 2:

‘1. For the purposes of this directive’

…

(b) a “public undertaking” is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

– hold the majority of the undertaking’s subscribed capital, or

…

2. This directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…’

5. Article 5 states:

‘1. This directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

…’

6. Article 30 reads:

‘1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

…

5. When the legislation of the Member State concerned provides for it, the contracting entities may ask the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with paragraph 6 …

…'

2. Directive 2012/34/EU[3]

7. Pursuant to Article 1:

'1. This directive lays down:

(a) the rules applicable to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State as set out in Chapter II;

(b) the criteria applicable to the issuing, renewal or amendment of licences by a Member State intended for railway undertakings which are or will be established in the Union as set out in Chapter III;

(c) the principles and procedures applicable to the setting and collecting of railway infrastructure charges and the allocation of railway infrastructure capacity as set out in Chapter IV.

2. This directive applies to the use of railway infrastructure for domestic and international rail services.'

8. Article 3 provides:

'For the purpose of this directive, the following definitions apply:

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

(2) "infrastructure manager" means any body or firm responsible 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;

(3) "railway infrastructure" means the items listed in Annex I;

…

(24) "infrastructure capacity" means the potential to schedule train paths requested for an element of infrastructure for a certain period;

(25) "network" means the entire railway infrastructure managed by an infrastructure manager;

…

3 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).

(27) “train path” means the infrastructure capacity needed to run a train between two places over a given period;

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

…’

9. Article 10 stipulates:

‘1. 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. That right shall include access to infrastructure connecting maritime and inland ports and other service facilities referred to in point 2 of Annex II, and to infrastructure serving or potentially serving more than one final customer.

…’

10. Under Article 27:

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

2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings, 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.

…’

11. Article 44 provides:

‘1. Applicants may apply under public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as provided for in Section 2 of Chapter IV.

…’

12. Article 45 reads:

‘1. The infrastructure manager shall, as far as possible, meet all requests for infrastructure capacity …

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. Interested parties shall include all those who have requested infrastructure capacity and other parties who wish to have the opportunity to comment on how the working timetable may affect their ability to procure rail services during the working timetable period.

…’

13. Article 46 stipulates:

‘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.

…’

B. National law

1. Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster[4]

14. Under Chapter 2, Paragraph 20, contracting entities include, inter alia, any undertaking over which a contracting authority may exercise a dominant influence. Dominant influence is to be presumed where a contracting authority, directly or indirectly, with regard to an undertaking, holds more than half of the shares in the undertaking, or controls a majority of the votes because of its shareholding or similar, or may nominate more than half of the members of the company’s supervisory board or corresponding governing body.

15. The first subparagraph of Chapter 1, Paragraph 8, provides that an activity is covered by the law if it constitutes the provision or operation of public networks in the form of transport by, inter alia, railway.

16. Under the second subparagraph of Chapter 1, Paragraph 8, a network in the field of transport services is deemed to exist if the service is provided in accordance with conditions which are laid down by a competent authority and which relate to the routes to be served, the capacity to be made available, the frequency of the service and similar conditions.

2. Järnvägslagen (2004:519)[5]

17. Under Chapter 5, Paragraph 2, a railway undertaking with its head office in a State within the EEA or in Switzerland is entitled to operate and organise services on the Swedish rail network.

18. Chapter 6, Paragraph 7, states that any entity which is entitled to operate or organise services on the Swedish rail network may request from an infrastructure manager an allocation of infrastructure capacity as regards train paths in accordance with the description of the rail network.

19. Chapter 6, Paragraphs 1 and 7, and Chapter 6, Paragraph 9, deal with requests for information about infrastructure capacity and also with the handling and determination of the allocation of infrastructure in response to requests for such capacity.

20. Chapter 6, Paragraph 9, provides that the infrastructure manager must prepare a draft working timetable on the basis of the requests which have been received.

4 Law (2007:1092) on procurement in the water, energy, transport and postal services sectors; the ‘Law on procurement’.

5 Law (2004:519) on railways.

21. It follows from Chapter 6, Paragraph 10, that the infrastructure manager is to attempt, by coordination, to resolve any conflicts of interest which arise in the allocation of capacity. Where that is impossible, the infrastructure manager is to provide an expedited dispute resolution procedure (Chapter 6, Paragraph 12).

22. Chapter 6, Paragraphs 14 and 15, concern the priority criteria stated in the description of the rail network.

II. Facts of the dispute and the questions referred for a preliminary ruling

23. In January 2012, SJ concluded two contracts for the provision of cleaning services on its trains (the values of which were SEK 56 million and SEK 60 million respectively) without holding a public procurement procedure in respect of those contracts.

24. In January 2013, the Konkurrensverket lodged an application with the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) for an order that SJ pay a penalty fine on the grounds that that undertaking carried out an activity covered by Chapter 1, Paragraph 8, of the Law on procurement. SJ contested the form of order sought by the applicant, which was dismissed.

25. The Konkurrensverket lodged an appeal against the first-instance judgment with the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which was also dismissed.

26. The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), which is seised of an appeal against the judgment of the appellate court, has referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the second subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that there is a network in the field of transport services when transport services on a State-administered rail network for national and international rail traffic are provided in accordance with provisions in national legislation which implement Directive 2012/34, which involve the allocation of rail infrastructure capacity on the basis of requests from railway companies and a requirement that all requests are to be met so far as possible?

(2) Must the first subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that an activity which is carried out by a railway company such as is referred to in Directive 2012/34 and which entails the provision of transport services to the public on a rail network constitutes the provision or operation of a network as referred to in that provision of the directive?’

III. Summary of the parties’ observations

A. The first question referred

27. The Konkurrensverket submits that, as Directive 2004/17 does not define what is to be understood by transport service ‘network’ or by ‘provision or operation of networks’, the meaning and scope of those terms reflect their usual meaning in everyday language, in accordance with the context in which they are used and the aims pursued.

28. The Konkurrensverket draws attention to the risk that public contracting entities, influenced by States, may tend to favour national undertakings in breach of the provisions of the FEU Treaty governing free movement and competition. The procurement procedures provided for in Directive 2004/17 are intended to neutralise that risk. Without such provisions, the reduction in competition which results from the limits inherent in network capacity would enable contracting entities to overlook financial considerations when awarding a contract and to focus on criteria of national preference.

29. The Konkurrensverket contends that Directive 2012/34 governs access by railway undertakings (like SJ) to a technical network of limited capacity. When the infrastructure manager allocates train paths on that network, it stipulates the conditions concerning, inter alia, the routes to be served, the transport capacity to be made available and the frequency of the service. The fact that the network manager must endeavour to meet requests made by railway undertakings does not alter the limited capacity of that network.

30. The Konkurrensverket acknowledges that, in accordance with Article 30 of Directive 2004/17, activities which fall within the scope of the directive are not subject thereto where those activities are directly exposed to competition on markets to which access is not restricted. However, that possibility requires a Commission Decision, after the relevant procedure has been held, which has not occurred in this instance.

31. SJ observes that, unlike other States, in which rail transport is still subject to a monopoly, rail transport in Sweden is completely deregulated and operates under an equal competition regime.

32. SJ states that, despite being a company which is wholly owned by the Swedish State, it does not receive any funding or any other State advantages. Its revenue comes from the sale of tickets and it does not benefit from any preferential treatment when it comes to the allocation of train paths.

33. SJ submits that the second subparagraph of Article 5(1) of Directive 2004/17 must be interpreted strictly, as is clear from the Court's case-law.[6] It is not sufficient that an entity is subject to a dominant influence of the kind referred to in Article 2(1)(b) of Directive 2004/17. The conditions set out in the second subparagraph of Article 5(1) must be laid down unilaterally by the competent authority of the Member State; those conditions are of immediate and essential concern to potential users in that they directly and specifically affect the manner in which the train service is provided by the railway undertaking.

34. SJ adds that both it and the other railway undertakings operating in Sweden determine themselves, on the basis of commercial criteria, the train paths, the trains they use, the timetables, the number of departures, the stops and the ticket prices. The infrastructure manager does not have any powers beyond those granted by Directive 2012/34 and its tasks are confined to ensuring access to the railway infrastructure on an equal basis but not to stipulating the specific conditions applicable to transport services provided by railway undertakings.

35. In the Commission's submission, the wording of the second subparagraph of Article 5(1) of Directive 2004/17 was intended to convey a broad definition of 'network'. A network can exist not only where there is physical infrastructure (as is the case of railway tracks and tram tracks) but also where there is no physical infrastructure, provided that there is a network of connected lines used by vehicles in accordance with the conditions laid down by the authorities.[7]

6 SJ cites the judgment of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraphs 27 and 29.

7 The Commission refers in that connection to its Communication on the Community rules for public procurement in excluded sectors: water, energy, transport and telecommunications (COM/88/376).

36. The Commission cites Directive 2012/34 as the instrument which, in addition to defining the actors involved in rail traffic, makes it possible to ensure that railway undertakings have transparent and non-discriminatory access to railway infrastructure. The Commission draws particular attention to Chapter IV, Section 3, which deals with the allocation of infrastructure capacity and describes the manner in which conditions like those laid down in the second subparagraph of Article 5(1) of Directive 2004/17 should be stipulated.

37. The Commission asserts that, since the Trafikverket (Transport Authority, Sweden) approves the network statement, decides on the allocation of train paths and determines the working timetable, it sets the conditions relating to the use of the railway infrastructure. The fact that that authority must, so far as possible, meet the requests of interested parties in no way precludes that assertion.

B. The second question referred

38. The Konkurrensverket submits that a transport services network exists for the purposes of the second subparagraph of Article 5(1) of Directive 2004/17 where the movement of trains requires access to a technical network of limited capacity. The term 'operation' refers to the implementation in the strict sense of traffic on the railway network. [8]

39. SJ maintains that it is not in charge of railway infrastructure and that its activity is confined to providing transport services to the public who travel on that infrastructure. Accordingly, it is not involved in the provision or operation of the Swedish railway network, meaning that its activities do not fall within the scope of Directive 2004/17.

40. The Commission observes that the first subparagraph of Article 5(1) differentiates between the provision and operation of networks. Neither the first Procurement Directive (Directive 90/531/EEC) [9] nor Directive 93/38/EEC [10] used the term 'provision'. It was Directive 2004/17 which included that term in order to cover the management of the physical network and distinguish between the two activities, which are normally assigned to different operators, thereby ensuring that both activities fall within the scope of the directive.

41. The Commission submits that the 'operation of networks' covers the actual provision of rail transport, whereas the 'provision' of networks refers to the possibility of access to the network so that it can be used by a third party.

IV. Procedure before the Court of Justice

42. The order for reference was received by the Registry of the Court on 29 June 2017.

43. Written observations were lodged by the Konkurrensverket, SJ and the European Commission; all those parties attended the hearing held on 13 June 2018.

8 The Konkurrensverket relies on point 48 of the Opinion of Advocate General Mischo in *Concordia Bus Finland*, C-513/99, EU:C:2001:686, according to which 'to operate a network means to run it oneself, generally using one's own workforce and buses.'

9 Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

10 Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

V. Assessment

44. The parties to the proceedings and the referring court rely on Directive 2012/34 to delimit the dispute and *understand* the meaning of the terms used in Article 5(1) of Directive 2004/17.

45. I believe that that approach is correct. However, Directive 2012/34 of 21 November 2012 cannot, as such, apply *ratione temporis* to contracts such as those at issue in these proceedings, which were signed in January 2012. That argument is overturned by the fact that Directive 2012/34 'recast and merged into a single act in the interest of clarity'[11] other earlier directives which were in force when those contracts were concluded.

46. Moreover, it is common ground that SJ is a railway undertaking in accordance with the definition in Article 3(1) of Directive 2012/34, and that, as a company wholly owned by the State, it can be a contracting entity (specifically, a public undertaking, within the meaning of Article 2(1)(b) of Directive 2004/17).

47. However, the national court is unsure whether SJ's activity is covered by the description in Article 5(1) of Directive 2004/17. Only if the answer to that question is in the affirmative will Directive 2004/17 be applicable to SJ, since Article 2(2)(a) of the directive requires that contracting entities must pursue one of the activities referred to in Articles 3 to 7 thereof.

A. The first question referred

48. Article 5(1) of Directive 2004/17 creates a connection between the concept of transport network ('a network shall be considered to exist') and the provision of a service 'under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service'.

49. By its first question, the referring court seeks to clarify whether, by exercising its powers, the railway infrastructure manager, which is responsible for the allocation of train paths, in fact imposes conditions on railway undertakings which may affect matters such as routes to be served, the capacity to be made available or the frequency of the service.

50. The question relates to a situation in which railway undertakings, whether public or private, provide a transport service in a commercial manner[12] but are not themselves rail network managers. It is necessary, therefore, to examine first of all the definition of 'network', before going on to consider its effect on these proceedings.[13]

1. Management of the network and allocation of infrastructure capacity

51. 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.

11 Recital 1, *in fine*.

12 Recital 5 of Directive 2012/34 states that '[i]n order to render railway transport efficient and competitive with other modes of transport, Member States should ensure that railway undertakings have the status of independent operators behaving in a commercial manner and adapting to market needs.'

13 Although SJ mentions that there are more than 320 railway infrastructure managers in Sweden, it must be noted that the network at issue in these proceedings is a State network. That follows from Paragraph 2, point 9, of the förordningen (2010:185) med instruktion för Trafikverket (Ordinance (2010:185) laying down instructions for the Trafikverket [Swedish Transport Authority]), in accordance with which, if no other decision is adopted, the infrastructure manager for the rail network belonging to the Swedish State is the Trafikverket. The latter is the competent authority for the allocation of infrastructure in the main proceedings (paragraph 27 of the order for reference).

52. Naturally, rail infrastructure has a limited capacity[14] because it is a 'natural monopoly'[15] 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.[16] The concept of network is linked to railway infrastructure: the rail network is 'the entire railway infrastructure managed by an infrastructure manager'.[17]

53. Railway infrastructure (which is linked to the concept of train path)[18] 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.

54. 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.[19]

55. 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.[20] It must also prepare the draft working timetable and send it to the interested parties so that they may present their views.

56. The entirety of the decisions taken[21] 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. Annex VII, paragraph 2, of 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.

2. Application to the instant case

57. As I have observed, SJ maintains that, in Sweden, railway undertakings determine the routes on which their trains will travel, their timetables, the number of departures and the stopping places. SJ argues that if that capacity is limited, it is simply because that is dictated by the limited physical capacity of the infrastructure but not because the infrastructure manager is vested with the power to determine unilaterally the manner in which the service provided by railway undertakings is managed.

14 Recital 58 of Directive 2012/34 points out as much, stating that '[t]he charging and capacity-allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and, ultimately, the scarcity of capacity.'

15 Recital 71 of Directive 2012/34.

16 Those items 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, plant for transforming and carrying electric power for train haulage, and buildings used by the infrastructure department.

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

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

19 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)).

20 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 it has the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

21 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).

58. I do not find SJ's line of reasoning persuasive. 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. That also occurs on the Swedish State network.

59. The freedom of railway undertakings, like SJ, 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.

60. 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. [22]

61. 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.

62. Lastly, it is acceptable to impose public-service obligations on rail transport, and those may further affect the conditions governing access to the infrastructure. Directive 2012/34 provides for open access services and services under public service contracts to co-exist on the rail networks of the Member States, with the option for prioritised criteria to be set in cases where infrastructure is congested. [23]

63. 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. That is specifically what Article 5(1) of Directive 2004/17 requires in order for a transport network to be considered to exist.

B. The second question referred

64. The referring court seeks to ascertain the meaning of the expression 'the provision or operation of networks' used in Article 5(1) of Directive 2004/17. In particular, the referring court asks whether, because rail undertakings provide rail transport services, their activities are covered by one of those terms.

22 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.'

23 The second subparagraph of Article 47(4) of Directive 2012/34 refers to public-service requirements. In the same vein, recital 24 of Directive 2016/2370 confirms the option of Member States to limit the right of access 'where it would compromise the economic equilibrium of … public service contracts'.

65. The uncertainties relate to the 'operation of networks'. It appears to be common ground that the 'provision of networks' is a prerogative of the infrastructure manager, not the transport undertakings. I shall therefore focus on the interpretation of the term 'operation'.

66. The Commission's suggestion is thought-provoking in its clarity: the 'provision' of networks refers to the duties of the infrastructure manager, whereas the 'operation of networks' is an activity of railway undertakings. That is confirmed by the legislative evolution which led to the wording of Article 5(1) of Directive 2004/17: unlike the related articles of the earlier directives on the award of contracts in specific sectors,[24] which referred exclusively to the 'operation of networks', in 2004 the word 'provision [of those networks]' was added.

67. The Commission submits that the word 'provision' was inserted to cover the management of the physical network and to distinguish between two different activities: the 'operation of networks' covers the actual provision of rail transport services, which is performed by undertakings, whereas the 'provision' of networks refers to the possibility of accessing the network so that it can be used by a third party.

68. However, the Commission's argument encounters an obstacle: Directive 2012/34 clearly differentiates between 'the provision of transport services', on the one hand, and 'the operation of infrastructure', on the other.[25] The latter is the responsibility of the infrastructure manager, whereas the provision of transport services is performed by undertakings which are granted a licence for that purpose.

69. Directive 2012/34 refers more than once to the notion of 'operating rail transport services', which it identifies with the activities of entities which are licensed as railway undertakings and provide those services to the public. However, according to the terminology of that directive, the 'operation of the service' is not the same as the 'operation of infrastructure'.

70. Under Directive 2012/34, the 'operation of infrastructure' is exclusively the task of the infrastructure manager, which not only makes that infrastructure available to undertakings providing rail transport services but also maintains[26] and manages it, using the network to carry out the functions assigned to infrastructure managers under Article 7 of that directive.

71. That bipartite scheme was already apparent in the definitions contained in the original version of Directive 2012/34. The definition of 'network' in that directive[27] suggested that its operation was the responsibility of the infrastructure manager. Subsequent provisions have advanced on the same lines:

— First, Implementing Regulation 2015/909, applicable to the calculation of the operating costs defrayed through the infrastructure charge,[28] creates a link between railway undertakings and the operation of rail services (recital 18), as opposed to the infrastructure manager-operation of the network relationship referred to in recital 2 ('Infrastructure managers are under the obligation to operate networks').

24 Directive 90/531 and Directive 93/38.

25 Recital 6 of Directive 2012/34. Also in that connection, recital 26 states: 'a distinction should be made between the provision of transport services and the operation of service facilities'.

26 However, Article 7(1) allows Member States to 'assign to railway undertakings or any other body the responsibility for contributing to the development of the railway infrastructure, for example through investment, maintenance and funding.'

27 'The entire railway infrastructure managed by an infrastructure manager'.

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

— Second, the amendment of Directive 2012/34 in 2016 added new wording to Article 3(2), in accordance with which '"operation of the railway infrastructure" means train path allocation, traffic management and infrastructure charging'.[29] Those tasks are assigned to the infrastructure manager and not to transport undertakings.

72. In those circumstances, there are two options as regards interpretation. The first is to interpret Article 5(1) of Directive 2004/17 in the light of later legislation which specifically governs the single railway area (in particular, Directive 2012/34 and the amendments thereof).

73. If that approach is taken, it will be necessary to bring the term 'operation of [rail] networks', used in Article 5(1) of Directive 2004/17, into line with the term 'operation of [railway] infrastructure' used in Directive 2012/34. Operation of the rail service is not covered by that term if regard is had to the definition (now) provided by Article 3(2b) of Directive 2012/34, as amended by Directive 2016/2370. In other words, operation of the network does not encompass operation of the rail service, which relates to the provision of transport services by railway undertakings.

74. The second option favours an autonomous interpretation of the term 'operation of networks' in Article 5(1) of Directive 2004/17, which is unaffected by the legislative vicissitudes to which I referred above.[30] In line with that interpretation, there is nothing to preclude railway undertakings from also 'operating' the network, in the sense that they enjoy the benefit of it, take advantage of it or use it to provide rail transport.

75. A number of arguments tend to support that second option. First, there is the argument put forward by the Commission regarding the origins of Article 5(1) of Directive 2004/17, which, by introducing the 'provision of the network' as a separate concept distinct from the operation of the network, appears to extend the semantic scope of the latter expression.

76. Second, from a literal point of view, the different meanings of the word 'operation' include that which identifies it with the action of deriving benefit from something by using it. Undertakings providing rail services to travellers 'operate' the network on which their trains travel; that is, they use it or take advantage of it to obtain from it the benefit inherent in their public service activity.

77. Third, taking a systematic approach, it would make little sense if Article 5(1) of Directive 2004/17 were to exclude generally from its scope undertakings providing transport services, on the basis that that activity does not constitute operation of the network, only then to go on (Article 5(2)) to state straightaway that the directive is not to apply 'to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.' The reason that explicit statement is needed is because other undertakings which provide transport services are, in principle, covered by Directive 2004/17.

78. Fourth and finally, Directive 2004/17 includes 'the non-exhaustive lists of contracting entities within the meaning of this Directive [which] are contained in Annexes I to X.'[31] Thus, Annex IV, which concerns contracting entities in the field of rail services, lists the public undertakings in the different Member States which provide those services. In particular, as regards Sweden, such undertakings include 'public entities operating railway services in accordance with the järnvägslagen (2004:519) and järnvägsförordningen (2004:526).'[32]

29 Article 3(2b), inserted by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 352, p. 1).

30 The Commission adopted that position at the hearing.

31 Article 8 ('List of contracting entities') of Directive 2004/17.

32 Commission Decision of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (OJ 2008 L 349, p. 1).

79. The inclusion of that class of entity (to which SJ belongs) in Annex IV to Directive 2004/17 reveals that the EU legislature considers that the activities of undertakings which provide transport services to the public using the rail network come within the concept of the operation of that network, for the purposes of Article 5(1) of that directive, meaning that, where the other conditions are satisfied, the procurement procedures laid down in Directive 2004/17 must be used. [33]

80. In short, while recognising that there is a certain lack of consistency between the terms used in the provisions relating to the single European railway area (Directive 2012/34 and concordant provisions) and those used in Directive 2004/17, the interpretation of the phrase 'operation of networks' in Article 5(1) of the latter directive is not dependent on the terms defined in the former.

81. Finally, SJ has stressed that it is an undertaking which operates for strictly commercial ends, in competition with other rail operators, which, it submits, precludes it from being regarded as a contracting entity covered by the provisions of Directive 2004/17.

82. Directive 2004/17 provides for that situation in Article 30 ('Procedure for establishing whether a given activity is directly exposed to competition'). Suffice it to state that, in this case, there is no evidence that that procedure has been used, from which it follows that the application of that directive cannot be excluded.

VI. Conclusion

83. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden):

Article 5(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that:

– there is a 'network' when State-administered rail infrastructure is made available to undertakings providing transport services, under operating conditions laid down by the competent authority of that State, even if that authority is required to meet, so far as possible, all requests for the allocation of capacity submitted by those undertakings.

– the activity carried out by a public undertaking, consisting of the provision of public transport services using the rail network, constitutes the 'operation of networks' for the purposes of Directive 2004/17/EC.

33 Although in the judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, it did not address the issue raised in these proceedings, with which the reference for a preliminary ruling in that case was not concerned, the Court held that, in the circumstances of the case and subject to certain exceptions, the activity of a subsidiary wholly owned by the Lithuanian rail company, to which it provided the rail equipment necessary for it to carry on its rail transport activity, intended to meet needs in the general interest, was covered by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). In my Opinion in that case (C-567/15, EU:C:2017:319), I argued, in response to the submission of one of the parties which claimed that Directive 2004/17 was applicable, that, 'since Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of "bodies governed by public law", … the questions raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) can be answered without making a prior determination on the applicability of either directive.'