

# DECISIONS

## COMMISSION DECISION

of 5 January 2010

**exempting certain financial services in the postal sector in Italy 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(2009) 10382)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/12/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 <sup>(1)</sup>, and in particular Article 30(4) and (6) thereof,

Having regard to the four requests submitted by the Italian Republic by e-mail received on 8 July 2009,

After consulting the Advisory Committee for Public Contracts,

Whereas:

### I. FACTS

(1) On 8 July 2009, the Commission received four Italian requests pursuant to Article 30(4) of Directive 2004/17/EC, transmitted to the Commission by e-mail. The Commission requested additional information by e-mail of 24 September 2009, which, following a prolongation of the initial deadline, was transmitted by the Italian authorities by e-mail of 16.10.2009.

(2) The requests submitted by the Italian Republic on behalf of Poste Italiane SpA (in the following referred to as 'Poste') concern various financial services provided by

Poste. In their turn, each of the four separate requests pursuant to Article 30(4) concerns various financial services that have been grouped under four different headings. In the requests, these services are described as follows:

(a) Collection of savings from the public through a current account (in the following referred to as 'savings').

(b) Lending on behalf of banks and accredited financial intermediaries (in the following referred to as 'financing'). As described, this group of services would notably cover Poste's acting as a distributor of third party

— lending (in particular mortgages and loans),

— consumer credit, and

— financial leasing.

(c) Investment services and activities (in the following referred to as 'investments'). Besides custody and management of financial instruments, this group of services is described as covering the downstream (distribution) phase for:

— the placement of financial instruments (bonds in particular), and

<sup>(1)</sup> OJ L 134, 30.4.2004, p. 1.

- the placement of supplementary pension and financial/insurance products (in particular personal pension policies).
- (d) Payment and money transfer services (in the following referred to as 'payments'). As described, this group of services comprise two distinct categories, namely:
- payment services, defined as covering credit card services and debit card services, and
  - money transfer services, including international funds transfer through the Eurogiro system or by international money order and transfer of funds within Italy by postal money order.
- (3) The request is accompanied by two resolutions from an independent national authority (Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture, the Italian Supervisory Authority for Public Contracts). In its final resolution of 12 November 2008, it stresses that, should Article 30(1) be found to be applicable to some or all of the services concerned here, then there would be a need for specific surveillance measures to ensure that Community rules on public procurement continue to be applied as appropriate to all procurements made by Poste for the pursuit of activities other than those to which Article 30(1) would have been found to be applicable. The resolution consequently concludes that Poste should take adequate measures to separate procurements according to the activities for which they are intended.
- (4) The request is furthermore also accompanied by an opinion issued by an independent national authority, Autorità garante della concorrenza e del mercato (the Italian competition authority). It stresses the openness of the Italian financial sector in general with over 800 banks and more than 80 banking groups and more than 170 companies operating in the insurance sector, 68 of which are active providers in the life assurance branch only, 77 in non-life insurance only and 17 in both life and non-life. The sector would also be characterised by relatively low degrees of concentration, as the aggregate market shares in 2007 of the five biggest groups amounted to approximately 51,5 % in the banking sector and, in respect of all life insurance branches, about 53 %. In its general comments, the authority also points to the fact that Poste provides its financial services

through 'a distribution network based on its postal business, which is very comprehensive and is not comparable to that of any other operator. The network consists of some 14 000 post offices<sup>(1)</sup>, whereas the leading banking group operating in Italy has an overall network of slightly over 6 000 branches.'

- (5) Based on its practice in the field of bank mergers, the authority set out detailed comments on the various services covered by the request and concludes: 'The procedure launched by Poste Italiane relates to a wide range of activities inherent in the banking, insurance and managed savings sectors. As regards those sectors, access to which can be considered to be unrestricted, the Competition Authority has found the typical characteristics of open markets [...] In this context, Poste Italiane for its part is seen as a particular operator, both because of the normative constraints regulating the services of Bancoposta and because of the customer base it serves. This is confirmed by Authority's precedents, according to which Poste Italiane has never been fully assimilated either to banks or to other financial intermediaries operating on the markets concerned. Bancoposta services have on the whole been found to be complementary and close to those of the banks rather than substitutable for them [...] despite the specific nature of Poste Italiane, the conclusion is that the provision of banking, financial and insurance services in Italy can be considered as taking place in the contexts of markets to which access is not restricted, on which there are various operators and where the degrees of concentration are comparable to the European averages.'
- (6) Nevertheless the Italian competition authority has since opened a procedure against Poste Italiane SpA for abuse of domination in the field of payments, more specifically credit transfers by means of postal accounts. Commitments by Poste Italiane to solve the issue are under discussion with the Competition Authority<sup>(2)</sup>.

## II. LEGAL FRAMEWORK

- (7) It should be recalled that, in accordance with Article 6(2)(c) of Directive 2004/17/EC, the provision of financial services as defined in the fourth indent of said point (c) are 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. Poste is the only contracting entity in Italy which offers the services concerned here.

<sup>(1)</sup> See Corte dei Conti [Court of Auditors] Report on the financial management of Poste Italiane for financial year 2006.

<sup>(2)</sup> Provvedimento N.19778. Poste Italiane-Aumento Commissione bolletini, available on [www.agcm.it](http://www.agcm.it)

- (8) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the 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. Where no relevant Community legislation is listed in the Directive's Annex XI, as is the case in respect of the services concerned here, then Article 30(3), second subparagraph requires that it 'must be demonstrated that access to the market in question is free de facto and de jure'.
- (9) Regarding financial services, it should be recalled that a large body of legislation has been adopted at Community level aiming at liberalising establishment and provision of services in this sector. Furthermore, the Commission has already found in the context of different State aid cases concerning Poste that 'the banking sector has been open to competition for many years. Progressive liberalisation has enhanced the competition that may already have resulted from the free movement of capital provided for in the EC Treaty' <sup>(1)</sup>. The condition set out in Article 30(3) relating to free access to the market can therefore be taken to be met.
- (10) 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 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.
- (11) 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 Poste 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.

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

### III. ASSESSMENT

#### Savings

- (13) As mentioned under recital 5 above, the Italian competition authority has dealt with various mergers <sup>(2)</sup> between banks or other financial institutions in Italy and found the financial services provided by Poste in connection with its postal accounts to be 'complementary' to rather than 'substitutable' for the services provided by banks through the various forms of bank accounts. This practice must, however, be seen in its context, namely, an examination of Poste's possibilities of bringing competitive pressure to bear on banks <sup>(3)</sup>. The detailed analysis carried out by or for the Italian competition authority shows that a large majority of customers <sup>(4)</sup> having a bank account would not consider closing that account and opening a postal account. Thus, in 2005, over 28 million (legal or natural) persons had a bank account only, over 3 million had both a bank account and a postal account and less than 2,3 million persons had only a postal account. It is also noteworthy that the number of persons having a postal account only was found to grow less than the number of persons having both a postal account and a bank account. These facts may to a large extent be explained through the normative restraints under which Poste operates and the ensuing fact that it offers a more restricted range of services connected to its accounts. Customers whose needs include a broad range of services would therefore be reticent to consider changing to a postal account not offering the accustomed range of services <sup>(5)</sup>. The reason most frequently given for having both types of accounts was the 'possibility to choose from time to time the most practical/easy and or the most advantageous/economic [means]'.

<sup>(2)</sup> See in particular the authority's ruling of 20 December 2007, No 16249, C8027 Intesa/Sanpaolo, in Bull. 49/2006.

<sup>(3)</sup> In fact, the detailed analysis carried out in the abovementioned Intesa/Sanpaolo case, looked, *inter alia*, at the degree to which bank customers would be inclined to change to the services provided by Poste.

<sup>(4)</sup> 78,1 % would not consider changing to a postal account as opposed to 10,1 % who would. Globally, the same tendency was also found when examining the willingness of bank customers to change when faced with 5 % rises in charges related to the use of a bank account. Here also, a majority was not willing to abandon their bank account in favour of a postal account.

<sup>(5)</sup> While the normative restraints will remain unchanged, Poste has started broadening the range of services it offers, which should intensify competition.

<sup>(1)</sup> See Commission Decision C(2006) 4207 final of 26.9.2006 in State aid case C 42/06 (ex NN 52/06) — Italy — Poste Italiane — BancoPosta, point 59 and, in the same sense, Commission Decision C(2006) 5478 final of 22.11.2006 in State aid case C 49/06 (ex NN 65/06) — Italy — Poste Italiane — BancoPosta, point 72.

- (14) The aim of the present Decision is to establish whether the services offered by Poste are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, Poste's procurement for the pursuit of the activities concerned here will be carried out in a transparent, non-discriminatory manner based on criteria allowing it to identify the solution which overall is the economically most advantageous one. For this purpose it is therefore necessary to examine whether the banks have the possibility of bringing competitive pressure to bear on Poste.
- (15) The facts set out in recital 13 above — in particular, the fact that for a customer of Poste, the choice of a bank account may offer either new services or, at least, more options when using services offered by both types of accounts — seem to strongly suggest that Poste is indeed subject to competitive pressure from the banks. This is also indicated by the Commission's Decision C(2006) 4207 final of 26.9.2006<sup>(1)</sup>, in which the Commission, focusing on Poste's competitive situation on the market for financial services, stated explicitly that 'notably, the post office current accounts are in competition with bank current accounts, where both banks and PI have outlets'<sup>(2)</sup>. However, it is worth noting that in the State aid field market analysis is carried out in a very general way, in the sense that markets are not defined and no specific market tests are performed. Therefore there is no market investigation organised such as those launched by the Commission for antitrust decisions.
- (16) Consequently, for the purposes of Article 30 and without prejudice to the application of the rules on competition, it is necessary to take into account the services offered by banks and other financial institutions when establishing whether Poste is or not directly exposed to competition when offering savings services.
- (17) Geographically, the markets for savings collection are regional in extension and Poste's market share varies from one region to the next. According to the latest available information, transmitted by the Italian authorities on 16 October 2009, Poste's market shares stay within a band that varies between 1,4 % in Trentino Alto Adige to a regional maximum of 11,8 % in Molise. According to the available figures, Poste's share on a nationwide basis amounted to 5,6 % in 2006 and would seem to have remained at a comparable or even slightly lower level in the subsequent years. Considering the degree of concentration on this market, where the two biggest competitors have an aggregate market share

at the national level, which, for 2008, was estimated at 44,7 %, these factors should be taken as an indication of direct exposure to competition.

### Financing

- (18) The services concerned under this heading are described as covering lending, i.e. (third party) mortgages and loans, consumer credit, and financial leasing. Given the normative constraints under which Poste operates (it may not grant credit to the public) it operates essentially as an intermediary which places the services concerned on behalf of banks and accredited financial intermediaries. Poste, through its internal division, BancoPosta, operates 'principally in the retail market for consumer banking and financial services and only marginally in the business services and public administration market'.
- (19) The services concerned here can in turn be subdivided in many different ways according to factors such as the purposes for which a loan is taken<sup>(3)</sup> or the typical customer (consumers, SMEs, larger undertakings or public administrations) etc. As indicated in recital 11 above, the exact definition can, however, be left open for the purposes of the present Decision.
- (20) Depending on the computations, Poste's market share as distribution outlet for personal loans amounted to approximately 4,8 %<sup>(4)</sup> – 5 % in 2008, whereas the aggregate market shares of its three biggest competitors in the field of personal loans amounted to 43,6 % in that same year. For financial leasing, its market share was negligible in 2008, amounting to a mere 0,03 %. Its market share in respect of mortgages, even though higher, can still be considered as being fairly negligible as it only amounted to 1,6 % in 2008. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition.

### Investments

- (21) In the field of investment Poste is mainly active in the downstream (distribution) phase for the placement of financial instruments (bonds in particular), and the placement of supplementary pension and financial/insurance products (in particular personal pension policies). These services can be divided in many different ways (according to the type of financial instrument, the stage in the management chain (upstream/downstream), according to the type of customers etc. Here as well, the exact definition can be left open for the purposes of the present Decision (see recital 11 above).

<sup>(1)</sup> The Commission's Decision on State aid C 42/06 (ex NN 52/06) — Italy Poste Italiane — BancoPosta 'Remuneration of current accounts deposited with the Treasury', published in OJ C 290, 29.11.2006, p. 8.

<sup>(2)</sup> Point 60 of the Decision. In the same sense, see also point 73 of Commission Decision C(2006) 5478 final of 22.11.2006 in State aid case C 49/06 (ex NN 65/06) Italy — Poste Italiane — Postal savings, published in OJ C 31, 13.2.2007, p. 11.

<sup>(3)</sup> For example, for general purposes or for the purchase of a specific good such as a vehicle.

<sup>(4)</sup> Including both its placement of Deutsche Bank loans and of Compass loans.



(22) In fact, according to the available information, Poste's market share in the various fields concerned here varied between relatively limited — 19,8 % of the entire indirect intake, including BancoPosta bonds — to negligible, such as is the case in the field of mutual funds, where its market share amounted to 0,7 % in 2008. In the latter field, the aggregate market shares of its two main competitors amounts to 43,4 %; when looking at the various distribution channels for mutual funds the competitive pressure becomes even more marked as distribution through banks <sup>(1)</sup> and promoters <sup>(2)</sup> account for an aggregate share of 78,3 % as opposed to the 0,7 distributed through postal offices. In the field of life insurances, in 2008 Poste offered various types of insurances within branches I and III and was not active in branches IV, V and VI. Measured in number of policies its market share of branch I life insurances amounted to 17,03 %, while the corresponding figure for Branch III amounted to 19,4 %. Looking at the aggregates for all the branches, its overall share amounts to 17,5 % of the number of life policies in 2008. Considering the collection of life insurance premiums (i.e. looking at the value side), Poste obtained a market share of 10,1 % of the total in 2008 as opposed to 43,6 % collected through banks and the share collected by agents amounting to 23,8 % in that same year. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition.

#### Payment and money transfer services

(23) The payment services concerned here cover credit card services, including revolving credit cards, debit card services and prepaid card services. The abovementioned normative restrictions on Poste have the effect that, in respect of credit cards, it operates essentially as an intermediary placing cards issued by others who take the full insolvency risk. It may, on the other hand, issue debit cards (Postamat) and prepaid cards. According to the information submitted, Poste's market share, measured in terms of value, amounted to 0,8 % in 2008 <sup>(3)</sup> in respect of credit cards. Looking at debit cards, Poste obtained a market share of 16,74 % of this market, which constitutes 44,6 % of the overall sector for payment cards in Italy. The remaining part of the debit card sector is made up of bank debit cards authorised at the POS (point of sale) for payments. Concerning in particular prepaid cards, Poste has obtained a quite substantial part since the introduction of its PostePay card in November 2003, and currently holds a market share which fell from 59,8 % in 2007 to 56,5 % in 2008. Conversely, over the same period, the aggregate market shares for the two biggest competitors rose from 15,7 % to 20,4 %, while the aggregate market shares for the three biggest competitors rose from 18,8 % in 2007 to 24,6 % in 2008. Even though Poste's position on this market, which represents 9,7 % of the overall sector for payment cards in Italy, continues to be strong, the aggregate (and rising) market shares of its three biggest

competitors amounts to slightly less than half that of Poste, at which level they are able to bring a significant competitive pressure to bear on Poste <sup>(4)</sup>. For the purposes of this Decision, these factors should therefore be taken as an indication of direct exposure to competition in the field of credit cards, debit cards and prepaid cards.

(24) As recalled under recital 2(d) above, the request also covers money transfer services. According to the available information, Poste's market share in respect of money orders and banker's orders amounted to 16 % in 2008. Discussions are underway to facilitate interoperability and competition between banker's orders and postal orders. For international money orders, the available information does not include specific market shares for Poste due to apparent problems in obtaining comparable statistics on international money transfers within the banking system. However, considering that the number of international money orders only reaches slightly over 2 % of the total number of money orders and banker's orders, it may be considered to be negligible for the purposes of this Decision, given also the ever increasing liberalisation initiatives in respect of money transfers across borders, such as the single euro payment area. These factors should therefore be taken as an indication of direct exposure to competition in the field of money transfer services.

#### IV. CONCLUSIONS

(25) In view of the factors examined in recitals 13 to 24, 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 Italy:

- (a) Collection of savings from the public through a current account.
- (b) Lending on behalf of banks and accredited financial intermediaries.
- (c) Investment services and activities.
- (d) Payment and money transfer services.

<sup>(1)</sup> 58,1 %.

<sup>(2)</sup> 20,2 %.

<sup>(3)</sup> 1,9 % if measured in terms of the number of active credit cards.

<sup>(4)</sup> This is, *mutatis mutandis*, the reasoning applied in previous Decisions. See, for example, recital 17 of Commission Decision 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden 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 19, 23.1.2009, p. 50).

(26) Since the condition of unrestricted access to the market is also met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable the services listed in points (a) to (d) of recital 25 to be carried out in Italy, nor when design contests are organised for the pursuit of such an activity in Italy.

(27) This Decision is based on the legal and factual situation as of July to October 2009 as it appears from the information submitted by the Italian Republic. 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 Italy:

(a) Collection of savings from the public through a current account.

(b) Lending on behalf of banks and accredited financial intermediaries.

(c) Investment services and activities.

(d) Payment and money transfer services.

*Article 2*

This Decision is addressed to the Italian Republic.

Done at Brussels, 5 January 2010.

*For the Commission*

Charlie McCREEVY

*Member of the Commission*

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