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Commission Implementing Decision of 2 April 2014 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2014) 2093) (Only the German text is authentic) (Text with EEA relevance) (2014/184/EU)

COMMISSION IMPLEMENTING DECISION

of 2 April 2014

exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document C(2014) 2093)

(Only the German text is authentic)

(Text with EEA relevance)

(2014/184/EU)

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) and (6) thereof,

Whereas:

I. FACTS

- (1) On 1 October 2013, Österreichische Post AG (hereinafter referred to as 'Austrian Post') transmitted to the Commission, by e-mail, a request pursuant to Article 30(5) of Directive 2004/17/EC. In accordance with the first subparagraph of Article 30(5) of that Directive, the Commission informed the Austrian authorities thereof by letter of 18 October 2013. The Commission requested additional information from the Austrian authorities by e-mail of 5 December 2013, and from the applicant by emails of 4 November 2013, 28 November 2013, 10 January 2014 and 13 January 2014. Additional information was received from the Austrian authorities by e-mail of 18 December 2013, and from the applicant by e-mails of 8 November 2013, 2 December 2013 and 14 January 2014 respectively.

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- (2) The request concerns certain postal services as well as certain services other than postal services, both provided by Austrian Post in the territory of Austria. The services concerned are described as follows in the request:
- (a) postal services for addressed letters between business customers (hereinafter referred to as ‘B2B’) and between business customers and private customers (hereinafter referred to as ‘B2C’) on a national level (‘domestic’ and ‘inbound’);
 - (b) postal services for addressed letters between private customers (hereinafter referred to as ‘C2C’) and between private customers and business customers (hereinafter referred to as ‘C2B’) on a national level (‘domestic’ and ‘inbound’);
 - (c) postal services for addressed international (‘outbound’) letters B2B and B2C (hereinafter referred to as ‘B2X’) as well as C2B and C2C (hereinafter referred to as ‘C2X’);
 - (d) postal services for addressed advertising letters on a national and international level;
 - (e) postal services for non-addressed advertising letters, on a national and international level;
 - (f) postal services for addressed and unaddressed newspapers;
 - (g) management services for mailrooms;
 - (h) value-added services linked with electronic media and provided entirely by such media;
 - (i) philately — special postage stamps;
 - (j) financial services.

II. LEGAL FRAMEWORK

- (3) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which Directive 2004/17/EC applies shall not be subject to that Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition in 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 XI to Directive 2004/17/EC, which, for the postal sector, refers to Directive 97/67/EC of the European Parliament and of the Council⁽²⁾.

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- (4) Austria has implemented and applied Directive 97/67/EC as amended by Directive 2002/39/EC of the European Parliament and of the Council⁽³⁾ and Directive 2008/6/EC of the European Parliament and of the Council⁽⁴⁾. None of the services concerned by the present request were reserved at the time of the request. As Austria has reached the level of market opening provided for under the legislation listed in Annex XI to Directive 2004/17/EC, access to the market should be deemed not to be restricted in accordance with the first subparagraph of Article 30(3) of that Directive.
- (5) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, 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. Another criterion could be the degree of concentration in those markets. As the conditions vary for the different activities that are concerned by this Decision, the examination of the competitive situation should take into account the different situations in different markets.
- (6) Although a narrower or a broader market definition might be envisaged in certain cases, the precise definition of the relevant market can be left open for the purposes of this Decision to the extent that the result of the analysis remains the same whether it is based on a narrow or a broad definition.
- (7) This Decision is without prejudice to the application of the rules on competition. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 30 of Directive 2004/17/EC are not necessarily identical to those used to perform an assessment under Articles 101 or 102 of the Treaty or Council Regulation (EC) No 139/2004⁽⁵⁾.

III. ASSESSMENT

- (8) 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 30 of Directive 2004/17/EC) which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, 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.
- (9) In this context, it should be recalled that the product markets defined are generally characterised by the presence of several operators. However, according to the available information, out of those operators, only the Austrian Post is a contracting entity within the meaning of Directive 2004/17/EC. The procurement of Austrian Post's competitors, for the purpose of carrying out the activities concerned by this Decision is not subject to the

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provisions of Directive 2004/17/EC. Consequently, for the purposes of this Decision and without prejudice to competition law, the market analysis will not focus on the general degree of competition in a given market, but will assess whether or not the activities of Austrian Post are exposed to competition in markets to which access is not restricted.

- (10) In its practice⁽⁶⁾, the Commission has taken the view that the markets for mail delivery services and any segments thereof are national in scope. This segmentation is mainly based on the fact that such services are provided at national level. The applicant's position is in line with that Commission practice.
- (11) Given that, in the case of mail delivery services, there are no indications of a wider or smaller geographical scope of the market, for the purposes of evaluating whether the conditions laid down in Article 30(1) of Directive 2004/17/EC are fulfilled, and without prejudice to competition law, the relevant geographic market is considered to be the territory of Austria.
- (12) As regards other services than postal services, which are subject to this request, the applicant considers that the markets are national in scope. As the services concerned by the request are domestic services, for the purposes of this Decision, and without prejudice to competition law, the relevant geographic market is considered to be the territory of Austria.
- (13) The Commission has held in its previous practice that the market for mail delivery services can be segmented as follows:
- (a) domestic and cross-border mail⁽⁷⁾;
 - (b) inbound cross-border mail services and outbound cross border mail services⁽⁸⁾;
 - (c) business mail and mail for private consumers⁽⁹⁾;
 - (d) addressed and unaddressed mail⁽¹⁰⁾.

Postal services for addressed letters B2X on a national level ('domestic' and 'inbound')

- (14) According to the request, the product market for postal services for addressed letters B2X is made up mainly of transactional mail and advertising mail. Transactional mail is defined as communication between companies or between companies and individuals, related to ongoing contracts/provisions of goods and services. Examples of transactional mail include invoices sent by utilities, payment forms, monthly account statements sent by banks, etc. In Austria 74 % of all transactional mail is made of invoices or financial statements⁽¹¹⁾. Invoices can be transmitted to their recipients electronically (e-invoicing) or by postal delivery.
- (15) The applicant argues that the delivery mode of business mail is technologically neutral meaning that both modes of delivery — electronic and

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postal — belong to the same relevant market. This assertion is not in line with the Commission precedents.

- (16) Having due regard to the current legal and factual situation in Austria, the Austrian authorities were invited⁽¹²⁾ to express their views with regard to the substitution between electronic and postal delivery and more precisely on the definition of the relevant product market. The Austrian authorities could not provide additional information⁽¹³⁾ to support the applicant's assertions.
- (17) It should be noted that according to Union competition rules, substitutability should be analysed, inter alia, on the basis of product characteristics, prices and intended use.
- (18) The applicant argues that internet and broadband penetration is very high in Austria which allows for substitution of postal delivery by electronic means of communication. However, in order to be able to send and/or to receive for instance an electronic invoice which allows for an automated processing, some additional infrastructure may be required, particularly in the case of B2B e-invoices. Such infrastructure may imply the use of an external service provider or of a special internal application⁽¹⁴⁾, the use of an electronic signature, etc. Furthermore, according to information available to the Commission, the use of e-invoicing could be associated with a range of value added services (e.g. it allows for automated processing, allows for financing of the payment by third parties — the so-called supply chain financing, etc.) and benefits (e.g. reduced cost both for sender and for the receiver, reduce processing and payment time, reduced archiving costs, allows for payment of discounts if e-invoicing is used instead of paper invoices, etc.). In view of the above, it appears that the characteristics and intended use of paper-based invoices and of e-invoices differ significantly.
- (19) As regards e-invoicing, the Commission notes that, starting January 2014, the e-invoicing became mandatory *de jure* at federal level in business to government relations. In this case, the substitutability issue is not relevant as the senders do not have the possibility to choose postal delivery. In addition, other similar situations may be found, where e-invoices are made mandatory *de facto* following a large customer's or a large supplier's request⁽¹⁵⁾.
- (20) The applicant performed a hypothetical monopolist test analysis using survey data collected from 451 Austrian firms. The survey included a set of indirect questions aimed at eliciting the preferences for paper and electronic mail using conjoint analysis techniques. The results would imply that a [... %]⁽¹⁶⁾ increase in postage price would decrease demand for sending letters by [... %]. Although those results would imply that both paper and electronic mail belong to the same relevant market, there are some technical aspects of the design of the survey that cast doubts on the validity of the results. For instance, the set of characteristics to define the products is chosen in a way that could induce some bias in favour of electronic means of communication. The

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controversial assumptions do not seem to be used in the relevant economic literature applying the conjoint analysis technique and it is not possible to measure their impact on the estimated decrease of [... %].

- (21) The applicant also provided graphs⁽¹⁷⁾ of the evolution of quantities and prices⁽¹⁸⁾ that suggested much smaller sensitivity of quantities to prices than the one reported in the survey analysis. In order to clarify this apparent contradiction, the applicant was asked to provide the real data used to produce the graphs and to quantify the sensitivity of demand. The sensitivity of demand calculated by the applicant using the real data ranged between [... %] and [... %], depending on the technique used. Nevertheless, the applicant did not use the standard econometric analysis⁽¹⁹⁾ to produce those results. The preliminary results of a separate analysis conducted by our services using the same data set and standard econometric techniques for demand estimation in the economics literature suggest that the sensitivity of quantities to price changes could be as low as [... %].
- (22) Therefore, there is not robust and conclusive evidence that electronic and postal delivery are actual substitutes.
- (23) Customers, both business and private customers, who cannot or who are not willing to switch to electronic communication will remain as a segmented, captured market that will presumably only be served by the applicant. Austrian Post currently holds a large majority of the market for paper mail⁽²⁰⁾. The fixed costs of entry and operation of the network required to deliver the service can be seen as a barrier to entry and to competition. This position of Austrian Post is not likely to be contested in a future shrinking market situation, where potential entrants could expect, as compared to current market conditions, to have even more difficulties in making a profit given the amount of fixed costs to recover. In that virtually monopolistic situation, it cannot be assumed that the national incumbent would have strong incentives or constraints that would force it to behave competitively in the procurement of its inputs.
- (24) Austrian Post would be able to pass the cost increases on to the customers⁽²¹⁾ who, given their intrinsic preference for postal delivery, would have no other choice than assuming the price increase. For the same reason, the clearly dominant position of Austrian Post does not guarantee that potential cost decreases will be passed on to customers.
- (25) The applicant's assertion that electronic and postal delivery belong to the same relevant market, therefore cannot be accepted.
- (26) While a main effect of the increasing use of electronic means of communication is the reduction of the overall size of the letters market, it cannot be concluded that electronic communication introduced direct competition within the market of postal delivery.

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- (27) Further distinction could be also envisaged on the basis of the type of consignees: within the B2X segment, a distinction between deliveries to businesses (B2B) and to customers (B2C) since B2C delivery requires a denser network than B2B deliveries.
- (28) Nevertheless, it appears that in both scenarios (if B2B and B2C are considered two separate markets or only one market B2X) the result of the assessment of the competitive situation would be the same.
- (29) The applicant considers that the postal services for addressed letters B2X domestic and inbound⁽²²⁾ are part of the same market. Since the result of the assessment would be the same, whether we consider them separately or in the same market, no distinction will be made for the purpose of this Decision and the precise definition of the relevant market will be left open in this respect.
- (30) Based on the information above, for the purposes of this Decision and without prejudice to competition law, it can be considered that the relevant product market is the market for postal services for addressed letters B2X, while the precise definition of the relevant market can be left open.
- (31) According to the information available⁽²³⁾, Austrian Post has a very strong position in that market with an estimated market share of [... %].
- (32) The Commission notes that the postal market has been fully liberalised from January 2011, in line with Directive 2008/6/EC, and that the liberalisation has until now resulted in competitors gaining an aggregate estimated market share of just [... %] even in the most readily competitive segment (B2X addressed letter services).
- (33) Therefore, it cannot be concluded that the category of services in question is directly exposed to competition in Austria. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Postal services for addressed letters C2X on a national level ('domestic' and 'inbound')

- (34) In the case of postal services for addressed letters C2X the applicant also argues that both modes of delivery, electronic and postal, belong to the same market. That assertion is not in line with the Commission precedents.
- (35) The Austrian authorities were invited⁽²⁴⁾ to express their views with regard to the substitution between electronic and postal delivery in case of addressed letters C2X, and more precisely on the definition of the relevant product market. The Austrian authorities could not provide additional information⁽²⁵⁾ to support the applicant's assertions.
- (36) The applicant argues that internet and broadband penetration is very high in Austria and this implies the substitutability of postal delivery by the

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electronic means of communication. However, according to a recent study⁽²⁶⁾, almost 30 % of the population in Austria never used internet, around 55 % of the population does not use internet banking and 75 % does not fill in administrative forms online.

- (37) No further empirical evidence was provided by the applicant to support its assertions, and to demonstrate the substitutability.
- (38) Having due regard to the above, it cannot be concluded that electronic and postal delivery for addressed letters C2X belong to the same relevant market.
- (39) For the purposes of this Decision and without prejudice to competition law, it can be considered that the relevant product market is postal services for addressed letters C2X.
- (40) According to available information⁽²⁷⁾, Austrian Post market share was around [... %].
- (41) The market has been fully liberalised from January 2011, in line with Directive 2008/6/EC. The Commission notes that the liberalisation has until now only resulted in competitors gaining an aggregate estimated market share of just [... %].
- (42) Therefore, it cannot be concluded that the category of services in question is directly exposed to competition in Austria. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Cross-border postal services for addressed ('outbound') B2X and C2X letters

- (43) The applicant argues that also for this market the delivery mode of cross-border mail is technologically neutral and that electronic and postal delivery services belong to the same relevant market. That assertion cannot be accepted essentially for the same reasons as described in relation to postal services for domestic and inbound addressed letters B2X and C2X.
- (44) Previous Commission decisions⁽²⁸⁾ make a distinction between inbound cross-border mail services and outbound cross-border mail services.
- (45) As explained in recital 29, for the purposes of this Decision, the inbound mail services were considered as part of the domestic market for postal services for addressed mail for B2X and C2X respectively. Only outbound postal services will therefore be considered the relevant market.
- (46) Competition for cross-border letter post is very different for private persons and for companies. Private persons generally have no real choice but to send international mail with their national universal service provider. The volumes sent by private persons are generally too low to offer incentives for new entrants into the market.

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- (47) It is noted that the competitive situation depends also on the size/population of each city due to the fact that cross-border service providers do not maintain a nationwide access network but generally collect the mail directly at the customer's premises.
- (48) Previous Commission practice⁽²⁹⁾ made a distinction between the cross-border postal services for addressed B2X letters market and the cross-border postal services for addressed C2X letters market.
- (49) There is no evidence that the situation is different in Austria, therefore, for the purposes of this Decision and without prejudice to competition law, two separate product markets will be considered, namely the cross-border postal services for outbound B2X addressed letters and the cross-border postal services for outbound C2X addressed letters.
- (50) Austrian Post could not provide detailed information⁽³⁰⁾ on its relevant shares in each market, nor the market shares of its main competitors. In the absence of information on the degree of competition in each of those markets, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC to cross-border postal services for outbound B2X addressed letters and to cross-border postal services for outbound C2X addressed letters in Austria are met. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Postal service for addressed advertising letters on a national and international level

- (51) Addressed advertising mail is defined as mail consisting solely of advertising, marketing or publicity material and comprising an identical message. That type of advertising mail, which can be addressed to companies or to private persons, has to have the customer's name and address on, and the customer's agreement to receive such information.
- (52) The applicant states that, the market for addressed advertising mail, could be included in the market for B2X postal services for addressed letters, but did not provide any empirical evidence thereof. The applicant's assertion is not in line with Commission Decision 2007/564/EC⁽³¹⁾.
- (53) For the purposes of this Decision and without prejudice to competition law, it can be considered that the relevant product market is postal service for addressed advertising letters.
- (54) According to the applicant⁽³²⁾, its share of the market for addressed advertising letters is of [... %].
- (55) The postal market for addressed advertising letters has been fully liberalised from January 2011. The Commission notes that the liberalisation has until

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now resulted in competitors gaining a total aggregated estimated market share of just [... %].

- (56) Therefore, it cannot be concluded that the category of services in question is directly exposed to competition in Austria. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Postal services for non-addressed advertising letters, both national and internationally

- (57) Unaddressed advertising mail is characterised by the absence of a particular destination address. It is unsolicited advertising mail, which fulfils certain criteria such as: uniform weight, format, contents and layout for distribution to a group of recipients.

- (58) The applicant defines the relevant product market for unaddressed advertising as including advertisement in other media such as advertisement in daily newspapers as well as weekly regional newspapers. The starting point was the fact that in 2009 the Austrian Cartel Court accepted⁽³³⁾ that both direct advertisement and unaddressed advertisement can be considered part of the same relevant market for freely distributed newspapers. However, the Court recognised the substitutability only for large clients (e.g. large retailers), and made several distinctions in respect of the relevant geographical market (depending on the type of advertising campaign used: local, regional and national).

- (59) The applicant extended that conclusion to all newspapers and implied that the delivery of free/unaddressed mail competes with advertisement in all newspapers. The applicant performed a hypothetical monopolist test analysis using survey data collected from 248 subjects. The results of the test were given due consideration. However, the applicant's far reaching interpretation of the Austria Cartel Court ruling is not in line with Commission precedents⁽³⁴⁾, according to which different media types (electronic, television, radio or print) are complementary to each other rather than interchangeable with each other.

- (60) The Austrian authorities were invited⁽³⁵⁾ to express their views with regard to the proposed market definition for unaddressed advertising market, having due regard to the abovementioned Cartel Court ruling and the current legal and factual situation in Austria. The Austrian authorities could not provide additional information⁽³⁶⁾ to support the applicant's assertions.

- (61) Consequently, the information currently available to the Commission is not conclusive enough to support the market definition proposed by the applicant.

- (62) Therefore, for the purposes of this Decision and without prejudice to competition law, the relevant product market is defined as postal services for non-addressed advertising letters.

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- (63) According to the applicant⁽³⁷⁾, its market share for non-addressed advertising letters is of [... %]. The applicant could not provide market shares of its individual main competitors. However, according to the available information, most of the competitors do not have national coverage.
- (64) Therefore, it cannot be concluded that the category of services in question is directly exposed to competition in Austria. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Postal services for standard delivery of addressed and unaddressed newspapers

- (65) Decision 2007/564/EC made a distinction between early delivery of newspapers and standard delivery.
- (66) The applicant is not active in the early delivery of newspapers⁽³⁸⁾, but is active in the standard delivery of newspapers.
- (67) For the purposes of this Decision and without prejudice to competition law, the relevant product market is postal services for standard delivery for addressed and unaddressed newspapers.
- (68) Austrian Post has a share of [... %] of that market⁽³⁹⁾. The main competitors are the national or regional networks organised by the publishers, which deliver addressed and unaddressed newspapers to households. However, those competitors altogether have a cumulated market share of only [... %].
- (69) Therefore, it cannot be concluded that the category of services in question is directly exposed to competition in Austria. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Austria.

Management Services for mailrooms

Mailroom Services ('mailroom management')

- (70) Mailroom management offers customers a solution for the processing of mail within an organisation. Depending on the relevant demand, customised solutions are elaborated that include the outsourcing of individual activities or even the entire processing of mail.
- (71) The market for mailroom services includes all services that provide support with regard to the internal mail processing within a company. Those internal processes are often outsourced to third parties in order to increase efficiency, and those third parties often combine them with additional activities in order to use the capacity of persons performing that activity to the best possible extent. This is why various office services such as scanning, copying and phone services are provided in addition to the mail processing services.
- (72) Mailroom services can be provided in the form of staff leasing or service contracts. Therefore the market comprises the performance of activities in the

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form of service contracts as well as staff leasing. The applicant provides those services in the form of service contracts.

- (73) Using market definition for mailroom management services based on the preceding paragraphs, which is without prejudice to competition law, the Austrian Post had, according to the request⁽⁴⁰⁾, a market share of [... %] in 2010, [... %] in 2011 and [... %] in 2012.
- (74) The cumulated market share of the first two competitors was [... %] in 2010 and 2011 and [... %] in 2012. At that level they are able to bring a significant competitive pressure on Austrian Post.
- (75) The factors listed in the above two recitals shall therefore be taken as an indication of direct exposure of the Austrian Post to competition.

Printing services

- (76) Printing services are defined as printing, inserting into envelopes, logistics and processing of materials needed for recurring business processes (invoices, reminders, mailings, reading protocols and wage slips).
- (77) In order to increase cost efficiency, such internal processes are often outsourced by companies to third parties.
- (78) There is a market for electronic and digital printing processes where the customer transmits the printing data electronically, and all further services for printing, folding, inserting into envelopes, etc. are provided by the service provider. In this way, the customer does not need to purchase the machines required for such services.
- (79) Using market definition for printing services based on the preceding paragraphs, which is without prejudice to competition law, the Austrian Post had, according to the request⁽⁴¹⁾, a market share of [... %] in 2010 and 2011 and [... %] in 2012.
- (80) The relevant Austrian market is highly fragmented. A large number of businesses are active in this market. However, only one competitor holds a market share of more than [... %].
- (81) The factors listed in the above two recitals shall therefore be taken as an indication of direct exposure of the Austrian Post to competition.

Value-added services linked with electronic media and provided entirely by such media

Sale of addresses, data and comparison services ('address trading')

- (82) The applicant provides a range of address data services to companies which wish to have improved quality data on the stock of addresses of its customers.
- (83) Using market definition for address trading based on the preceding paragraphs, which is without prejudice to competition law, Austrian Post had, according to the available information⁽⁴²⁾, a market share of [... %] in 2010,

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[... %] in 2011 and [... %] in 2012. The largest competitor had a market share of [... %] which has been steadily increasing from 2010.

- (84) The factors listed above shall therefore be taken as an indication of direct exposure of the Austrian Post to competition.

Electronic mail

- (85) Austrian Post is active on the electronic communication market, where it provides services such as: dispatch module (fully automated, safe delivery of written documents to individual persons); e-invoicing; e-wage slip (wage slips produced directly from the wage accounting system and made available to employees via internet banking). The main part of the business in the electronic mail market is made up by e-invoices.

- (86) Using market definition for electronic mail based on the preceding paragraphs, which is without prejudice to competition law, the applicant had, according to the available information⁽⁴³⁾, a market share of [... %] in 2010, [... %] in 2011 and [... %] in 2012.

- (87) The factors listed above shall therefore be taken as an indication of direct exposure of the Austrian Post to competition.

Philatelic services

- (88) For the purposes of this Decision, and in line with previous Commission practice⁽⁴⁴⁾, philatelic services are defined as ‘sales of stamps and stamp related products mainly to collectors of stamps and, to a limited extent, to gift and souvenir buyers’.

- (89) Austrian Post is the company responsible for issuing new special Austrian postal stamps. Foreign postal service providers also issue special stamps for the philatelic market. The philatelic market, however, is not limited to the issue of new special stamps, but includes also stamp trading, by auction houses, stamp traders and online sales and auctions.

- (90) Austrian Post's estimated⁽⁴⁵⁾ share in the overall market for philatelic services, a market definition, which is without prejudice to competition law, amounted to [... %] in 2010, [... %] in 2011 and [... %] in 2012.

- (91) This factor should therefore be taken as an indication of direct exposure to competition for philatelic services.

Financial services

- (92) In accordance with point (c) of Article 6(2) of Directive 2004/17/EC, the provision of financial services as defined in the fourth indent of said point (c) is covered by that Directive only to the extent that such services are provided by entities which also provide postal services within the meaning of point (b) of that provision.

- (93) Austrian Post provides the following financial services:

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- (a) on its own behalf: payment services — cash collection (on the delivery of parcels ‘Nachnahme’) and debt collection services by post delivery staff ‘Postauftrag’;
 - (b) on behalf and for the account of Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft (BAWAG PSK): cash withdrawal and cash savings.
- (94) In accordance with Commission precedents⁽⁴⁶⁾, for the purposes of this Decision and without prejudice to competition law, it is considered that the relevant product markets are: payment services, cash withdrawal services and services for intermediation of savings accounts.
- (95) Austrian Post provides on its own behalf payment services as listed in point (a) of recital 93. Austrian Post has a market share of less than [...] %] and in providing such services is competing with payment services offered by banks and financial institutions, which can bring significant competitive pressure on the Austrian Post.
- (96) Those factors should therefore be taken as an indication of direct exposure to competition for payment services provided by Austrian Post on its own behalf.
- (97) Austrian Post could not provide⁽⁴⁷⁾ its market shares and the market shares of its main competitors, for the services provided on behalf of BAWAG PSK, namely for cash withdrawals and cash savings.
- (98) In the absence of information on the degree of competition in each of those product markets for services provided on behalf of BAWAG PSK, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC are met. Consequently, Article 30(1) of that Directive does not apply to contracts intended to enable the pursuit of those activities in Austria.

IV. CONCLUSIONS

- (99) In view of the factors examined in recitals 2 to 98, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of the following services provided in Austria:
- (a) management services for mailroom;
 - (b) value-added services linked with electronic media and provided entirely by such media;
 - (c) philatelic services;
 - (d) payment services provided on its own behalf.

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- (100) Since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable the provision of services listed in points (a) to (d) of recital 99 in Austria, nor when design contests are organised for the pursuit of such activities in that Member State.
- (101) This Decision is based on the legal and factual situation from October 2013 to January 2014 as it appears from the information submitted by Austrian Post and the Austrian authorities. It may be revised, should the conditions for the applicability of Article 30(1) of Directive 2004/17/EC be no longer met, following substantial changes in the legal or factual situation.
- (102) Nevertheless, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered not to be met with respect to the other activities subject to the request of Austrian Post, in the territory of Austria.
- (103) Since some services subject to this request continue to be subject to Directive 2004/17/EC, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 9 of Directive 2004/17/EC. 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 2004/17/EC and activities not exempted, 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 were not exempted, the provisions of Directive 2004/17/EC 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 9(2) and (3) of Directive 2004/17/EC.
- (104) 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 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Austria:

- (a) management services for mailroom;
- (b) value-added services linked with electronic media and provided entirely by such media;
- (c) philatelic services;
- (d) payment services provided on its own behalf^[F1];
- (e) ^[F2]postal services for addressed international letters B2B and B2C.]

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Textual Amendments

- F1** Substituted by Commission Implementing Decision (EU) 2017/131 of 24 January 2017 amending Implementing Decision 2014/184/EU exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2017) 259) (Only the German text is authentic) (Text with EEA relevance).
- F2** Inserted by Commission Implementing Decision (EU) 2017/131 of 24 January 2017 amending Implementing Decision 2014/184/EU exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2017) 259) (Only the German text is authentic) (Text with EEA relevance).

Article 2

This Decision is addressed to the Republic of Austria.

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- (1) OJ L 134, 30.4.2004, p. 1.
- (2) Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14).
- (3) Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21).
- (4) Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3).
- (5) 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).
- (6) Case No COMP/M.6503 — La Poste/Swiss Post/JV.
- (7) Case COMP/M.3971 — DeutschePost/Excel.
- (8) Case COMP/M.5152 — Posten AB/Post DanmarkA/S.
- (9) See footnote 8.
- (10) See footnote 8.
- (11) Request, p. 8.
- (12) Commission letter MARKT/C4/MMT/id (2013)3891034 of 5 December 2013 to the Austrian Permanent Representation.
- (13) E-mail of Austrian Federal Ministry of Economy, Family and Youth of 18 December 2013 enclosing the replies from the relevant authorities: the Federal Ministry of Transport, Innovation and Technology and the national regulator (Rundfunk und Telekom Regulierungs-GmbH).
- (14) According to Annex 1 to the request, p. 54.
- (15) According to Annex 1 to the request, p. 60.
- (16) [****] confidential information.
- (17) According to Annex 1 to the request, p. 32.
- (18) E-mail of Austrian Post of 2 December 2013.
- (19) In demand analysis, the price is usually regarded as an endogenous variable. That endogeneity needs to be controlled for the associated sensitivity of quantities to prices to be considered an unbiased estimation of elasticity. The applicant did not perform that type of control of endogeneity and did not properly justify the exogeneity of prices, assuming without justification that prices were exogenous.
- (20) See footnote 18.
- (21) An increased tariff has been introduced in May 2011, following approval by the relevant national authorities, of a request by Austrian Post.
- (22) Inbound cross-border mail are services offered by a postal operator in Austria to another postal operator abroad (e.g. a postal operator distributes in Austria the mail received from a postal operator abroad).
- (23) See footnote 18.
- (24) See footnote 12.
- (25) See footnote 13.
- (26) *Main developments in the postal sector (2010-2013)*, WIK Consult, August 2013, p. 174.
- (27) See footnote 18.
- (28) See footnote 6.
- (29) See footnote 6.
- (30) E-mail of Austrian Post of 14 January 2014.

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- (31) Commission Decision 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland, excluding the Åland Islands, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ([OJ L 215, 18.8.2007, p. 21](#)).
- (32) See footnote 18.
- (33) OLG Wien, 26 Kt. 8,9/0-44, 43.
- (34) See point 11 of Commission Decision SG-Greffe(2005) D/201691 of 8 April 2005 (Case No COMP/M.3648 — Gruner + Jahr/MPS), and point 15 of Commission Decision SG-Greffe(2005) D/200313 of 24 January 2005 (Case No COMP/M.3579 — WPP/GREY).
- (35) See footnote 12.
- (36) See footnote 13.
- (37) See footnote 18.
- (38) See footnote 30.
- (39) See footnote 18.
- (40) Request, p. 22.
- (41) See footnote 40.
- (42) Request, p. 14.
- (43) See footnote 18.
- (44) Decision 2007/564/EC.
- (45) Request, p. 25.
- (46) Commission Implementing Decision 2011/875/EU of 16 December 2011 exempting certain financial services in the postal sector in Hungary from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector ([OJ L 343, 23.12.2011, p. 77](#)).
- (47) See footnote 30.

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