

COMMISSION IMPLEMENTING DECISION (EU) 2017/132**of 24 January 2017****concerning the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for provision of airport infrastructure for cargo in Austria***(notified under document C(2017) 260)***(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 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 ⁽¹⁾ and in particular Article 30(5) thereof,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 ⁽²⁾ and in particular Article 35(3) thereof,

Having regard to the request submitted by Flughafen Wien,

Whereas:

1. FACTS**1.1. The Request**

- (1) On 16 January 2015, the Commission received from Flughafen Wien (Vienna Airport, hereinafter referred to as 'the Applicant') a request pursuant to Article 30 of Directive 2004/17/EC (hereinafter referred to as 'the Request').
- (2) The Request concerned activities relating to the exploitation of a geographic area for the purpose of the provision of airport infrastructure on the territory of Austria ⁽³⁾.
- (3) The Request is accompanied, by an opinion of the independent authority competent for airport services in Austria, the Federal Ministry for Transport, Innovation and Technology (hereinafter referred to as 'BMVIT'), dated 22 December 2014. That opinion (hereinafter referred to as 'the Opinion') addresses the question as to whether there is free access to the market and whether the activities subject to the Request are directly exposed to competition.
- (4) In 2010, the Applicant first approached the Commission in order to discuss, informally, the possibilities for exemption from public procurement rules. The first exchanges of views were based on a draft request which was discussed during a meeting on 17 March 2010. That meeting was followed by an informal written list of comments and questions sent by the Commission to the Applicant on 12 April 2010.
- (5) On 26 September 2013, the Applicant submitted an updated draft Request. Following that submission, the Commission commented in writing (by letter dated 15 November 2013). The Applicant responded to the Commission letter, on 2 April 2014, and a further informal exchange of views took place in a meeting of 26 June 2014.

⁽¹⁾ OJ L 134, 30.4.2004, p. 1.

⁽²⁾ OJ L 94, 28.3.2014, p. 243.

⁽³⁾ Although the Applicant is Vienna airport, the Request concerns the activity of provision of airports in Austria, therefore all Austrian airports are covered by the request.

- (6) On 16 January 2015, the Applicant submitted formally the request for exemption.
- (7) On 5 February 2016, the Applicant withdrew the Request in so far as retail was concerned ⁽¹⁾.
- (8) Austrian public procurement law ⁽²⁾ allows contracting entities to submit requests under Article 30 of Directive 2004/17/EC.
- (9) VIE is as a contracting entity in line with Article 4(1)(b) of Directive 2014/25/EU, as it carries out an activity relating to the exploitation of a geographical area for the purpose of the provision of airports under Article 12 of Directive 2014/25/EU and operates on the basis of a special right in the meaning of Article 4(3) of Directive 2014/25/EU.
- (10) Following a first assessment, the Commission considered that, the Request did not include the necessary information to enable a proper assessment of the relevant criteria for the purposes of an exemption from public procurement rules.
- (11) On 27 February 2015, the Commission requested the Applicant to supplement the Request with the missing information and to provide empirical evidence in order to demonstrate the choice market definition, together with more reliable data on the competitive situation for each of the markets. The replies were transmitted by the Applicant, by emails of 4 and 15 September 2015. On 21 September 2015 and 23 October 2015 the Commission requested the Applicant to provide further clarifications to the reply of 15 September 2015. The Applicant's replies were received on 14 October 2015, and 5 February 2016. Given the fact that the replies had not been received within the deadline fixed by the Commission, the time-limit for taking a decision was suspended during the period between the expiry of deadline set in the request for information (13 March 2015), and the receipt of complete information (5 February 2016). A further extension of time was mutually agreed between the Parties. The new deadline for adoption was set for 29 July 2016.
- (12) In parallel, on 20 April 2015 the Commission requested additional information from the Austrian authorities. The replies were transmitted by the Austrian authorities, by emails of 3 July 2015.
- (13) A further exchange of correspondence took place in respect of the legal status of the Applicant as contracting entity. On 22 April and 19 May 2016, the Commission requested additional information from the Applicant. The Applicant replied on 4 May and 1 July 2016 respectively. Moreover, the Commission requested additional information on this subject from the Austrian Authorities on 11 July and 23 September 2016. The Austrian Authorities replied on 31 August and 30 September 2016 respectively.
- (14) On 5 July 2016, given that the need to obtain and analyse additional information, the deadline for adoption of a Commission Decision on this case was extended with the agreement of the parties, until 31 October 2016.
- (15) Given the fact that the replies to the request for information had not been received within the deadline fixed by the Commission, the time-limit for taking a decision was suspended during the period between the expiry of deadline set in the request for information (9 August 2016), and the receipt of complete information (31 August 2016), therefore the new deadline for adoption a Commission Decision became 23 November 2016.
- (16) On 8 November 2016, the Applicant withdrew the Request in so far as it extends to the provision of airport infrastructure for passenger traffic, ground handling, and parking. The Request was therefore up-held only in respect of provision of airport infrastructure for cargo. A new deadline for adoption of a Commission decision was mutually agreed by the parties on 18 November 2016. This deadline was set for 31 January 2017.

⁽¹⁾ Applicant's letter of 5 February 2016, p. 1.

⁽²⁾ Bundesvergabegesetz, Section 179(5).

- (17) On 23 September 2015, the International Air Transport Association — IATA, submitted a voluntary position paper on the assessment of the competition in the airport sector in Austria in relation to the request for exemption from the public procurement rules. The submission was based on the notice ⁽¹⁾ of opening the procedure in this case. The position paper focuses on the assessment of the provision of the air passenger international origin-destination services.

1.2. The airport sector in Austria

- (18) There are currently 6 commercial airports in Austria, namely Vienna Airport (hereinafter referred to by its IATA code, as 'VIE'), Graz Airport (hereinafter referred to as 'GRZ'), Innsbruck Airport (hereinafter referred to as 'INN'), Klagenfurt Airport (hereinafter referred to as 'KLU'), Linz Airport (hereinafter referred to as 'LNZ') and Salzburg Airport (hereinafter referred to as 'SZG').
- (19) The operator of VIE is a public limited company ⁽²⁾ which is listed at the Vienna Stock Exchange since 1992, while the operators of the other Austrian airports are all public limited companies.
- (20) The six Austrian commercial airports served a total of 26,3 million passengers in 2013 ⁽³⁾ and around [...] ⁽⁴⁾ tonnes of cargo per year ⁽⁵⁾.

2. LEGAL FRAMEWORK

- (21) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to provision of airport infrastructure, unless this activity is exempted pursuant to Article 34 of that Directive.
- (22) 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. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Union legislation opening a given sector or a part of it. That legislation is listed in Annex III to Directive 2014/25/EU. However for the provision of airport installations, that Annex does not list any relevant legislation liberalising this sector. Consequently, free access to the market cannot be presumed, and it has to be demonstrated *de facto* and *de jure*.
- (23) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, necessarily, *per se*, decisive. In respect of the markets concerned by this decision, the market shares constitute one criterion which should be taken into account. Given the characteristics of the markets concerned, further criteria could also be taken into account.
- (24) This Decision is without prejudice to the application of the rules on competition and 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 or Council Regulation (EC) No 139/2004 ⁽⁶⁾. This point was upheld also by the Court in a recent judgement ⁽⁷⁾.

⁽¹⁾ OJ C 93, 20.3.2015, p. 22.

⁽²⁾ VIE is ultimately owned in proportion of 40 % by regional authorities within the meaning of Article 2(1) of Directive 2004/17/EC, but VIE's legal standing as public undertaking, within the meaning of Article 2(1)(b) of Directive 2004/17/EC, was confirmed by the Austrian Federal Procurement Office (Ref. Bundesvergabeamt, N/0117-BVA/02/2009-24 and Bundesvergabeamt, N/0117-BVA/02/2009-EV8).

⁽³⁾ According to the study 'The Austrian Aviation sector in the context of business location Austria', June 2014, p. 3.

⁽⁴⁾ Confidential information

⁽⁵⁾ According to the information provided in Annex 7, the total cargo volumes were of 226 606 tonnes in 2010, 208 913 tonnes in 2011 and 188 261 in 2012.

⁽⁶⁾ 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).

⁽⁷⁾ Judgment of 27 April 2016, *Österreichische Post AG v. Commission*, T-463/14, ECLI:EU:T:2016:243, point 28.

- (25) It should be kept in mind that the aim of this Decision is to establish whether the services concerned by the Request are exposed to such a level of competition (in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU) which will ensure 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, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

3. ASSESSMENT

3.1. Free access to the market

- (26) In the present case, the relevant activity is the provision of airport infrastructure for cargo.
- (27) As regards the provision of airport infrastructure, there is no relevant Union legislation on the basis of which free access to the market can be presumed, therefore it is necessary to make the relevant assessment based on the existing case law of the Court of Justice pertaining to freedom of establishment under Article 49 TFEU.
- (28) According to the Applicant, the access to the market is not de jure restricted. In Austria, Section 71(1) of the *Luftfahrtgesetz* (LFG, Aviation Act) provides that an operator applying for a civil airport licence is entitled to receive a 'civil airport licence' if the plan to establish an airport is appropriate from a technical viewpoint and safe management can be expected, the operator is reliable, suitable and has sufficient financial resources, and there is no conflicting 'other public interest'. In this respect, according to Section 71(2) LFG, a planned public airport is presumed not to be in the public interest, if the following three conditions are simultaneously met: (i) the airport is less than 100 km away from an existing public airport; (ii) the airport is likely to undermine the transport functions of an existing airport; and (iii) the existing airport is able and willing to take over within 6 months the prospective duties of the planned airport.
- (29) It is pertinent to remind that it is settled case-law that a system of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Union law ⁽¹⁾. In order for a system of prior authorisation to be justified even though it derogates from the fundamental freedom to provide services, it must in any event be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily ⁽²⁾.
- (30) In addition, if the system of authorisation imposes conditions relating to the minimum distance between undertakings, then such a system may be considered justified, if it is generally appropriate to attaining the objective of ensuring that the provision of service to the public, such as the provision of airport infrastructure and related services, is reliable and of good quality ⁽³⁾. According to the case-law of the Court, the national legislation should be appropriate for ensuring attainment of the objective relied upon only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner ⁽⁴⁾.
- (31) In relation to the second criterion establishing a presumption of the absence of the public interest, namely the condition that the planned airport is likely to undermine the transport functions of an existing airport, the Applicant invokes a judgment in a case concerning the Austrian Code on Motor Transport Lines ⁽⁵⁾ (*Kraftfahrli-niengesetz*, KfLG) whereby the Supreme Austrian Administrative Court (VwGH) ruled that the second criterion should not be understood in a way that would shelter an existing undertaking from competition. However, according to the Supreme Austrian Administrative Court, even if the holder of a new concession may be obliged to tolerate competition to its business from other undertakings, this finds its limits where the existing concession

⁽¹⁾ Case C-157/99 *Smits and Peerbooms* [2001] ECLI:EU:C:2001:404, para. 90; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECLI:EU:C:2003:270, para. 84; Case C-372/04 *Watts* [2006] ECLI:EU:C:2006:325, para. 115. Para 70 is from the Opinion of the Advocate General, para. 115 is from the judgment.

⁽²⁾ Case C-205/99 *Analir and Others* [2001] ECLI:EU:C:2001:107, para. 38; Case C-372/04 *Watts* [2006] ECLI:EU:C:2006:325 para. 116.

⁽³⁾ Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECLI:EU:C:2010:300, para. 94.

⁽⁴⁾ See, for instance, Case C-169/07 *Hartlauer* [2009] ECLI:EU:C:2009:141, para. 55; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECLI:EU:C:2007:133 paras. 53 and 58.

⁽⁵⁾ Judgment of 25 March 2009, 2008/03/0090.

holder would suffer a loss of earnings that would manifestly call into question the economic operation of an existing route. Furthermore, according to the same Court, deterioration in the revenue-to-cost ratio which is merely transient in nature, be it due to seasonal fluctuations, transient external factors or investments in a route which the concession holder intends to amortise over a certain period of time, cannot justify a refusal to grant a new concession.

- (32) On the basis of the aforementioned, it appears that the second criterion has been construed by the Supreme Austrian Administrative Court as not intended to limit competition as such. It limits any room for arbitrary decision of the concession granting authority. In addition, it may be inferred from the judgment of the Supreme Austrian Administrative Court that a system of authorisations which sets out specific criteria for establishing a presumption of the absence of public interest in a new airport was created on the assumption that the new airport would provide services which are reliable and of good quality. The relevant Austrian legislation and the interpretation of the aforementioned second criterion by the Supreme Austrian Administrative Court seem to genuinely reflect a concern to attain the legislation's objectives in a consistent and systematic manner. Therefore, for the purposes of this decision, it may be concluded that the conditions for granting a licence to establish an airport in Austria meet the criteria of objectivity, non-discrimination and transparency, and, accordingly that access to the market for the provision of airport infrastructure may be considered to be *de jure* free.
- (33) As far as the assessment of free access to the market *de facto* is concerned, the Applicant claims that access is not restricted as new commercial airports are being established. The Applicant cites the Berlin Brandenburg airport and the Lublin airport as examples. According to the Applicant the Berlin Brandenburg airport, is regarded both by the Lufthansa group and by airberlin group as a concrete alternative to the Vienna airport. Furthermore, military airports can be adapted to operate as commercial airports, e.g. GRZ and LNZ in Austria. In addition, the Applicant claims that existing commercial airports may expand, e.g. the Frankfurt Hahn and the Weeze airports in Germany.
- (34) On the basis of the information submitted by the applicant, it is difficult to conclusively establish whether access to the market for establishing new airports is *de facto* restricted. When setting up a new airport, the potential entrant will need to make high capital investments, and hence there will be a significant risk of sunk costs involved which may deter potential entrants. However, it seems that these costs are part of normal commercial risks that entrants need to bear when deciding to establish a new airport. There is no information of existing factual barriers to entry in the market concerned apart from the normal commercial risk inherent in undertaking a major investment which concerns the provision of airport infrastructure. It is, therefore considered, for the purposes of this decision, that the access to the market is *de facto* free.

3.2. Competitive assessment — Market analysis

- (35) This section will analyse whether or not the second condition for exemption is met, namely that the activity covered by the request, and which satisfies the condition of free access to the market *de jure* and *de facto*, is directly exposed to competition. To this end, the relevant product and respective geographic market is defined, and on that basis, a market analysis is performed.

3.2.1. Product Market Definition

- (36) According to previous Commission decisions ⁽¹⁾ the following product markets were considered as relevant product markets for the purposes of application of the competition law of the Union to airlines and airports: (i) provision of airport infrastructure services (including the development, maintenance, use and provision of the runway facilities, taxiways and other airport structure, as well as the coordination and control of the activities performed on these infrastructures); (ii) provision (or contracting) of ground-handling services; and (iii) provision (or contracting) of associated commercial services (e.g. food and beverages, sale of advertising space) ⁽²⁾.

⁽¹⁾ M.7398 — *Mirael/Ferrovial/NDH1*, recital 19; M.786 — *Birmingham International Airport*, recital 15, M. 6732 — *Ferrovial/Qatar Holding/CDPQ/Baker Street/BAA*, recital 21; M. 5652 — *GIP/Gatwick Airport*, recital 21; M. 1035 — *Hochtief/Aer Rianta/Düsseldorf Airport* recital 11; M.2262 *Flughafen Berlin II* recital 13; and M.3823 — *MAG/Ferrovial Aeropuertos/Exeter Airport* recital 15.

⁽²⁾ Airport security services are generally not considered to be an economic activity, thus, competition rules would normally not apply (e.g. Commission decision of 2 May 2005 in case COMP/D3/38469, complaint relating to charges levied by AIA SA and the Olympic Fiel Company SA.).

- (37) Airport infrastructure services can be divided by the object of transportation as passenger traffic and those relating to cargo transportation as, apart from runways, passenger traffic and cargo transportation require different infrastructure.
- (38) Cargo is usually transported by trans-modal means of transport 'behind' and 'beyond' the origin and destination points. Moreover, unlike passengers, cargo may be routed with a higher number of stopovers. In addition, according to previous Commission decisions ⁽¹⁾ air cargo transport markets are inherently unidirectional due to differences in demand at each end of the route.
- (39) The Applicant agrees with the product market definition as established by Commission practice and structured the Request accordingly.
- (40) In view of the factors examined under recitals 36 to 39, for the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of competition rules or other fields of Union law, the relevant product market is the provision of airport infrastructure for cargo.

3.2.2. Geographic Market Definition and Competitive Assessment

- (41) This section is looking at the relevant geographic market definition corresponding to the product market defined, lists the applicant's arguments and provides Commission observations and conclusions thereof, and assesses the competitive situation.
- (42) According to the Applicant ⁽²⁾ the exact market definition for cargo can be left open, for the purposes of the Request. Moreover, the Applicant argues that the geographic market appears to be Europe wide.
- (43) While, the Commission found in earlier decisions ⁽³⁾ that the relevant market in intra-European routes of air cargo transport can be defined as European-wide and should include alternative modes of transport, notably road and train transport, it should be recalled that the product market for the purpose of the present decision is not air cargo transport, but provision of airport infrastructure for cargo.
- (44) For the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU, and without prejudice to competition law or any other field of Union law, the Commission considers that the exact geographical dimension of the relevant product market can be left open, as the Applicants' market share in the narrowest possible definition would still be low.
- (45) According to the information provided by the Applicant ⁽⁴⁾, on the assumption that the relevant geographic market is Europe wide, the market shares of VIE ⁽⁵⁾ in respect of cargo were [...] % in 2010, [...] % in 2011 and [...] % in 2012, while the other airports have market shares lower than 1 % all 3 years. On a more conservative approach when considering the geographic market encompasses only Lufthansa hubs, the market shares of VIE were of [...] % in 2010; [...] % in 2011 and [...] in 2012, while the other Austrian airports had less than 1 % in all 3 years. These factors should therefore be taken as an indication of direct exposure to competition in respect of this activity.

⁽¹⁾ M.5141 — KLM/Martinair, recital 38; M.5440 -Lufthansa/Austrian Airlines, recital 31.

⁽²⁾ Applicant's letter dated 4 September, page 19.

⁽³⁾ Case M.3280, *Air France/KLM*, para 36 dated 11 February 2004; Case M.5440, *Lufthansa/Austrian Airlines*, para 29 dated 28 August 2009; Case M.5747, *Iberia/British Airways*, para 41, dated 8 September 2010.

⁽⁴⁾ Annex 7 to the Request.

⁽⁵⁾ The market shares were calculated taking into account not all airports in Europe, but a smaller number of airports, which are most likely to exert a competitive pressure on VIE. These airports are: Amsterdam Airport Schiphol (AMS); Charles de Gaulle Airport (CDG); Dusseldorf Airport (DUS); Fiumicino Airport (FCO); Frankfurt Airport (FRA); Munich Airport (MUC); Milan Malpensa Airport (MXP); SZG; Berlin Tegel Airport (TXL) and Zurich Airport (ZRH).

- (46) For the purposes of this Decision and without prejudice to competition law, the factors listed in recital 45 should be taken as an indication of exposure to competition, of this activity in Austria. Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU does not apply to contracts intended to enable the pursuit of this activity in Austria.

4. CONCLUSIONS

- (47) In view of the factors examined in recitals 1 to 46, the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU is considered to be met in Austria in respect of provision of airport infrastructure for cargo.
- (48) Since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable those services to be carried out in Austria, nor when design contests are organised for the pursuit of such an activity in that country.
- (49) This Decision is based on the legal and factual situation as of January 2015 to November 2016 as it appears from the information submitted by the Applicant and by the Austrian Authorities. It may be revised, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation.
- (50) Since some services respect to provision of airport infrastructure to airlines (such as, airport infrastructure for passenger traffic, groundhandling, non-aeronautical services) continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 6 of that Directive. This means that, where a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both activities exempted from the application of Directive 2014/25/EU and activities not exempted therefrom, regard must be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support activities which are not exempted, the provisions of Directive 2014/25/EU are to be applied. Where it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the rules referred to in Article 6(3) of Directive 2014/25/EU ⁽¹⁾.
- (51) It is recalled that Article 16 of Directive 2014/23/EU of the European Parliament and of the Council ⁽²⁾ provides for an exemption from the application of that Directive for concessions awarded by contracting entities where, for the Member State in which the concessions are to be performed, it has been established in accordance to Article 34 of Directive 2014/25/EU that the activity is directly exposed to competition. Since it was concluded that the activity of provision of airport infrastructure to airlines for cargo transportation is subject to competition, concession contracts intended to enable the performance of those activities in the Republic of Austria will be excluded from the field of application of Directive 2014/23/EU.
- (52) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public contracts,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable provision of airport infrastructure for cargo to be carried out in Austria.

⁽¹⁾ The same material outcome would also result from the application of Article 9 of Directive 2004/17/EC.

⁽²⁾ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 24 January 2017.

For the Commission
Elżbieta BIEŃKOWSKA
Member of the Commission
