

Decision

of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC**COM(2011) 824 final; Council document 18008/11**

At its 892nd sitting on 10 February 2012 the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 EUZBLG (Act on cooperation between the Federal State and the *Länder* in matters relating to the European Union):

For general submission

1. The Bundesrat acknowledges that the proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC includes some valid lines of approach, such as the introduction of quality standards and minimum criteria for groundhandlers as well as the envisaged possibilities for the takeover of staff upon a change of provider. Overall, however, it does not consider the proposal in its present form to be appropriate for improving the quality and safety of groundhandling at EU airports. It believes that a further opening of the market for groundhandling services and the other measures provided for – except for setting quality standards and minimum training standards – entail significant operational risks for the groundhandling service providers and airport operators. The Bundesrat even fears that the proposal could constitute a step backwards as groundhandling service providers might engage in damaging price wars through wage dumping.

2. The Bundesrat therefore rejects the proposed Regulation as a whole for the following reasons and requests the German Government to defend this position at the European level.
3. The legal framework does not need to be changed. Instead, the existing framework of a Directive should be kept. In the Bundesrat's view, any need for changing the provisions on groundhandling services can be sufficiently met by amending the Directive and providing guidance. Moreover, this very option is mentioned in the explanatory memorandum to the proposed Regulation (in section 2.3 as "policy package 1").

Article 5 et seq. (Opening of the market)

4. The way that the suggested further opening of the market is spelled out and would be implemented is not convincing. The proposed approach essentially involves running needless risks.

First and foremost, it has to be noted that the groundhandling services provided at German airports are extremely reliable and safe. This is because sufficient competition has already been achieved at these airports, as can be seen from the market shares. Experience already shows that new competitors are having a hard time economically to secure an adequate market share, especially as groundhandling is an extremely labour-intensive service with personnel costs accounting for around 70 per cent of charges. If, as the proposal submitted provides, the number of groundhandling undertakings to be approved were to be raised through a binding legal requirement, regardless of the reality of the market, this would lead to unjustifiable competitive pressure at the various sites. It would put the competing service providers under enormous price pressure, which would have to focus entirely on cutting personnel costs and could lead to ruinous competition. It is to be feared that this likely development would come at the expense of staffing levels, thus jeopardising the reliability and safety of groundhandling. Moreover, no attempt whatever has been made, either in the legislative proposal or in the Member States, to assess the real impact.

5. The proposed Regulation only partially alleviates the difficulties already faced by the selection authority under current law. It fails to set out the chronological sequence of steps in the procedure or to make a special provision to end the

impractical suspensive effect of lawsuits. As a result, the proposed Regulation misses the opportunity to make significant improvements in the current legal framework with regard to the selection procedure.

6. The level of groundhandling prices, which was previously an award criterion, is not expressly stated as such in Article 9(3) of the proposed Regulation. Yet this criterion is of particular importance because it is only through a price element in their submissions that applicants can include appropriate and realistic price levels for the quality that they offer.
7. In cases where the competent authority takes the award decision after consulting the Airport Users' Committee and the managing body of the airport, as required under Article 9(1) of the proposed Regulation, the Bundesrat considers it advisable for the Users' Committee and the managing body to be granted access to applicants' submissions, as before. The expertise of the people working at the airport is vital for objective and appropriate decision-making.
8. Furthermore, in cases where the competent authority takes the award decision, the Bundesrat considers it important that the tender procedure can, as before, be run by the managing body of the airport, for reasons of administrative economy. This will not affect the objectivity of the selection decision.

Article 29 (Legal separation)

9. The Bundesrat points out that the proposed Regulation would have a significant impact on the business interests of the airport operator. It is therefore particularly opposed to the suggested legal separation between groundhandling services and centralised infrastructure activities, as well as to the subcontracting provisions.
10. According to Article 29(1), first subparagraph, of the proposed Regulation, managing bodies or managers/operators of the centralised infrastructure at airports with an annual traffic volume of not less than two million passengers or 50 000 tonnes of freight, must, when providing groundhandling services for third parties, set up a separate legal entity for this purpose. According to Article 29(1), second subparagraph, of the proposed Regulation, this legal entity must, in its legal form, its organisation and its decision-making, be

independent of any entity concerned with the management of the airport infrastructure.

The interpretation of the independence criterion is not clear. For example, there is concern that a strict interpretation of this rule on organisational separation may not be compatible with German company law (see Section 18(1), first sentence, of the Companies Act (*Aktiengesetz*)). The proposed approach goes far beyond the legal unbundling arrangements for the railways (Article 6 of Directive 91/440/EEC), energy (Article 14 of Directive 96/92/EC) and telecommunications (Article 11 of Directive 2002/19/EC). For instance, Article 6(2) of Directive 91/440/EEC provides for an option, while Article 29(1) of the proposed Regulation imposes a separation under company law. Moreover, the efforts made in the rail, energy and telecommunications sectors derive from directives and not from regulations. Directives are also the clearly preferred legal instrument with regard to the legal separation in groundhandling services, as they would allow for a harmonious national transposition into company law.

Article 30 (The airport as infrastructure manager)

11. Article 30 of the proposed Regulation lays down the obligation for airport operators to ensure that groundhandling is coordinated in a safe and crisis-proof way that complies with minimum quality standards (Article 32). It is certainly commendable that this is expressly mentioned. However, the proposed legislation goes far beyond what is legally enforceable. Indeed, there is no legal basis for airport operators to monitor the internal relationship between providers of groundhandling services and their staff. For example, the obligation for the airport operator to ensure that providers of groundhandling services comply with Regulation (EC) No 261/2004 is not legally sound as the obligations under Regulation (EC) No 261/2004 concern airlines only and not airports.

Article 34 (Training)

12. For the benefit of safety, the prevention of accidents and the protection of workers, the Bundesrat considers it essential that all staff receive relevant training appropriate to their duties. However, in the Bundesrat's view, the arrangement set out in Article 34 of the proposal, according to which every employee must attend 'at least two days' of training relevant for his tasks, is not sufficient or adequate to achieve the desired improvements in quality.

Article 35 (Subcontracting)

13. The arrangement pursued in Article 35 of the proposed Regulation on subcontracting is not understandable, as airport operators would not be allowed to engage in subcontracting, as opposed to third-party providers. This will clearly distort competition and contradicts the aim of the proposed Regulation to increase competition at the sites.

Workers' rights

14. The currently applicable Directive 96/67/EC, transposed in Germany by the Regulation on groundhandling services at airports (*Verordnung über Bodenabfertigungsdienste auf Flugplätzen*, BADV), has opened up the market for groundhandling services. Airport operators can call on self-handling airport users and service providers (currently at least one) to supply groundhandling services. This opening of the market has met with serious criticism, in particular from workers and trade unions, because it has led to precarious employment conditions and wage dumping in the groundhandling industry. The Commission has, *inter alia*, commissioned several studies into the social consequences of opening the market, the results of which are not conclusive. Under this proposal, the Commission leaves the Member States room for individually protecting the social rights of workers, as previously under Article 18 of Directive 96/67/EC. Germany has to use this possibility to prevent an increase in temporary work and wage dumping as well as a damaging form of competition waged on the basis of working conditions and labour costs only. The Bundesrat therefore requests the German Government to take all necessary measures to ensure and support the protection of workers' rights.

Transfer of undertakings

15. The proposed Regulation leaves it up to the Member States to regulate the transfer of staff (see the preliminary observations of the proposal). The Federal Republic of Germany regulated this issue in the BADV as part of the transposition of Directive 96/67/EC on groundhandling. However, the BADV had to be repealed due to an infringement procedure. There is a case to be made for regulating the transfer of staff on a common European basis. Indeed, the current national legal basis (Section 613a of the Civil Code (*Bürgerliches Gesetzbuch*, BGB) is not applicable in this regard.

16. In addition, the German Government should, in the further legislative process of

the Regulation, seek to ensure that the tendering authorities can immediately and directly, without further implementation measures by the Member States, use the possibility under Article 12 of the proposed Regulation for regulating the transfer of staff, in accordance with article 4(5) of Regulation (EC) No 1370/2007. This could help curb the further decline in working conditions in groundhandling services at airports.

Other

17. In addition, the Bundesrat refers to its opinion of 17 June 2011 (Bundesrat printed paper 179/11 (Decision), par. 36), in which it already spoke out against further liberalisation of groundhandling services.

Transmission of an opinion to the Commission

18. The Bundesrat will submit this opinion directly to the Commission.