DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2020/1025

of 13 July 2020

on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to railway freight transport in Slovenia

(notified under document number C(2020) 4540)

(Only the Slovenian 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) On 19 September 2019, Slovenske železnice – Freight Transport d.o.o. ('the Applicant'), submitted to the Commission by letter a request pursuant to Article 35(1) of Directive 2014/25/EU ('the Request'). The request complies with Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ([2]).

(2) The Request concerns railway freight transport services, as referred to in Article 11 of Directive 2014/25/EU, provided by the Applicant in the territory of Slovenia. The services concerned are described as follows in the Request: the Applicant mainly operates rail freight services within Member States (in the territory of Slovenia) and international rail freight operations.

(3) The Request was accompanied by a reasoned and substantiated position adopted on 12 June 2019 by the Slovenian Competition Protection Agency ('AVK') that is competent in relation to the activities concerned. AVK is an independent national authority. AVK has thoroughly analysed the conditions for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of Article 34 of that Directive.

(4) The position of AVK relied on information-gathering through requests for information and questionnaires sent to licensed rail freight transport operators and to customers (enterprises purchasing such services, large manufacturers and logistics companies). AVK also requested information from the Slovenian regulatory body – Agency for Communication Networks and Services of Slovenia ('AKOS') and the Public Agency for Rail Transport.

(5) In accordance with point 1(a) of Annex IV to Directive 2014/25/EU, the implementing acts referred to in Article 35 of that Directive are to be adopted within 90 working days where free access to a given market is presumed on the basis of the first subparagraph of Article 34(3) of Directive 2014/25/EU. In accordance with the third paragraph of point 1 of Annex IV to Directive 2014/25/EU, the deadline for adoption of the implementing acts is to commence on the first working day following the date on which the Commission receives the request referred to in Article 35

([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 Article 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).

(1) of that Directive or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information. On 6 December 2019, the Commission requested additional information to the applicant. The Applicant replied on 17 December 2019. On 16 December 2019, the Commission requested additional information from the Slovenian authorities. The Slovenian authorities replied on 25 May 2020. The Applicant made additional submissions on 31 January 2020 and 18 March 2020.

2. **LEGAL FRAMEWORK**

(6) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to transport services within the meaning of Directive 2014/25/EU, unless the activity is exempted pursuant to Article 34 of that Directive.

(7) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which Directive 2014/25/EU applies are not to be subject to that Directive if, in the Member State in which the activity is carried out, it is directly exposed to competition on markets to which access is unrestricted. Direct exposure to competition is assessed on the basis of objective criteria, which may include the characteristics of the products or services concerned, the existence of alternative products or services considered to be substitutable on the supply side or demand side, the prices and the actual or potential presence of more than one supplier of the products or provider of the services in question.

3. **ASSESSMENT**

3.1. **Unrestricted access to the market**

(8) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it to competition. That legislation is listed in Annex III to Directive 2014/25/EU, which includes, as regards rail freight transport, Directive 2012/34/EU of the European Parliament and of the Council ([3]).

(9) As confirmed by AVK in its position, and on the basis of the information available to the Commission, Slovenia has transposed Directive 2012/34/EU into national law by means of an Act amending the Railway Transport Act ([4]) and a Decree on train path allocation, infrastructure charges and the performance regime in the public railway infrastructure ([5]). Access to the relevant market is therefore deemed not to be restricted in accordance with Article 34(3) of Directive 2014/25/EU.

3.2. **Direct exposure to competition**

(10) Direct exposure to competition should be evaluated based on various indicators, none of which is, *per se*, decisive. In respect of the markets concerned by this Decision, the market share of the main players on a given market constitutes one criterion, which should be taken into account. As the conditions vary for the different activities that are covered by the Request, the examination of the competitive situation should take into account the different situations in the relevant markets.

(11) 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 ([6]) as confirmed by the General Court ([7]).

([3]) Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32).

([4]) National transposition act: UL RS No 84/2015, 6 November 2015. The Railway Transport Act was further amended in 2018 (UL RS No 99/15 – official consolidated text, No 30/18).

([5]) UL RS No 44/2016, 24 June 2016. The Decree amending the Decree on train route allocation, infrastructure charges and the performance regime in the public railway infrastructure was adopted in 2019 (UL RS No 16/2019, 15 March 2019).

([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, EU:T:2016:243, paragraph 28.

(12) The aim of this Decision is to establish whether the activities concerned by the Request are exposed to a level of competition, on 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 by the Request 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.

(13) In this context, it is important to mention that, in the markets concerned, not all market players are subject to public procurement rules. Therefore, the companies which are not subject to those rules, when acting on those markets, would normally have the possibility to exert competitive pressure on the market players which are subject to public procurement rules. On the markets subject to the Request, only the Applicant is a contracting entity in the meaning of Article 4(1) of Directive 2014/25/EU and, hence, is subject to public procurement rules.

3.3. **Definition of the relevant market(s)**

(14) The Commission has held in previous decisions ([8]) that the rail freight transport market was the relevant market, but did not exclude that it could be segmented into domestic rail freight transport, international rail freight transport, rail transport in single wagons and rail transport in a complete train (also known as block train). In the Request, the Applicant takes the view that the relevant product markets are those four segments. However, the Applicant argues, in its submission of 31 January 2020, that the Commission should assess whether the competition from other modes of transport, in particular road transport, has an impact on the definition of the relevant market.

(15) In its position, AVK argues that rail freight transport services are not interchangeable with other forms of freight transport services and constitute a separate relevant market. The main reason is that road freight transport and rail freight transport are complementary services. Road freight transport is flexible, faster and best suited for small distances, whereas rail freight transport is best suited for large bulk shipments, in particular where large quantities of goods are being shipped at the same time.

(16) AVK notes that the proportion of domestic transport is negligible compared to international transport (standing between 2,67 % and 3,99 % of goods transported and 1,66 % to 2,62 % of work performed between 2014 and 2018). As customers do not distinguish between domestic and international rail freight transport, AVK sees no need to separate the two markets.

(17) Concerning rail transport in single wagons, AVK in point 36 of its position notes that the Applicant is the only company offering the service, which is significantly more complex and expensive than complete trains. Its competitors focus on block trains, which appear to be the most potentially lucrative business. Users of the service, such as manufacturers or logistics companies, indicated that their choice between single wagons and complete trains was depending on factors such as the type of goods, the quantity, required delivery time and price. AVK concludes that single wagon and block train services are interchangeable for the users and belong to the same market.

(18) Consequently, AVK finds that the relevant market is the railway freight transport market, whether it is domestic or international, and indifferently includes single wagons or block trains.

(19) In its submission of 31 January 2020, the Applicant argues that it is exposed to international competition in the rail freight services. It mentions a series of tenders where road freight carriers were competing with the Applicant, but fails to indicate the amounts at stake or whether road carriers have indeed won these tenders.

(20) The Commission has previously found that there are strong indications for a market for the transport of goods by rail distinct from other modes of transport ([9]). In light of this, despite the evidence brought forward by the Applicant concerning the impact of alternative modes of transport, such as road transport, the Commission sees no reason to depart from its previous practice. The Commission previously held that not all modes of transport are

([8]) Case COMP/M.4746 – Deutsche Bahn/English Welsh & Scottish Railway Holdings (EWS); Case COMP/M.5096 – RCA/MAV Cargo; Case COMP/M.5855 DB/Arriva.

([9]) Cases COMP/M.5855 DB/Arriva, paragraph 145; COMP/M.5480 – DB/PCC, paragraph 22; COMP/M.4746 Deutsche Bahn/EWS, paragraph 17; AT.39678 DB I, paragraph 32; AT.39813 Baltic Rail, paragraph 150.

substitutable to each other and it generally depends on the geographic location of the customer and the specific characteristics of the goods to be transported ([10]). The Commission therefore considers that the scope of the relevant market does not extend beyond that of railway freight.

3.4. **Definition of the relevant geographic market**

(21) In its previous practice, the Commission found that, in view of different technical and regulatory requirements, the markets for rail freight services were rather national in scope, but could become international on certain routes, which are part of a corridor ([11]). In certain particular situations, the Commission also found that a corridor-based approach might best reflect the competitive situation ([12]).

(22) As regards the geographic market, the Applicant takes the view that, due to the high level of liberalisation of rail freight, the relevant geographic market encompasses the entire territory of the Union. It argues that is also actively involved in the markets of neighbouring and other countries. It also notes that Slovenia is located at the intersection of two rail freight corridors (the Baltic-Adriatic and the Mediterranean corridor, while a third corridor is in construction). This enables the company *to* play an active role in the major part of the area covered by these corridors.

(23) In its submission of 31 January 2020, the Applicant refers to the poor condition of the Slovenian railway network. It also underlines the fact that the transport route through Slovenia runs through countries of the former Yugoslavia, not all of which are Member States, while the detour route north of Slovenia runs entirely in Member States, which means simplified procedures and thus a competitive advantage.

(24) In point 45 of its position, AVK notes that, while the Applicant has increased its presence in Austria and Croatia, the activity of the company is still overwhelmingly carried out in Slovenia (97,5 % of work performed in net-tonne kilometres or 98 % of its gross revenue from transport services). In addition, AVK argues that railway undertakings provide their services mainly within Slovenia through companies registered in Slovenia, with Slovenian train drivers and engines (which typically change at the border with another country). Based on these elements, AVK finds that the geographic market is national in scope.

(25) The Commission finds that there is no significant element to substantiate the Applicant's claim that the relevant market covers the entire Union or, alternatively, that the areas connected with the Baltic-Adriatic and Mediterranean rail freight corridors should be considered as a relevant geographic market. The Commission observes that technical and regulatory requirements are largely different between Member States. The European Court of Auditors, in its Special report No 8/2016 entitled 'Rail freight transport in the EU: still not on the right track', found that market liberalisation has achieved uneven progress in Member States and a single European railway area is still a long way from being achieved. The European Court of Auditors in its Special report concludes that the EU rail network remains a system of separate rail networks, which are not fully interoperable.

(26) For the purposes of the assessment under this Decision and without prejudice to competition law, the Commission considers the relevant geographic market to be national, covering the territory of Slovenia.

([10]) Case COMP/M.5855 DB Arriva, paragraph 144.

([11]) Rail Freight Corridors were established by Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight (OJ L 276, 20.10.2010, p. 22). The Regulation defines them as 'all designated railway lines, including railway ferry lines, on the territory of or between Member States, and, where appropriate, European third countries, linking two or more terminals, along a principal route and, where appropriate, diversionary routes and sections connecting them, including the railway infrastructure and its equipment and relevant rail services in accordance with Article 5 of Directive 2001/14/EC.'

([12]) Cases COMP/M.5877 – Geodis/Giraud, paragraphs 14, 15 and 16; COMP/M.5480 – Deutsche Bahn/PCC Logistics, paragraph 29; COMP/M.5096 – RCA/MAV Cargo, paragraph 21; M.3150 SNCF/Trenitalia, paragraph 29; M.4746 DB/EWS, paragraph 32; M.4786 DB/Transfesa, paragraph 58; M.5855 DB/Arriva, paragraph 162; AT.39678 DB I, paragraph 35; AT.39813 Baltic Rail, paragraph 158.

3.5. **Market analysis**

(27) Regarding the assessment whether the activity is directly exposed to competition, there are currently, according to AVK, 6 licences issued for rail freight transport in Slovenia. Beyond the Applicant, other competitors include in particular Rail Cargo Carrier (subsidiary of Austrian Railway Group ÖBB) and Adria Transport (subsidiary of Luka Koper and Austrian railway company GKB). According to available information from the Slovenian regulatory body AKOS, the market share of the Applicant and its main competitors on the market were as follows:

Railway undertaking	Year 2014 (%)	Year 2015 (%)	Year 2016 (%)	Year 2017 (%)	Year 2018 (%)
SŽ Freight Transport	90,06	87,90	86,96	86,72	85,21
Rail Cargo Carrier	6,16	7,32	8,72	8,31	8,27
Adria Transport	3,78	4,78	4,32	4,97	6,52

(28) AVK, in its position, takes the view that all rail freight transport undertakings are granted access to public railway infrastructure in Slovenia under fair, non-discriminatory and transparent conditions for the purpose of providing all types of freight transport service. Currently three undertakings provide services on the rail freight transport market, and four new undertakings are entering the market. The undertakings enjoy fair access to train paths. There do not appear to have been any unjustified problems in obtaining licences or safety certificates, using the public railway infrastructure or setting the user charge.

(29) AVK argues that, while the market share of the Applicant remains high, its two competitors have gradually increased theirs (from 0 % in 2008 to 4,68 % in 2009 and 8,27 % in 2018 for Rail Cargo Carrier, and from 0 % in 2008 to 2,27 % in 2009 and 6,52 % in 2018 for Adria Transport). AVK adds that Rail Cargo Carrier and Adria Transport focus on transportation of goods to and from the port of Koper, whereas the Applicant covers the whole market. The limited growth of the Applicant's competitors can also be attributed to limited resources and problems with hiring staff. The railway infrastructure of Slovenia also hinders the development of competition.

(30) AVK concludes in its position that the condition of unrestricted access to the market *de jure* and *de facto* has been met and that the activity of rail freight transport in Slovenia is directly exposed to competition.

(31) The Applicant underlines that market shares are only one indicator when analysing competitive pressure on the relevant market. Further criteria should also be taken into account such as the structure of the market concerned, the actual or potential competition from undertakings located in or out of the Union, the market position of the undertakings concerned as well as their economic and financial power.

(32) The Commission acknowledges the fact that access to the Slovenian railway freight market is deemed not to be restricted as Slovenia has implemented and applied the relevant provisions of Directive 2012/34/EU, as provided for in Article 34(3) of Directive 2014/25/EU.

(33) When it comes to analysing direct exposure to competition, market share is an important element. The fact that, after 12 years since the market liberalisation, the Applicant still enjoys a market share of 85,21 % in 2018, and that its decline has been slow since 2014, demonstrates that the Applicant's position on the market is extremely strong. According to the position of AVK, it can be expected that the market share of the Applicant will continue to fall, as customers tend to choose undertakings operating in several operating countries.

(34) According to the Sixth report on monitoring development of the rail market ([13]) from the Commission, the market share of the Applicant was the second highest of all incumbents across the Member States where competition was active in 2016. Between 2016 and 2018, the competitors' market share has only increased from 13,04 % to 14,79 %, so the competitive situation of the Slovenian railway freight market is mostly unchanged.

(35) Moreover, the Commission notes that although the market share of the Applicant has decreased in the last years, the Applicant has transported more freight, given the increase of the total market volume.

(36) Even if the alternative geographic market definition, by route within the territory of Slovenia ([14]), was taken, the Applicant still has extremely high market shares. According to the information provided in its letter of 16 December 2019 when asked to provide its market shares by route, the Applicant indicated its market share at the different Slovenian railway border crossings. These shares, for the first 10 months of 2019, vary between […] % (Sežana meja border crossing) and […] % (Nova Gorica meja).

(37) The Applicant and the Slovenian NCA AVK consider that, as the Applicant's market share is going to drop in the future, it is a further element to take into account to assess competitiveness of the market. However, the Commission has to base its assessment on the existing market situation and not on forecasts of the evolution of market conditions for the coming years. Consequently, the Commission considers that the condition of direct exposure to competition of the Slovenian rail freight market is not met.

(38) For the purposes of this Decision and without prejudice to competition law, it should be established that Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of the activity in Slovenia.

4. **CONCLUSION**

(39) This Decision is based on the legal and factual situation as of September 2019 to February 2020 as it appears from the information submitted by the Applicant, the AVK and the information publicly available,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable the rail freight transport services to be carried out on the territory of Slovenia.

Article 2

This Decision is addressed to the Republic of Slovenia.

Done at Brussels, 13 July 2020.

For the Commission
Thierry BRETON
Member of the Commission

([13]) COM(2019) 51 final of 6 February 2019.
([14]) For the purpose of this decision, routes are considered to be equivalent to border crossings.