

Commission Implementing Decision (EU) 2020/1193 of 2 July 2020
on the applicability of Article 34 of Directive 2014/25/EU of the
European Parliament and of the Council to railway passenger transport in
Sweden (Only the Swedish text is authentic) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2020/1193

of 2 July 2020

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

(Only the Swedish 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 procedures of 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 13 December 2019, SJ AB ('the applicant') submitted to the Commission 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 passenger transport in Sweden. In particular, the request covers railway passenger transport that constitutes an activity relating to the operation of networks in accordance with Article 11 of Directive 2014/25/EU, and it is not intended to cover procurement by regional public transport authorities, national public transport authorities or other authorities⁽³⁾.

(3) Section 24 of Chapter 3 of the Swedish Act on public procurement in the utilities sectors⁽⁴⁾ allows contracting entities to submit requests under Article 34 of Directive 2014/25/EU. The applicant is a contracting entity in accordance with Article 4(2) of Directive 2014/25/EU and it carries out an activity relating to operation of networks providing a service to the public in the field of transport by railway, within the meaning of Article 11 of that Directive.

- (4) The request was accompanied by reasoned and substantiated positions adopted by two independent national authorities that are competent in relation to the activities concerned – the Swedish Transport Agency and the Swedish Competition Authority. Those positions thoroughly analyse the condition for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of that Article. In accordance with point 1(b) of Annex IV to Directive 2014/25/EU, given that free access to the market cannot be presumed on the basis of the first subparagraph of Article 34(3) of that Directive, the Commission is to adopt an Implementing Decision on the request within 130 working days. The initial deadline expires on 3 July 2020⁽⁵⁾.
- (5) The Commission held two conference calls with the representatives of the applicant on 30 March 2020 and 29 May 2020 and the applicant made further submissions on 4 May and on 4 June 2020.

1.2. *THE APPLICANT*

- (6) The applicant is a public undertaking, owned 100 % by the Swedish State which was created in 2001 as one of the six divisions formed by the separation and corporatization of the former historic state owned railways company Affärsverket Statens Järnvägar. The applicant is active in the railway passenger transport sector.
- (7) In 2018, it reported 31,8 million journeys⁽⁶⁾ indicating that it operated daily 1200 departures from 284 stations⁽⁷⁾. It mainly operates within Sweden, but also runs trains to Oslo, Halden, Narvik and Copenhagen.
- (8) Applicant's business model has two pillars: providing commercial rail services under its own brand and providing rail services procured by regional and national public transport authorities under its own brand or that of the procuring authority⁽⁸⁾.
- (9) Rail travel in Sweden is increasing due to population growth and urbanisation, deregulation and internationalisation and increased environmental awareness. Growth in travel compared to the previous year, was 2 percent in 2018⁽⁹⁾ passenger-kilometres.

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. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned.⁽¹⁰⁾ This assessment is, however, limited by the short deadlines applicable and by the need to rely on the information available to the

Commission – either from already available sources or from the information obtained in the context of the application pursuant to Article 35 – which can not be supplemented by more time consuming methods, including, in particular, public inquiries addressed to the economic operators concerned⁽¹¹⁾.

(12) 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. For the domestic railway services, that Annex does not list any relevant legislation liberalising this sector. Consequently, pursuant to Article 34(3) of Directive 2014/25/EU, free access to the market cannot be presumed, and it must be demonstrated *de facto* and *de jure*.

(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 entry barriers or intermodal⁽¹²⁾ competition.

(14) 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⁽¹³⁾ as confirmed by the General Court⁽¹⁴⁾.

(15) 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. 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 given sector or a part of it. That legislation is listed in Annex III to Directive 2014/25/EU. As regards the rail services, that Annex lists Directive 2012/34/EU of the European Parliament and of the Council⁽¹⁵⁾ rail freight transport and for international rail passenger transport but contains no entry for national passenger transport. Consequently, it has to be demonstrated that access to the market is free *de facto* and *de jure*.

(17) Directive (EU) 2016/2370 of the European Parliament and of the Council⁽¹⁶⁾ extends the liberalisation of the rail sector to domestic rail.

- (18) Sweden has not yet fully transposed⁽¹⁷⁾ Directive (EU) 2016/2370 in its national law – the Railways Act⁽¹⁸⁾.
- (19) In January 2019 the Commission addressed a letter of formal notice to Sweden concerning infringement procedure 2019/0087 for partial transposition of Directive (EU) 2016/2370. On 17 May 2019, Sweden notified its 12th transposition measure for that Directive claiming that it had concluded the transposition. However, on 13 December 2019 (date of receipt of the request) and until June 2020, the case was pending.
- (20) In its position⁽¹⁹⁾ accompanying the request, the Swedish Transport Agency examined whether access to the relevant market is free *de facto* and *de jure*, and concluded that this is the case.
- (21) As far as free access *de jure* is concerned, Sweden has extended its national provisions transposing Directive 2012/34/EU so as to provide for free market access also to domestic rail passenger transport. This kind of transport operations is thus covered by the scope of the Swedish Railways Act [2004:519].
- (22) As specified by the Swedish Transport Agency in this context, the Railways Act requires infrastructure managers to allocation infrastructure capacity to railway undertakings in a competition-neutral and non-discriminatory manner.
- (23) Moreover, it follows from the Railway act (Chapter 6, Section 5) that the details of the available infrastructure and information on the terms for access to and use of the infrastructure and on the procedures and criteria for allocating infrastructure capacity are to be published in the network statement, in accordance with Article 27(2) of Directive 2012/34/EU.
- (24) It can be concluded that the conditions of free market access *de jure* are met.
- (25) As far as free access *de facto* is concerned, the Commission notes that competitors started to enter the Swedish railway market progressively already since 1990. Today, along with the applicant, there are other fifteen different companies active in the domestic railway passenger market.
- (26) Based on the legal analysis of the relevant national legislation and the position of the Swedish Transport Agency, the Commission concludes that, while some of the concerns identified in the infringement procedure 2019/0087 still persist, and without prejudice to that infringement procedure, access to the market is be considered *de jure* and *de facto* free on the territory of Sweden for the purposes of this Decision.

3.2. COMPETITIVE ASSESSMENT

3.2.1. PRODUCT MARKET DEFINITION

- (27) In previous merger decisional practice⁽²⁰⁾, the Commission has found that it may be appropriate to consider the market for railways passenger services under public service obligation (PSO), and the market for commercially operated railways passenger

services as distinct markets. This distinction is due to the fact that transport services operated under PSO contracts are characterised by competition for the market, meaning that rail undertakings are competing to be awarded the right to offer transport services on a given route, whereas commercial transport services are characterised by competition in the market, meaning that rail undertakings compete to attract passengers.

(28) For the purposes of this Decision a route is understood as encompassing all journeys between any of the stations along that route (i.e. all point-to-point combinations along that route). Likewise, a sub-route is understood as a segment of a route, encompassing all journeys between the stations along that sub-route (i.e. all possible point-to-point combinations along that sub-route). End-to-end travel is understood as a (point-to-point) journey between two end stations of a given route.

(29) The applicant proposes to make this distinction between these two markets as referred to in recital 27.

(30) The Swedish National Competition Authority (NCA) and the Swedish Transport Agency, in their respective positions on the request, also agree⁽²¹⁾ with this distinction.

3.2.1.1. ***The railway passenger services under PSO contracts***

(31) PSO contracts are awarded through competitive tender processes, or by means of direct award, through which a contracting entity awards a bidder a contract to operate railway passenger services in a certain area or on one or several specific routes.

(32) Regional and inter-regional PSO contracts are tendered by regional public transport authorities, while the Swedish Transport Administration manages the tender process for subsidized night trains between Stockholm and northern Sweden.

(33) The Swedish Transport Agency indicates⁽²²⁾ that the awarding entities provide the trains and are responsible for their maintenance.

(34) For the purposes of the assessment under this Decision and without prejudice to the application of competition law, the Commission considers that the first relevant market is the market for railway passenger services under a PSO, where competition occurs ‘for the market’.

3.2.1.2. ***The commercially operated railway passenger services***

(35) The applicant argues that, in Sweden, commercially operated railways passenger services can, in principle, be offered by any operator and cover any routes.

(36) The applicant claims that it faces competition from PSO operators on the commercially operated routes.

(37) However, to the understanding of the Commission, commercially operated railway passenger services are generally long-distance transport services. In those circumstances, it is likely that PSO operators providing long-distance railway passenger services compete with commercially operated railway passenger services, to attract