

Case C-220/24

Request for a preliminary ruling

Date lodged:

22 March 2024

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

20 December 2021

Appellant:

Regia Autonomă Aeroportul Internațional „Avram Iancu” Cluj

Respondent:

Consiliul Concurenței

Intervener in support of the appellant:

Sindicatul Independent al Aeroportului Cluj

Intervener in support of the respondent:

Romanian Airport Services S.A.

[...]

CURTEA DE APEL BUCUREȘTI (Court of Appeal, Bucharest, Romania)

**SECȚIA A IX-A CONTENCIOS ADMINISTRATIV ȘI FISCAL (Ninth
Division for Administrative and Tax Matters)**

ORDER

Public hearing of 20 December 2021

[...]

The action has been brought by **REGIA AUTONOMĂ AEROPORTUL INTERNAȚIONAL „AVRAM IANCU” CLUJ**, the appellant, whose registered office is in the municipality of Cluj-Napoca [...] and which has an address for service in the municipality of Bucharest [...] at Mușat & Asociații S.p.a.r.l., represented by Paul Buta, lawyer, against the **CONSILIUL CONCURENȚEI** (‘Competition Council’, Romania), the respondent, whose registered office is in the municipality of Bucharest [...] – **interveners: SOCIETATEA ROMANIAN AIRPORT SERVICES S.A.**, with an address for service in the municipality of Bucharest [...] at Furtună și Asociații SPARL, and **SINDICATUL INDEPENDENT AL AEROPORTULUI CLUJ** (‘Independent Trade Union of Cluj Airport’, Romania), whose registered office is in the municipality of Cluj-Napoca [...] – seeking the ‘annulment of the acts regulating competition [...][, namely] the annulment of Ordinul președintelui Consiliului Concurenței (Decree of the President of the Competition Council) No 447 of 24 June 2016, the annulment of adresa Consiliului Concurenței (Competition Council Notice) No RG-4740 of 10 April 2018, and the annulment of Decizia Consiliului Concurenței (Competition Council Decision) No 74 of 8 October 2019’.

[...]

CURTEA (Court of Appeal, Bucharest, Romania),

On the request to make a reference to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union, and having regard to the recommendations of the Court of Justice of the European Union to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings [...], hereby rules as follows:

I Circumstances of the case

Regia Autonomă Aeroportul Internațional „Avram Iancu” Cluj (‘Regia’) has been a Romanian legal person under the direction of the Consiliul Județean Cluj (District Council of Cluj, Romania) (public supervisory authority) since 1997.

Regia’s main activity is services linked to air transport. In particular, it provides airport infrastructure (runways, lighting system, aircraft apron, terminals, and so forth) to passenger and/or cargo airlines and to air passengers. The amounts paid by the airlines for the use of the infrastructure constitute Regia’s main source of revenue.

Regia also provides access to airport infrastructure to certain undertakings that provide other services, such as groundhandling services.

At the same time, Regia itself provides certain categories of groundhandling services for airlines operating in Aeroportul Internațional „Avram Iancu” Cluj (Avram Iancu Cluj International Airport), as well as commercial services linked to

airport activity (rental of commercial premises for the provision of various activities, and so forth).

Avram Iancu Cluj International Airport falls within the category of Europe's regional airports and is the second largest airport in Romania in terms of passenger traffic.

Scheduled flights to 43 destinations in 20 countries in Europe and the Middle East depart from Avram Iancu Cluj International Airport, operated by the airlines Tarom, Wizz Air, Lufthansa, Lot Polish Airlines, Blue Air and Turkish Airlines (passenger transport), Air Est and Silver Air (freight).

In August 2016, Avram Iancu Cluj International Airport passed the threshold of one million (1 000 000) passengers recorded in a calendar year; by the end of 2016, a total of 1 880 319 passenger movements had been recorded.

Avram Iancu Cluj International Airport recorded two million passengers (2 000 000) for the first time on 21 September 2017. In 2017 there were a total of 2 688 731 passenger movements at Avram Iancu Cluj International Airport.

The investigation by the Competition Council was initiated in 2016, following a complaint by Romanian Airport Services S.A. against Regia.

Romanian Airport Services S.A. is a Romanian legal person that has provided groundhandling services at Romanian airports since 1994.

Romanian Airport Services S.A. asked to be allowed to provide groundhandling services at Avram Iancu Cluj International Airport.

Following the investigation that had started in 2016, the Competition Council issued Decision No 74 of 8 October 2019, finding that Regia had infringed Article 6(1) of Legea concurenței No 21/1996 (Competition Law No 21/1996; 'the Competition Law') and Article 102 of the Treaty on the Functioning of the European Union ('TFEU') through abuse of a dominant position in refusing to grant Romanian Airport Services S.A. access to the airport infrastructure necessary for the provision of groundhandling services at Avram Iancu Cluj International Airport between 11 September 2015 and 9 March 2017.

Pursuant to Article 55(1)(a) of the Competition Law, Decision No 74 of 8 October 2019 imposed a fine of RON 1 642 551.28 on Regia.

In the present case, entered in the docket to be heard before the Court of Appeal, Bucharest, Ninth Division for Administrative and Tax Matters [...], Regia, in its capacity as appellant, has sought, in proceedings between it and the Competition Council, the respondent, the annulment of Decision No 74 of 8 October 2019 ('Decision 74/2019').

In the course of the proceedings, the Independent Trade Union of Cluj Airport, Romania, submitted an application for leave to intervene in support of the appellant, Regia, while Romanian Airport Services S.A. submitted an application to intervene in support of the Competition Council, the respondent. Both applications were declared admissible, and therefore the Independent Trade Union of Cluj Airport and Romanian Airport Services S.A. became parties to the present proceedings as [...] interveners.

In the present case, Regia argued, inter alia, that Decision 74/2019 was adopted pursuant to a misinterpretation and misapplication of Directive 96/67/EC on access to the groundhandling market at Community airports, which led to an erroneous conclusion regarding the application, to the present case, of Article 6 of the Competition Law and Article 102 TFEU.

Regia argued that Directive 96/67/EC was applicable to it.

Regia claimed that, pursuant to Directive 96/67/EC, it enjoyed the right conferred by that directive, until the threshold of two million passengers was reached, to organise the groundhandling business at the airport taking into account only its own security, technical and commercial constraints and without being required to grant automatic access to the airport infrastructure to any applicant, under the conditions wished by the latter.

In that context, Regia pointed out that between 11 September 2015 and 9 March 2017 it had not reached the threshold of two million passengers.

Regia considered Directive 96/67/EC to be a more specific law that derogates from general competition law.

Arguing that the legal provisions on competition are general in nature, Regia maintained that Article 6 of the Competition Law and Article 102 TFEU cannot prevail over the specific provisions contained in Directive 96/67/EC, which are specifically aimed at regulating the gradual opening up to competition of the groundhandling market at EU airports, while observing rules on efficiency and safety.

The position of the respondent, the Competition Council, as regards the applicability of Directive 96/67/EC to the present dispute is set out in Decision 74/2019, in paragraph 420 et seq. The Competition Council submits, in essence, the following:

- Regia was not required, under Directive 96/67/EC, not to grant Romanian Airport Services S.A. access to the airport infrastructure necessary for the provision of groundhandling services;
- the possible application of the provisions of Directive 96/67/EC does not entail the disapplication of competition law provisions;

- the meaning that Regia ascribes to the process of liberalising access to groundhandling services for third parties is unclear, since the purpose of Regia's interpretation of the provisions of Directive 96/67/EC is to provide a legal justification for the following situation: several companies provided groundhandling services (self-handling or third-party handling) at Cluj airport, but, at the time of the request for access submitted by Romanian Airport Services S.A., Regia sought to rely on the provisions of Directive 96/67/EC;
- the interpretation of EU law as regards the legislation on groundhandling services and the relationship between that legislation and competition law must emanate from the institution empowered to interpret it, namely the Court of Justice of the European Union;
- the alleged absence of a legal obligation on Regia under the legislation on access to the groundhandling market is not an objective reason for refusing to grant Romanian Airport Services S.A. access to the airport infrastructure.

By its action, Regia claimed as follows:

- it was entitled under Directive 96/67/EC to organise the provision of groundhandling services at the airport, including with the assistance of other groundhandling operators, even before the threshold of two million passengers was reached, in so far as this was necessary and justified from a commercial point of view for those other operators as well;
- the fact that there were several groundhandling operators each providing specific services (fuel handling, aircraft repair, catering and a supplier for certain passenger and ramp handling services) does not logically justify the conclusion that another provider of groundhandling services would automatically have been necessary to overlap with them;
- the Competition Council's argument (based on the fact that there were already several suppliers of groundhandling services at Cluj airport in May 2015) is invalid and cannot be taken as a basis for denying the benefit of Regia's right under Directive 96/67/EC, namely that until the threshold of two million passengers has been reached, groundhandling at Cluj airport is organised without any obligation to open up or liberalise the market.

At the hearing of 7 June 2021, Regia asked the Court of Appeal, Bucharest, [...] to formulate and refer, pursuant to Article 267 TFEU, a question for a preliminary ruling [...] [*wording of the question referred for a preliminary ruling reproduced in the operative part*]

II The provisions of European Union law to be interpreted

Article 102 (ex Article 82 TEC) TFEU

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

Council Directive 96/67/EC on access to the groundhandling market at Community airports

‘Article 1

Scope

1. This Directive applies to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic in the following circumstances:

- (a) The provisions of Article 7(1) relating to categories of ground-handling services other than those referred to in Article 7(2) shall apply to any airport regardless of its volume of traffic as from 1 January 1998.*
- (b) The provisions relating to the categories of groundhandling services referred to in Article 7(2) shall apply as from 1 January 1998 to airports whose annual traffic is not less than 1 million passenger movements or 25 000 tonnes of freight.*
- (c) The provisions relating to the categories of groundhandling services referred to in Article 6 shall apply as from 1 January 1999 to airports:*

— whose annual traffic is not less than 3 million passenger movements or 75 000 tonnes of freight; or

— whose traffic has been not less than 2 million passenger movements or 50 000 tonnes of freight during the six-month period prior to 1 April or 1 October of the preceding year.

2. *Without prejudice to paragraph 1, the provisions of this Directive shall apply as from 1 January 2001 to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic, whose annual traffic is not less than 2 million passenger movements or 50 000 tonnes of freight.*

3. *Where an airport reaches one of the freight traffic thresholds referred to in this Article without reaching the corresponding passenger movement threshold, the provisions of this Directive shall not apply to categories of groundhandling services reserved exclusively for passengers.*

(...)'

'Article 6

Groundhandling for third parties

1. *Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.*

Member States shall have the right to require that suppliers of groundhandling services be established within the Community.

2. *Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:*

- *baggage handling,*
- *ramp handling,*
- *fuel and oil handling,*
- *freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.*

They may not, however, limit this number to fewer than two for each category of groundhandling service.

(...)'

'Article 7

Self-handling

1. *Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure the freedom to self-handle.*

2. *However, for the following categories of groundhandling services:*

- *baggage handling,*
- *ramp handling,*
- *fuel and oil handling,*
- *freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft,*

Member States may reserve the right to self-handle to no fewer than two airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria.'

III National law relied on

Legea concurenței nr. 21/1996, republicată (Competition Law No 21/1996, republished)

'Article 6

(1) Abuse by one or more undertakings of a dominant position on the Romanian market or in a substantial part of it shall be prohibited. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Whenever the Competition Council applies the provisions of paragraph 1, in so far as any abuse of a dominant position may affect trade between Member States, it shall also apply the provisions of Article 102 of the Treaty on the Functioning of the European Union.

(3) In the absence of proof to the contrary, it shall be presumed that one or more undertakings hold a dominant position if their relevant market share during the relevant period exceeds 40%.'

Ordinul Ministerului Transporturilor nr. 101 din 9 mai 2007 pentru aprobarea Reglementării aeronautice civile române privind accesul pe piața serviciilor de handling la sol pe aeroporturi (Decree of the Ministry of Transport No 101 of 9 May 2007 approving the Romanian Civil Aviation Regulations on access to the groundhandling market at airports) – RACR-APSH, edition 03/2007

‘Article 3

This Decree transposes the following provisions of Council Directive 96/67/EC on access to the groundhandling market at Community airports, published in the Official Journal of the European Communities [...] No 272/1996, as amended: Article 1(1) to (3), Articles 2 to 8, Article 9(1) to (3) and (6), Articles 11, 13, 14, 15 to 17, 19 to 21 and 23(1)’.

Annex I to Ordinul Ministerului Transporturilor nr. 101 din 9 mai 2007, [entitled] Reglementare aeronautică civilă română privind accesul pe piața serviciilor de handling la sol pe aeroporturi – RACR-APSH, ediția 03/2007 (Decree of the Ministry of Transport No 101 of 9 May 2007, [entitled] the Romanian Civil Aviation Regulations on access to the groundhandling market at airports) RACR-APSH, edition 03/2007

‘Article 1

Aim

(1) This Regulation applies to any airport located in the territory of Romania and open to commercial traffic in the following circumstances:

(a) the provisions relating to the categories of groundhandling services referred to in Article 7(1) other than those referred to in Article 7(2) shall apply to any airport regardless of its volume of traffic;

(b) the provisions relating to the categories of groundhandling services referred to in Article 7(2) shall apply to airports recording annual traffic of more than 1 million passengers or 25 000 tonnes of freight;

(c) the provisions relating to the categories of groundhandling services referred to in Article 6 shall apply to airports whose annual traffic is more than 2 million passengers or 50 000 tonnes of freight.

(2) Where an airport reaches the freight traffic threshold referred to in this Article without reaching the corresponding passenger movement threshold, the provisions of this Regulation shall not apply the categories of groundhandling services reserved exclusively for passengers.

(3) The Ministry of Transport shall submit to the Commission, before 1 July each year, the data required to compile the list of airports in Romania referred to in this Article.’

‘Article 6

Groundhandling for third parties

(1) *Airports shall take the necessary measures to ensure free access by suppliers of groundhandling services to the market for the provision of such services to third parties. With the approval of the Ministry of Transport, the airport may require suppliers of groundhandling services to be established within the Community.*

(2) *With the approval of the Ministry of Transport, the airport may limit the number of suppliers authorised to provide the following categories of groundhandling services:*

- *baggage handling;*
- *ramp handling;*
- *fuel and oil handling;*
- *freight and mail handling as regards the actual handling of freight and mail, whether incoming, outgoing and/or being transferred, between terminals and aircraft.*

The number of suppliers may not be limited to fewer than two for each groundhandling service.

(3) *In addition, at least one of the approved suppliers may not be directly or indirectly controlled by:*

- *the managing body of the airport;*
- *any airport user who has carried more than 25% of the passengers or freight at that airport during the year preceding that in which those suppliers were selected;*
- *a body controlled directly or indirectly by that airport managing body or by that airport user.*

(4) *Where pursuant to paragraph 2 the number of authorised suppliers is restricted, the airport may not prevent an airport user, to whom any part of the airport is allocated, from having, in respect of each category of groundhandling service subject to restriction, an effective choice between at least two suppliers of groundhandling services, under the conditions laid down in paragraphs 2 and 3’.*

‘Article 7

Self-handling

(1) *Airports shall take the necessary measures to ensure the freedom to self-handle.*

(2) *However, for the following categories of groundhandling services:*

- *baggage handling;*
- *ramp handling;*
- *fuel and oil handling;*
- *freight and mail handling as regards the actual handling of freight and mail, whether incoming, outgoing and/or being transferred, between terminals and aircraft,*

airports may, with the approval of the Ministry of Transport, reserve the right to self-handle to no fewer than two airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria.'

IV Reasons for the national court's request for a preliminary ruling

Ruling on the request for a reference for a preliminary ruling to be made, the Court of Appeal came to the conclusion that it was necessary, in order for a fair resolution of the case, to refer the question referred by the appellant, Regia, to the Court of Justice of the European Union for a preliminary ruling [...] *[text of the question for preliminary ruling reproduced in the operative part]*

[...] *[text of Article 267 TFEU]*

As regards the question referred, it concerns the interpretation of EU law and has a direct link with the subject matter of the main proceedings, it is useful and relevant to the outcome of the dispute, for the reasons set out below, and has not been interpreted by the Court of Justice of the European Union.

In the present case, the respondent, the Competition Council, argued that Directive 96/67/EC did not constitute a more specific provision of EU law than Article 102 TFEU.

The appellant, Regia, defended itself by arguing that Directive 96/67/EC constitutes a *lex specialis* in EU law and that that directive imposes an obligation to open access to the infrastructure necessary for the provision of groundhandling activities only for airports whose traffic exceeds two million passengers (and necessarily permits, *a contrario*, airports which have not reached that threshold to refuse third parties access to that infrastructure), whereas Article 102 TFEU penalises under certain conditions, under the *lex generalis*, the abuse of a dominant position within the internal market or in a substantial part of it (for example, by refusing to negotiate).

In conclusion, Regia argued that Directive 96/67/EC is a more specific law that derogates from the general law (competition law), invoking the principle ‘*lex specialis derogat legi generali*’.

Regia also argued that, for the activity carried out in Avram Iancu Cluj International Airport between 11 September 2015 and 9 March 2017, the provisions of Directive 96/67/EC are applicable and take precedence over the provisions of Article 102 TFEU, in addition to the fact that Competition Council Decision No 74/2019 was adopted in breach of the provisions of Directive 96/67/EC.

In those circumstances, the Court of Appeal, taking the view that a fair resolution of the dispute also requires a correct interpretation of the rules of EU law applicable in the present case, beyond all reasonable doubt, concluded that it was necessary to refer to the Court of Justice of the European Union a question for a preliminary ruling on the interpretation of the provisions of Directive 96/67/EC on access to the groundhandling market at Community airports, and in particular Articles 1, 6 and 7 of that directive, read in conjunction with Article 102 TFEU.

In the present case, the Court of Appeal considers that the conditions of Article 267 TFEU are satisfied [...]. [Moreover, the Court of Justice] has not adopted a decision clarifying the relationship between the provisions of Directive 96/67/EC and the competition law provisions referred to in Article 102 TFEU.

V The subject matter of the reference for a preliminary ruling

Consequently, in the light of all the foregoing considerations, the Court of Appeal upholds the request for a reference for a preliminary ruling to be made to the Court of Justice of the European Union, sought by the appellant, Regia.

[...] *[wording of the question referred for a preliminary ruling reproduced in the operative part]*

[...] *[provisions relating to the stay of proceedings]*

ON THOSE GROUNDS,

IN THE NAME OF THE LAW,

IT IS ORDERED THAT

[...]

Pursuant to [the second paragraph of] Article 267 in conjunction with [the first paragraph of] Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice is hereby requested to give a preliminary ruling on the following question: [‘]Must the provisions of Directive 96/67/EC on access to the

groundhandling market at Community airports, in particular Articles 1, 6 and 7 thereof, be regarded as precluding the application of Article 102 TFEU – and of any other rule having the same content – in situations concerning a refusal of access to the airport infrastructure necessary for the provision of groundhandling services at [EU] airports which have not reached the threshold of two million passengers[']?

[...] *[provisions relating to the stay of proceedings]*

[...] *[national procedure]*

[...]

WORKING DOCUMENT