

COMMISSION DECISION

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

(notified under document number C(2007) 3700)

(Only the Finnish and the Swedish texts are authentic)

(Text with EEA relevance)

(2007/564/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Business (BtB) and Business to Consumer (BtC)), both domestic and international;

Having regard to the Treaty establishing the European Community,

(b) addressed direct mail services;

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(4) and (6) thereof,

(c) unaddressed direct mail services;

(d) BtB standard parcel services, domestic and international;

Having regard to the request submitted by Finland by e-mail of 9 February 2007,

(e) BtC standard parcel services, domestic and international;

(f) consumer standard parcel services (CtC and CtB), domestic and international;

After consulting the Advisory Committee for Public Contracts,

(g) express and courier parcel services, domestic and international;

Whereas:

(h) early delivery of newspapers;

I. FACTS

(1) On 9 February 2007, Finland transmitted a request pursuant to Article 30(4) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested additional information by e-mails of 21 March, 18 April and 15 May 2007, which was transmitted by the Finnish authorities by e-mails of 4 April, 24 April and 16 May 2007.

(i) standard delivery of newspapers;

(2) The request submitted by Finland on behalf of Suomen Posti Oyj, which as of 1 June 2007 changed its name to Itella Oyj, (hereinafter referred to as Finland Post) concerns certain postal services as well as certain services other than postal services in Finland, excluding the Åland Islands. The services described in the request are as follows:

(j) light goods services (also called single consignments) and freight services;

(k) warehousing services;

(a) addressed letters services (Consumer to Consumer (CtC), Consumer to Business (CtB), Business to

(l) contract logistics;

(m) overall solutions in respect of direct mail;

(n) printing services;

(o) data management services;

(p) e-transaction services;

⁽¹⁾ OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

(q) philatelic services.

(3) The request is accompanied by the conclusions of the independent national authority, Kilpailuvirasto/Konkurrenssverket (the Finnish Competition Authority), which, on the one hand, does not see 'any particular reason to oppose the granting of the exclusion referred to in Article 30 ...', while stating on the other hand that 'it should be remembered that Finland Post Corporation still has a very strong market position in its traditional core business, i.e. the collection and distribution of letters, packages and other addressed items, even though the entire postal sector was opened up to competition in Finland as early as 1994 pursuant to the Act on Postal Operations. Nevertheless, no competition has emerged in Finland Post Corporation's traditional core business.'

II. LEGAL FRAMEWORK

(4) 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 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. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it.

(5) Since Finland has implemented and applied 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 ⁽¹⁾, access to the market should be deemed not to be restricted in accordance with the first subparagraph of Article 30(3) of Directive 2004/17/EC. Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, per se, decisive.

(6) 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 is the degree of concentration on 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 on different markets.

(7) Although narrower market definitions might be envisaged in certain cases, the precise definition of the relevant market can be left open for the purposes of this Decision as far as a number of the services listed in the request submitted by Finland are concerned to the extent that the result of the analysis remains the same whether it is based on a narrow or a broader definition.

(8) This Decision is without prejudice to the application of the rules on competition.

III. ASSESSMENT

Services not covered by Directive 2004/17/EC

(9) In accordance with Article 6(2)(c) of Directive 2004/17/EC, logistics services, such as warehousing services and contract logistics, and added-value services, such as printing services, data management services and e-transaction services, are covered by that Directive on condition that such services are provided by entities which also provide postal services within the meaning of Article 6(2)(b) of Directive 2004/17/EC. According to the information available to the Commission, that condition is not met in Finland in respect of warehousing, printing, data management and e-transactions services. The Directive 2004/17/EC consequently does not apply to the provision of those services in Finland.

Services to which Article 30(1) of Directive 2004/17/EC is not applicable

Addressed letter services

(10) In respect of consumer letters (CtC and CtB addressed letter services, domestic and international), Finland Post has a market share of 100 %. For business letters, its estimated market share varies between 85 % (for BtB addressed letter services, domestic and international) and 95 % (for BtC addressed letter services, domestic and international), with none of its competitors having obtained an estimated market share exceeding 10 %. According to the available information, Finland Post's market shares for international addressed letter services (inbound and outbound letters) are the same as for purely domestic services. According to the Finnish authorities, those services are directly exposed to competition, first because of competitive pressure from the possibility to substitute 'traditional' paper-based letter services with electronic means of communication (such as e-mail or SMS) and, second, because the existing unrestricted access to the market exposes it to potential competition

⁽¹⁾ OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

from possible newcomers. In respect of substitution, it should be noted that according to EC competition rules, substitutability should be analysed, inter alia, on the basis of product characteristics, price of the products and barriers associated with the switching of demand to potential substitutes. It appears that the characteristics of paper-based mail and of electronic communications differ significantly and that there is a significant barrier to switching between paper-based mail and electronic mail⁽¹⁾. This indicates that electronic communications belong to a different product market and therefore they cannot exercise a direct competitive restraint on Finland Post's addressed letter services. Furthermore, it would seem that the main effect of the increased use of electronic mail would substantially reduce the overall size of the paper-based mail market, rather than introduce competition within it. For example, according to the information supplied, the response by Finland Post to an increased marketing of e-invoicing by Finland's banks was to offer its own electronic services and not take any initiative concerning 'traditional', paper-based communications. Second, as to the potential competition, it is significant that the entire postal sector has been opened to competition since 1994 and that this has until now only resulted in competitors gaining an aggregate estimated market share of just 15 % even in the most readily competitive segment (BtB addressed letter services, domestic and international). As a result, there is no indication that the potential competition will play any significant role in the foreseeable future. Consistent with conclusions of the independent national authority, Kilpailuvirasto/Konkurrensverket (the Finnish Competition Authority), it should be concluded that the services examined in this recital are not directly exposed to competition in Finland. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Finland.

Addressed direct mail services

- (11) In respect of addressed direct mail which for the purposes of this Decision means addressed deliveries intended as marketing communications, Finland Post has an estimated market share of 90 % with none of its competitors having obtained a market share estimated to exceed 10 %. In view of this high level of concentration on this market and in the absence of any other indicators to the contrary, it should be concluded that addressed direct mail services are not directly exposed to competition in Finland. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of that activity in Finland.

⁽¹⁾ For instance, roughly one third of Finnish households are not connected to the Internet. Furthermore, the part of the Finnish population that has access to e-mail at home is stated to be 'over half', which, conversely, means that almost half do not have such access at home.

Consumer standard parcel services (CtC and CtB), domestic and international

- (12) In respect of these services, Finland Post's position is quite strong with an estimated market share of 80 %⁽²⁾. The market share of the biggest (and only significant) competitor of Finland Post covers virtually the remaining 20 %⁽³⁾. Consistent with the conclusions of the Finnish competition authority, it should be concluded that the category of services examined is not directly exposed to competition in Finland. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Finland.

Early delivery of newspapers

- (13) This service is defined as morning delivery, seven days a week, of newspapers published at least three times per week. In respect of this service, Finland Post has a market share estimated at almost three quarters (74 %) and that of its biggest competitor amounts to approximately 10 %. In view of the high market share of Finland Post and conversely the relatively low market share of even its biggest competitor, it should be concluded that early delivery of newspapers is not directly exposed to competition in Finland. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of this activity in Finland.

Standard delivery of newspapers

- (14) With a market share of 100 % Finland Post is the only supplier of these services. As the delivery of these newspapers takes place at the same time as the delivery of letters and using the same circuits as those used for the delivery of addressed letter services examined under recital 10, the same conclusion as to the competitive situation applies, particularly since the different characteristics of printed newspaper and electronic communication are even more obvious here. For these reasons it should be concluded that standard delivery of newspapers is not directly exposed to competition in Finland. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of that activity in Finland.

⁽²⁾ The estimated market share of Finland Post remains the same, namely 80 %, regardless of whether the markets are defined as CtC or CtB and it is also the same regardless of whether the markets are defined as domestic or international.

⁽³⁾ In other words, the share of this competitor barely reaches one quarter of that of Finland Post.

Overall solutions in respect of direct mail

- (15) According to the notification and the supplementary information submitted by the Finnish authorities, overall solutions in respect of direct mail are seen as different combinations of various services such as printing services, addressing and focusing services, copy services and (electronic) feedback services in combination with addressed and/or unaddressed direct mail services⁽¹⁾. The precise combination of services depends on the demands of the individual customers. Taken individually, Finland Post's estimated market shares for some of the services that could be combined within an 'overall solution', vary quite widely: for addressed direct mail: 90 %, unaddressed direct mail: 41 %, printing services: 36 %, data management services (which include feedback services): 4 %. This would seem to indicate that the competitive situation cannot be the same irrespective of the chosen combination of services. Also, unaddressed direct mail can be considered as being directly exposed to competition, whereas that is not the case for addressed direct mail. Since it cannot be ascertained which services may be grouped together if one or more customers decide to request them, a decision as to the legal regime applicable to overall solutions would entail substantial legal uncertainty. Under these circumstances, overall solutions in respect of direct mail as defined in the Finnish notification cannot be the subject of a decision pursuant to Article 30 of Directive 2004/17/EC as a single category of services.

Services to which Article 30(1) of Directive 2004/17/EC is applicable

Unaddressed direct mail services

- (16) On this market, Finland Post's market share amounts to an estimated 41 %. Considering the degree of concentration on this market, where the biggest competitor has obtained a share estimated at approximately 30 %, these factors should be taken as an indication of direct exposure to competition.

BtB standard parcel services, domestic and international

- (17) In respect of domestic BtB standard parcel services, Finland Post's market share amounts to an estimated 35 %. For international services, Finland Post's market share, according to the available information, is lower

than for domestic services, between the order of 13 and 15 %. Considering that the estimated aggregate market shares of the two biggest competitors with regard to domestic services amount to 28 %, which is not substantially different from the market share of Finland Post, it is concluded that the activity is directly exposed to competition.

BtC standard parcel services, domestic and international

- (18) Finland Post's market share for domestic services amounts to an estimated 63 %, which is a relatively high level per se. For international services, Finland Post's market share, according to the available information, is lower than for domestic services, between 13 and 15 %. However, at 37 % for domestic services, the estimated market share of the biggest competitor amounts to more than half of that of Finland Post and at that level it can be considered that that competitor would be able to exert a significant competitive pressure on Finland Post. These factors should therefore be taken as an indication of direct exposure to competition.

Express and courier parcel services, domestic and international

- (19) On this market, Finland Post does not have the biggest market share and its estimated share of 10 % is several times smaller than that of its biggest competitor, whose market share lies in a range between a third and up to a half of the market. These factors should therefore be taken as an indication of direct exposure to competition of express and courier parcel services, domestic and international.

Light goods services and freight services

- (20) On the market for light goods services, defined as transportation of single consignments in transportation units of 35 to 2 500 kg, and the market for freight, defined as transportation services concerning heavy container loads, over 5 000 kg or heavy container loads, 2 500-5 000 kg, Finland Post has an estimated market share of 6,7 % as regards the market for light goods services and 1,7 % as regards the market for freight. Those shares are several times smaller than the aggregate market shares of its two biggest competitors. On the market for light goods services, the two biggest competitors have estimated shares amounting to 51 % and 30 %, i.e. an estimated aggregate share of 81 %. On the freight market, the two biggest competitors have an estimated aggregate share of

⁽¹⁾ The supplementary information given also refers to the development of advertising content as a service that might fall within the concept of 'overall solutions in respect of direct mail'. However, as such services are neither a relevant activity pursuant to Article 6 of Directive 2004/17/EC nor offered by Finland Post or its subsidiaries, they have not been examined.

92 % (80 % and 12 % respectively). These factors should therefore be taken as an indication of direct exposure to competition.

Contract logistics

(21) As stated in recital 9, contract logistics, defined as outsourced logistics and the associated data system services/logistics application and consultation services, are covered by Directive 2004/17/EC only to the extent these services are being provided by entities which also provide postal services within the meaning of its Article 6(2)(b). According to the available information, Finland Post is the only such entity on this market in Finland. On the market for contract logistics Finland Post's market share is negligible as it amounts to barely 1 %. This can therefore be taken as an indication of direct exposure to competition.

Philatelic services

(22) Beside Finland Post, which issues stamps in Finland (to the exclusion of the Åland Islands), two other categories of actors are active on the market for philatelic services: stamp dealers and (stamp) auction houses. Finland Post's estimated market share on the overall market for philatelic services in Finland, whether provided by dealers or auction houses, amounts to 50 %, whereas the estimated aggregate shares of the two biggest stamp dealers on that market amounts to 20 % and the estimated global share of the two largest auction houses on the overall market amounts to 12 %. The estimated aggregate shares of these four actors (32 %) thus amount to more than half of that of Finland Post (50 %). Furthermore, if services rendered by stamp dealers and auction houses are considered separately, then the estimated aggregate market shares of the two largest actors for each of these two categories amount to substantially higher levels. For stamp dealers, the estimated aggregate share is 55 % of the stamp-dealing market and, for auction houses, the estimated aggregate share is 75 % of the stamp auction market. These factors should therefore be taken as an indication of direct exposure to competition for philatelic services, whether the market considered is the overall market or the separate stamp-dealing market and the stamp auction market.

IV. CONCLUSIONS

(23) In view of the factors examined in recitals 9 to 22, 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 Finland, excluding the Åland Islands, in respect of the following services:

(a) unaddressed direct mail advertising;

(b) standard business to business parcel services, domestic and international;

(c) standard business to consumer parcel services, domestic and international;

(d) express and courier parcel services, domestic and international;

(e) light goods services (also called single consignments) and freight services;

(f) contract logistics;

(g) philatelic services.

(24) 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 services listed in points (a) to (g) of recital 23 to be carried out in Finland, excluding the Åland Islands, nor when design contests are organised for the pursuit of such an activity in Finland.

(25) This Decision is based on the legal and factual situation as of February to May 2007 as it appears from the information submitted by the Republic of Finland. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met,

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 Finland, excluding the Åland Islands:

(a) unaddressed direct mail advertising;

- (b) standard business to business parcel services, domestic and international;
- (c) standard business to consumer parcel services, domestic and international;
- (d) express and courier parcel services, domestic and international;
- (e) light goods services (also called single consignments) and freight services;
- (f) contract logistics;
- (g) philatelic services.

Article 2

This Decision is addressed to the Republic of Finland.

Done at Brussels, 6 August 2007.

For the Commission
Charlie McCREEVY
Member of the Commission
