

COMMISSION IMPLEMENTING DECISION (EU) 2022/418**of 10 March 2022****on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to non-commercial bus transport services in the Austrian regions under the competence of the regional transport authorities Verkehrsverbund OstRegion (VOR) and Oberösterreich Verkehrsverbund (OÖVV)***(notified under document C(2022) 1352)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ⁽¹⁾ and in particular Article 35(3) thereof,

After consulting the Advisory Committee for public contracts,

Whereas:

1. FACTS**1.1. The request**

- (1) On 2 October 2020, the Permanent Representation of Austria submitted to the Commission, on behalf of Österreichische Postbus AG ('Postbus' or 'the applicant'), a request pursuant to Article 35(1) of Directive 2014/25/EU ('the request'). The request complies with formal requirements set out in Article 1(1) of and Annex I to Commission Implementing Decision (EU) 2016/1804 ⁽²⁾.
- (2) The applicant belongs to the ÖBB group (Austrian Federal Railways). 100 % of the shares in the applicant are held by ÖBB-Personenverkehr AG, which itself is a 100 % subsidiary of ÖBB-Holding AG. All the shares in ÖBB-Holding AG are held by the Republic of Austria. The applicant is active in the passenger bus transport sector.
- (3) The applicant is a contracting entity within the meaning of Article 4(2) of Directive 2014/25/EU and it carries out an activity relating to the operation of networks providing a service to the public in the field of transport by bus, as referred to in Article 11 of that Directive.
- (4) Scheduled bus services are periodic and publicly accessible passenger transport services, which are provided by passenger transport operators against payment within specific transport routes, enabling passengers to get on and off the bus at predetermined stations. If public authorities grant a financial compensation to an undertaking for performing these services, they are called non-commercial transport services.

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

⁽²⁾ Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 275, 12.10.2016, p. 39).

- (5) Non-commercial bus services give rise to the award of two different types of contracts. The first type is the award of public service contracts by competent transport authorities in compliance with the provisions of Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽³⁾, which is applicable to public passenger transport services by rail and by road. The second type is the award of contracts by the operator designated to execute such a public service contract, such as contracts with a cleaning company for the cleaning of buses or with a company providing buses for use by the operator.
- (6) The request only covers the second type of contracts, i.e. the award of contracts intended to enable the performance of non-commercial scheduled bus transport services in Austria, an activity relating to the operation of networks in accordance with Article 11 of Directive 2014/25/EU. The request does not cover the award of contracts for the pursuit of non-commercial bus services directly awarded to internal operators. It does not cover either the award by a regional transport authority (Verkehrsverbund) of a contract to operate bus transport services to a bus operator, as such awards fall under the scope of Regulation (EC) No 1370/2007.
- (7) The request was initially not accompanied by a reasoned position of the Bundeswettbewerbsbehörde (Austrian National Competition Authority, 'NCA'). In accordance with point 1(b) of Annex IV to Directive 2014/25/EU, considering that free access to the market cannot be presumed on the basis of Article 34(3), first subparagraph, of that Directive, the Commission is to adopt an Implementing Decision on the request within 130 working days. The initial deadline was suspended in accordance with point 2 of Annex IV to Directive 2014/25/EU. The Commission should adopt an Implementing Decision by 28 February 2022.
- (8) The Commission requested further information to the Austrian authorities on 11 November 2020. The Austrian authorities submitted information on 2 December 2020, 23 February 2021 and 23 March 2021. The submission of 23 March 2021 included a position of NCA, which analyses whether Article 34(1) of Directive 2014/25/EU applies to the activities concerned, in accordance with paragraphs 2 and 3 of that article.
- (9) On 19 October 2021, the applicant narrowed the geographic scope of the request for exemption to two parts of the Austrian territory, Vienna, Lower Austria and Burgenland (under the competence of the regional transport authority Verkehrsverbund Ost-Region (VOR)) and Upper Austria (under the competence of the regional transport authority Oberösterreich Verkehrsverbund (OÖVV)). The applicant provided additional information on 21 October and 8 November 2021.

2. LEGAL FRAMEWORK

- (10) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related 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, unless the activity is exempted pursuant to Article 34 of that Directive.
- (11) Pursuant to Article 34 of Directive 2014/25/EU, contracts intended to enable the performance of an activity to which that Directive applies are not to be subject to that Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted.
- (12) Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned ⁽⁴⁾. This assessment is, however, limited by the short deadlines applicable and by the need to rely on the information available to the Commission. That information originates either from already available sources or from the information obtained in the context of the application pursuant to Article 35 of Directive 2014/25/EU and— cannot be supplemented by more time consuming methods, including, in particular, public inquiries addressed to the economic operators concerned ⁽⁵⁾.

⁽³⁾ 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) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

⁽⁴⁾ Directive 2014/25/EU, recital 44.

⁽⁵⁾ *Ibid.*

- (13) Direct exposure to competition should be evaluated on the basis of various indicators, none of which is necessarily, on its own, decisive. In respect of the market concerned by this Decision, market shares constitute one criterion, which should be taken into account, along with other criteria, such as the existence of entry barriers or intermodal competition.

3. ASSESSMENT

- (14) The aim of this Decision is to establish whether the services concerned by the request are exposed to a level of competition (in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU) which ensures that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent and non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.
- (15) This Decision is based on the legal and factual situation as of November 2021 and on the information submitted by the applicant, the Austrian authorities, including the Austrian Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology ('BMK'), the NCA and the regional transport authorities, and the publicly available information.

3.1. Unrestricted access to the market

- (16) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a certain sector or a part of it. Regulation (EC) No 1370/2007 is applicable to public passenger transport services by rail and by road. Pursuant to article 5(1) of that Regulation, the award of public service contracts for public passenger transport services by bus in the form of service concessions contracts is to be awarded in accordance with the rules laid down in Regulation (EC) No 1370/2007 ⁽⁶⁾. These rules, set out in article 4 of the Regulation, entail, inter alia, a clear definition of the public service obligations with which the public service operator is to comply, the geographical areas concerned, or the duration of the contract. However, Regulation (EC) No 1370/2007 is not listed in Annex III to Directive 2014/25/EU. Consequently, the applicant must demonstrate that access to the market for the provision of non-commercial bus services is free *de facto* and *de jure*.
- (17) Other public service contracts for public transport by bus, which do not take the form of service concessions, are to be awarded in accordance with the public procurement rules transposing (inter alia) Directive 2014/25/EU.
- (18) The relevant national legislation is the Act on Scheduled Bus Services (Bundesgesetz über die linienmäßige Beförderung von Personen mit Kraftfahrzeugen (Kraftfahrlineiengesetz – KfllG)) ⁽⁷⁾ and the Act on Local and Regional Public Passenger Transport (Bundesgesetz über die Ordnung des öffentlichen Personennah- und Regionalverkehrs (Öffentlicher Personennah- und Regionalverkehrsgesetz 1999 – ÖPNRV-G 1999)) ⁽⁸⁾.
- (19) The KfllG applies to periodic and publicly accessible passenger transport services, which are provided by passenger transport operators against payment within specific transport routes, enabling passengers to get on and off the bus at predetermined stations. Concessions under the KfllG, which fall within the remit of Regulation (EC) No 1370/2007, are granted for specific routes. If public authorities grant a financial compensation for the discharging of public service obligations, such transport services are non-commercial transport services.

⁽⁶⁾ Article 5(1) of Regulation (EC) No 1370/2007 reads: 'Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives.'

⁽⁷⁾ Austrian Federal Gazette (BGBl.) I No 203/1999.

⁽⁸⁾ Austrian Federal Gazette (BGBl.) I No 204/1999.

- (20) The ÖPNRV-G regulates the organisational and financial aspects of the operation of local and regional public passenger transport services (rail and bus) as well as the structure and the area of responsibility of transport associations.
- (21) As far as *de jure* free access to the market of non-commercial bus services is concerned, both the KfLG and the ÖPNRV-G establish that the contracting authority has to choose the transport company in compliance with the public procurement rules that transpose Directive 2014/25/EU and with Regulation (EC) No 1370/2007.
- (22) Regulation (EC) No 1370/2007 and the Austrian legislation apply to the activities of the applicant. Although Regulation (EC) No 1370/2007 is not listed in Annex III to Directive 2014/25/EU, it provides for a regulatory framework which is liable to ensure appropriate competition on a case by case basis. Article 5(3) of Regulation (EC) No 1370/2007 mandates the award of public service contracts on the basis of a competitive tendering procedure, except in very specific cases (average annual value lower than EUR 1 000 000, annual provision of less than 300 000 kilometres of public passenger transport services or (immediate risk of) disruption of services). As a result, competition takes place when awarding the contracts for the operation of bus lines in the present case given that such contracts are awarded following open tenders in the two regions subject to the request, in compliance with Regulation (EC) No 1370/2007.
- (23) In view of the above, the Commission considers that the conditions of *de jure* free market access are met.
- (24) As far as *de facto* free access to the market of non-commercial bus transport services is concerned, the Commission notes that new market players have entered the market in recent years. For instance, three undertakings from other Member States than Austria entered the market in the two regions subject to the request successfully between 2016 and 2020.
- (25) According to the applicant, the two regional awarding authorities have increasingly used competitive tendering in the award of contracted bus services over the past years, as a result of the adoption of Regulation (EC) No 1370/2007. Regulation (EC) No 1370/2007 established that the award of public service contracts for transport by rail and by road shall comply with the principles established in its Article 5 as from 3 December 2019, thereby limiting strictly direct awards. By June 2021, the share of competitive tenders was 92 % for the region under the competence of VOR and 100 % for the region under the competence of OÖVV.
- (26) In their positions, BMK and NCA acknowledge the fact that access to the market in question is free *de jure* and *de facto*.
- (27) For the purposes of this Decision, the Commission concludes that access to the markets of non-commercial bus transport services on the respective territories of the regions under the competence of VOR and OÖVV should be considered *de jure* and *de facto* free within the meaning of Article 34 of Directive 2014/25/EU.

3.2. Competition assessment

3.2.1. Relevant product market definition

3.2.2. Product Market Definition

- (28) Bus transport services in Austria encompass the following: scheduled bus transport services, which are subject to KfLG, and non-scheduled bus transport services regulated under the Act on Non-Scheduled Bus Services – Gelegenheitsverkehrs-Gesetz (GelverkG).

- (29) The ÖPNRV-G as well as Regulation (EC) No 1073/2009 of the European Parliament and of the Council ⁽⁹⁾ distinguish between commercial and non-commercial bus transport services. According to Section 3(2) of ÖPNRV-G, transport services shall only be regarded as commercial transport services if public authorities grant no compensation. Wherever public authorities grant financial compensation, transport services are qualified as non-commercial.
- (30) When purchasing non-commercial transport services or making changes to an existing operating schedule, the contracting authority has to choose the transport company in compliance with the applicable provisions of public procurement law and Regulation (EC) No 1370/2007. In general non-commercial bus transport services are subject to compulsory tender procedures. Following the entry into force of Regulation (EC) No 1370/2007 on 7 December 2019, an increasing number of non-commercial bus transport services have been awarded in competitive tender procedures in Austria. The Commission's merger practice ⁽¹⁰⁾ confirms the view that commercial bus transport services and non-commercial public bus transport services constitute different product markets due to the difference in the nature of competition.
- (31) As regards the market for non-commercial bus transport services, competition between public bus transport operators takes place at the level of bidding for contracts, namely during the award of contracts to operate public transport bus services, and not afterwards on the market in relation to aspects such as price, capacity, frequency or other service features. Compared to commercial transport services, non-commercial bus transport operators usually have very little influence on basic dimensions of competition such as frequencies, fares or the comfort of passengers, as those features are set by the authority awarding the contract to provide the service. Non-commercial bus transport operators are obliged to provide their services in accordance with the contract concluded with the awarding authority and they cannot adapt their services to the passengers' needs, as commercial operators would normally do.
- (32) The applicant argued that non-commercial bus transport services provided by internal operators could constitute a separate relevant market within the market of non-commercial bus transport services for the following reasons:
- transport services provided by internal operators are not subject to compulsory tender procedures, as long as the requirements laid down in the relevant legislation (Article 5((2) of Regulation (EC) No 1370/2007, Article 10 of Directive 2014/24/EU of the European Parliament and of the Council ⁽¹¹⁾ or Article 28 or 29 of Directive 2014/25/EU) are met.
 - as long as the requirements of Regulation (EC) No 1370/2007 are met, the owner may compensate costs of the internal operator even if these costs are higher than costs incurred by competing companies.
 - the 'make or buy' decision might not solely be based on the costs of the internal operator in comparison with the expected result of a competitive tender. Municipal transport operators often have employees with special protection against dismissal and would have to bear their salary costs even if they made an unsuccessful bid for the public transport contract.
 - There have not yet been any tenders in Austria for transport services previously operated by internal operators. Internal operators themselves also conduct public tenders for subcontracts. In such cases, the successful tenderer becomes the subcontractor of the internal operator. For instance, the internal operator Wiener Linien GmbH & Co KG awards tenders to subcontractors for about 44 % of its bus transport services.
- (33) BMK confirmed ⁽¹²⁾ the applicant's view on the scope of the relevant product market.
- (34) The Commission accepts that internal operators belong to a separate market.

⁽⁹⁾ Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ L 300, 14.11.2009, p. 88).

⁽¹⁰⁾ Case COMP/M.5855 DB/Arriva of 11.8.2010 paragraphs 20 et seq., Case COMP/M.6818, Deutsche Bahn/Veolia of 30.4.2013, paragraph 19, Case COMP/M.6818, Deutsche Bahn/Veolia of 30.4.2013, paragraphs 25 et seq.

⁽¹¹⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁽¹²⁾ BMK's reply of 2 December 2020.

- (35) For the purposes of the assessment under this Decision and without prejudice to the application of competition law, the Commission considers that the relevant product market is the market for non-commercial bus transport services for passengers where competition occurs for the market.

3.2.3. *Geographic Market Definition*

- (36) The applicant states that the regulatory framework regarding bus transport services as well as the Austrian Federal Public Procurement Act apply consistently throughout Austria. Furthermore, bidders need to comply with further regulations to submit an offer, such as regulations regarding labour law or collective bargaining agreements, are applicable uniformly throughout Austria (personnel costs account for about 50 % of the overall costs of scheduled bus transport services). On the other hand, the applicant points to significant differences between regions due to the existence of regional transport associations responsible for bus transport.
- (37) BMK stated that the differences observed at regional level did not warrant a regional market definition.
- (38) In its position, the NCA explains that public bus transport services are tendered out by seven regional transport associations, which cover together the entire territory of Austria. Internal operators tender out subcontracts, for example in the Vienna metropolitan area. Each transport association tenders out only the services within its territory. The NCA concludes that the non-concurrent tendering and contracting of purely regional or local non-commercial bus transport services, and the fact that contract decisions are made by seven regionally active transport associations, all pursuing their own interests, tends to argue against a uniform national market.
- (39) In its merger practice, the Commission has defined the relevant geographic market for bus transport services as the market where the same regulatory framework applies to all public transport authorities ⁽¹³⁾.
- (40) The Commission observes that the responsibility for organising non-commercial bus services lies with the competent regional authorities (Verkehrsverbünde). Those authorities are in charge of designing the tenders, within the framework conditions set by the national applicable legislation (KfVG, GelverKG, ÖPNRV-G and the public procurement act BVerG 2018).
- (41) In both regions subject to the request, the respective competent regional transport authority and internal operators tender gross contracts ⁽¹⁴⁾ and the main bidders are the same.
- (42) In view of the above, for the purposes of the assessment under this Decision and without prejudice to the application of competition law, the Commission considers that the relevant geographic markets are, on the one hand, the region under the competence of VOR and, on the other, the region under the competence of OÖVV.

3.3. **Market analysis**

- (43) In Austria, existing contracts for non-commercial bus transport services have been awarded through competitive tenders or through direct award. A vast majority of such contracts were awarded following a tender procedure. Regulation (EC) No 1370/2007 had established a transition period until December 2019 for the award of contracts falling under its scope. The applicant claims that its decreasing market share within the two regions, as well as the high percentage of tendered contracts, the high number of bids and the high operator change ratio in both regions show that those markets are directly exposed to competition.

⁽¹³⁾ Case COMP/M.5855 DB/Arriva of 11.8.2010, paragraph 27.

⁽¹⁴⁾ Case COMP/M.6818, Deutsche Bahn/Veolia, decision of 30.4.2013, pt 14: 'For gross contracts, the operator bids for the full operating costs, and all revenue goes to the authority; with net contracts the operator will be granted all revenue and will bid only for the necessary difference between fare revenue and the amount needed to make the desired profit.'

- (44) According to BMK ⁽¹⁵⁾, where a competitive tendering procedure takes place, procurement by operators providing those services which have been put out to tender (for example the operation of bus routes or subcontracting services for the specific non-commercial transport service) should be excluded from the scope of Directive 2014/25/EU, because those operators are undoubtedly subject to competition on the basis of the specific procurement procedure.
- (45) The NCA argues on the contrary that the prevalence of certain factors (long contract duration, small volumes tendered, few active tenderers) tends to leave little scope for sustainable competition. It therefore considers, for the purposes of the question referred, that the weight of the argument points to insufficient competition.
- (46) In its analysis, the Commission takes account of several factors. The Commission does not share BMK's opinion that competitive tendering by itself is sufficient to demonstrate direct exposure to competition. While competitive tendering for non-commercial bus transport services is a prerequisite to competition on the market, the Commission considers that other factors have to be taken into account.
- (47) Market shares are an important aspect, but, given that the market of non-commercial bus transport services is subject to tenders or direct awards, the number of bidders and the success rate of different market players should also be taken into account.

3.3.1. *Market shares, number of bidders and the success rate*

- (48) All market shares calculations and indications related to the share of contracts tendered are based on information submitted by the applicant ⁽¹⁶⁾.

3.3.1.1. Eastern Austria (covering Vienna, Lower Austria and Burgenland)

- (49) As of 2021, non-commercial bus services in this region represent [100 to 110] million scheduled kilometres (skm) yearly. Excluding direct awards to internal operators ([approximately 20 million skm] for Wiener Linien and Wiener Neustadt), the relevant market represents [80 to 90] million skm per year. The main contracting authorities are Verkehrsverbund Ostregion GmbH (VOR) ([65 to 70] million skm) and Wiener Linien ([15 to 20] million skm).
- (50) As of November 2021, the market share of the applicant in Eastern Austria is [35 to 45 %] (it was [45 to 55]% in 2013, the year when open tenders started). Its main competitors have the following market shares: Dr Richard ([25 to 30 %]), Gschwindl ([10 to 15%]), Blaguss ([5 to 10%]), N-Bus ([5 to 10%]), Zuklin ([0 to 5%]) and Retter ([0 to 5%]).
- (51) In Eastern Austria, 92 % of existing contracts (in million skm) have been tendered as of June 2021.
- (52) Since 2018, 14 procurement procedures has taken place in the region, with 75 bids presented, resulting in an average number of 5,4 tenderers per procedure. Beyond the applicant, its major competitor, Dr Richard, has participated in 12 tenders, with a success rate of [...]%. The applicant's success rate is [...]%. For the majority of tender procedures, the winners were Postbus or Dr Richard.

3.3.1.2. Upper Austria

- (53) Non-commercial bus services in this region represent [35 to 45] million skm. Excluding direct awards to internal operators ([approximately 5 million] skm for Linz and Steyr), the relevant market represents [30 to 40] million skm per year in 2021. The main contracting authority is Oberösterreichische Verkehrsverbund-Org. GmbH Nfg. & Co KG (OÖVV) ([30 to 35] million skm).The, the urban bus transport services in Wels are tendered by EWW ([1 to 2] million skm).

⁽¹⁵⁾ BMK's reply of 2 December 2020.

⁽¹⁶⁾ Commission calculation based on Annex 3 to the position of NCA.

- (54) In 2021, the market share of the applicant in Upper Austria is [40 to 50]% (it was [45 to 55]% in 2020 and [60 to 70]% in 2013, the year when open tenders started). Due to the design of the tenders in Upper Austria, which favours small lots, small enterprises have been able to win five of the ten tenders recently organised. In total, the main competitors of Postbus in Upper Austria are Sabtours ([15 to 20]% of the market), Welser ([10 to 15]%), Stern&Hafferl ([5 to 10]%), Dr Richard ([5 to 10]%) and Leitner ([5 to 10]%).
- (55) In Upper Austria, 100 % of existing contracts (in million skm) have been tendered as of 2021. According to the regional authority, 21 procurement procedures have been organised since 2011, divided into 90 lots, with an average number of 5,2 tenderers per lot. Out of 90 lots, Postbus won [...] ([...])%.

3.3.2. Conclusion on competitive assessment

- (56) The applicant holds a rather high, but decreasing share of non-commercial bus transport services contracts in the regions subject to the request. Its market share has decreased since 2013 by almost [...] % in Eastern Austria and by around [...] % in Upper Austria.
- (57) The proportion of competitive tenders is very high in both regions, leading to respective proportions of tendered contracts of 92 % and 100 %.
- (58) The number of bidders per competitive tender is higher than the average number of bidders in the Union for public contracts, standing at 5,4 (Eastern Austria) and 5,2 (Upper Austria). While it is true that the applicant usually presents a bid in almost all tendering procedures independently of the location, there is still competition from other operators. In particular, Dr Richard is very active across both regions, while other operators are regularly bidding in the region where they are already active.
- (59) In general, contracts for non-commercial bus transport services in Austria are of long duration, around 6 to 10 years according to the applicant ⁽¹⁷⁾. This feature is inherent to the market, as regional transport authorities seek to avoid frequent complex tenders. While this may be detrimental to competition ⁽¹⁸⁾, it is counterbalanced by the fact that tenders by the respective regional transport authorities are mostly small lots, often lower than 1 million skm. The latter feature is an important element favouring market entry and, eventually, competition in both regions ⁽¹⁹⁾.
- (60) The NCA argues on the contrary that the prevalence of certain factors like long contract duration, small volumes tendered, few active tenderers, tends to leave little scope for sustainable competition. It therefore considers, for the purposes of the question referred, that the weight of the argument points to insufficient competition. It is important to note, however, that the NCA's conclusion considered the competition situation across the whole of Austria and that the NCA recognised very significant differences between the Verkehrsverbünde (regional transport associations). The factors mentioned in the NCA's position are significantly more relevant for other Austrian regions than those covered by the request. For instance, the rate of competitive tenders stood at only 30 % in Carinthia and 32 % in Tyrol in 2020 (against 92 % and 100 % in the region under the competence of VOR and in the region under the competence of OÖVV). The average number of bidders only reached 2,3 in Vorarlberg, as compared to more than five in the two regions subject to the request. While the market share of the applicant in Salzburg stood at [70 to 80]%, it was below 50 % in both regions subject to the request.
- (61) In view of the factors examined above, the Commission concludes that the activity of non-commercial bus transport services in the transport regions under the competence of VOR and OÖVV is directly exposed to competition within the meaning of Article 34(1) of Directive 2014/25/EU.

⁽¹⁷⁾ Application, p. 28.

⁽¹⁸⁾ See recital 15 of Regulation (EC) No 1370/2007.

⁽¹⁹⁾ Communication COM 2017/572 'Making Public Procurement work in and for Europe', in which the Commission argues that the first measure to improve SMEs' access to public procurement markets is the division of contracts into lots.

4. CONCLUSION

- (62) For the purposes of this Decision and without prejudice to the application of European Union competition law, the findings of the market analysis listed in recitals (43) to (55) should be taken as an indication of the fact that non-commercial bus transport services in the two Austrian transport regions under the competence of VOR and OÖVV are exposed to competition within the meaning of Article 34 of Directive 2014/25/EU. Consequently, it should be established that Directive 2014/25/EU should not apply to contracts intended to enable the pursuit of that activity in the two transport regions under the competence of VOR and OÖVV.
- (63) Directive 2014/25/EU should continue to apply to contracts awarded by contracting entities and intended to enable the provision of non-commercial bus transport services on the territory of the other transport regions not covered by this Decision.
- (64) This Decision is without prejudice to the application of the rules on competition and to other fields of Union law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or 102 of the Treaty on the Functioning of the European Union or under Council Regulation (EC) No 139/2004 ⁽²⁰⁾ as confirmed by the General Court ⁽²¹⁾,

HAS ADOPTED THIS DECISION:

Sole Article

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the provision of non-commercial bus transport services in the territory of the regions under the competence of Verkehrsverbund Ost-Region and the region under the competence of Oberösterreich Verkehrsverbund.

This Decision is addressed to the Republic of Austria.

Done at Brussels, 10 March 2022.

For the Commission
Thierry BRETON
Member of the Commission

⁽²⁰⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

⁽²¹⁾ Judgment of 27 April 2016, *Österreichische Post AG v. Commission*, T-463/14, EU:T:2016:243, paragraph 28. See also Directive 2014/25/EU, recital 44.