

COMMISSION IMPLEMENTING DECISION

of 22 March 2013

exempting certain 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

(notified under document C(2013) 1568)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2013/154/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 3 October 2012 Magyar Posta Zrt. transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. In accordance with Article 30(5) first subparagraph, the Commission informed the Hungarian authorities thereof by letter of 19 October 2012. The Commission requested additional information from the Hungarian authorities by e-mail of 22 November 2012, from the relevant national Regulatory Authority ⁽²⁾ by e-mail of 7 January 2013, and from the applicant by emails of 12 November 2012 and of 7 January 2013. Additional information was transmitted by the Hungarian authorities by e-mail of 13 January 2013, by the national Regulatory Authority on 21 January 2013 and by the applicant on 20 November 2012 and 15 January 2013 respectively.
- (2) The request submitted by Magyar Posta concerns certain postal services as well as certain services other than postal services provided by the Magyar Posta on the territory of Hungary. The services concerned are described as follows in the request:

(a) domestic standard consumer parcel services (hereinafter referred to as C2X), which comprise consumer to consumer standard parcel services (hereinafter referred to as C2C) and consumer to business standard parcel services (hereinafter referred to as C2B);

(b) domestic standard business parcel services (hereinafter referred to as B2X) which comprise business to business standard parcel services (hereinafter referred to as B2B) and business to consumer standard parcel services (hereinafter referred to as B2C);

(c) domestic express parcel services;

(d) domestic courier parcel services;

(e) domestic pallet services; and

(f) contract logistics services.

- (3) Magyar Posta provides the above services, with the exception of contract logistics and, to a certain extent, domestic pallet services, in the so-called Courier, Express and Parcel (CEP) sector of Hungary. The CEP sector is a segment of the freight transport market and postal market, which provides time guaranteed services, whereby the service provider undertakes an obligation to the sender to deliver the item within a specified period or at a specific point in time.

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

⁽¹⁾ OJ L 134, 30.4.2004, p. 1.

⁽²⁾ The National Media and Infocommunications Authority is the national Regulatory Authority designated in accordance with Article 22(1) of Directive 97/67/EC of the European Parliament and of the Council (OJ L 15, 21.1.1998, p. 14) as amended by Directive 2002/39/EC (OJ L 176, 5.7.2002, p. 21) and by Directive 2008/6/EC (OJ L 52, 27.2.2008, p. 3).

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 EU legislation opening a given sector or a part of it. This legislation is listed in Annex XI to Directive 2004/17/EC, which, for the postal sector, refers to Directive 97/67/EC.

- (5) The application concerns postal services such as domestic standard consumer parcel services, domestic standard business parcel services, domestic express parcel services, domestic courier parcel services and also other services than postal services, namely those services referred to as domestic pallet services and contractual logistics.
- (6) Hungary has implemented and applied Directive 97/67/EC as amended by Directive 2002/39/EC and Directive 2008/6/EC, using the possibility pursuant to Article 3(1) of the latter to reserve certain items of correspondence ⁽¹⁾ until 31 December 2012 for the designated universal service provider, Magyar Posta ⁽²⁾. None of the services concerned by the present request were reserved at the time of the request. As Hungary 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. Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, *per se*, decisive.
- (7) 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.
- (8) 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 Article 101 or 102 TFEU or

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ⁽³⁾.

III. ASSESSMENT

1. Relevant product market

- (9) The Commission has held in previous decisions taken on the basis of the Merger Regulation ⁽⁴⁾ that the market for parcel delivery services can be segmented as follows:
- Express versus standard parcel delivery services. This segmentation takes into account that express services are on the whole faster and more reliable than a standard service, that each of these services require a different infrastructure and that express services comprise additional value added service features and are also more expensive.
 - Further distinction were also envisaged on the basis of type of customers and/or type of consignees: (i) a distinction parcel delivery services for consumers versus parcel delivery (C2X) ⁽⁵⁾ for businesses (B2X); (ii) within the B2X segment, a distinction between deliveries to businesses (B2B) and deliveries to consumers (B2C) since B2C delivery requires a denser network than B2B deliveries so that private consignees can be reached.
 - International versus domestic delivery services. In a recent decision ⁽⁶⁾, the Commission also distinguished international intra-EEA services and international extra-EEA services.
- (10) The applicant takes the view that the relevant product markets for parcel delivery services are those listed in recital 2 above. This approach is generally in line with Commission previous practice. Nevertheless, the applicant assessed the domestic B2X market as a whole (i.e. without distinguishing the B2B and B2C segments) which may not be fully in line with previous Commission practice ⁽⁷⁾.

⁽³⁾ OJ L 24, 29.1.2004, p. 1.

⁽⁴⁾ Case No COMP/M.5152 — Posten AB/Post Danmark A/S of 21 April 2009.

⁽⁵⁾ A distinction could be envisaged between C2C and C2B parcel services; however, because of this close substitutability on the supply-side, it is appropriate to treat these services as one C2X service. This is also consistent with analysis adopted for Austria, Finland and Sweden in, decisions adopted pursuant to Article 30 of Directive 2004/17/EC, respectively, Commission Decisions 2010/142/EC (OJ L 56, 6.3.2010, p. 8), 2007/564/EC (OJ L 215, 18.8.2007, p. 21) and 2009/46/EC (OJ L 19, 23.1.2009, p. 50).

⁽⁶⁾ Decision of 30 January 2013 prohibiting the planned acquisition of TNT Express by UPS.

⁽⁷⁾ Case No COMP/M.5152 — Posten AB/Post Danmark A/S of 21 April 2009.

⁽¹⁾ Items of correspondence with a weight of up to 50 g and 2,5 times the public tariff for an item of correspondence in the first weight step of the fastest category.

⁽²⁾ As of 1 January 2013, full market opening is implemented in Hungary and the formerly reserved area under Article 7 of Directive 97/67/EC as amended by Directive 2002/39/EC and Directive 2008/6/EC has been abolished.

- (11) The applicant argues that Magyar Posta does not differentiate between B2B and B2C services in terms of available prices, and that it does not distinguish the services on the basis of addressee groups. This argument is held up also by the Hungarian Authorities ⁽¹⁾, which in addition points out that according to the information available on websites of the main competitors of Magyar Posta, on the B2X standard post parcels, there is no distinction made in terms of published prices, as to whether parcel recipients are consumers or businesses.
- (12) Previous Decisions ⁽²⁾ under Article 30 of Directive 2004/17/EC, concerning post parcels made a distinction between B2B and B2C standard post parcels. However, in all cases the result of the assessment for both markets was the same, which may be seen as an indication of the fact that the product market definition could have been left open.
- (13) Moreover, it appears from the information provided by the National Regulatory Authority ⁽³⁾, that in both scenarios (if two separate markets are considered for B2B and B2C standard post parcels, or only one market for B2X standard post parcels) the result of the assessment of the competitive situation would be the same.
- (14) Based on the information on recitals 9 to 13, for the purposes of the assessment under this Decision and without prejudice to competition law, it can be considered that the relevant product market is B2X, while the precise definition of the relevant market can be left open as the result of the analysis remains the same whether it is based on a narrow or a broader definition.
- (15) Previous Commission Decisions under Article 30 of Directive 2004/17/EC ⁽⁴⁾ considered the express and courier parcels services as one product market. The applicant assumes that express and courier parcels services form part of different markets. For the purposes of the assessment under this Decision and without prejudice to competition law, it can be considered that the relevant product markets are express parcel services and courier parcel services, while the precise definition of the relevant market can be left open as the result of the analysis remains the same whether it is based on a narrow or a broader definition.
- (16) Domestic pallet services are part of the so-called freight forwarding markets, which have also been assessed in previous Decisions under the Merger Regulation. In previous cases, freight forwarding has been defined ⁽⁵⁾ as the 'organisation of transportation of items (...) on behalf of customers according to their needs'. Although some further product markets delineations were considered in previous cases (i.e. between domestic and international freight forwarding services ⁽⁶⁾, or between different modes of transport ⁽⁷⁾) in this stance, given that the market definition has no decisive impact on the outcome of the assessment under Article 30 of Directive 2004/17/EC, no further delineation of the market will be considered, for the purposes of this assessment.
- (17) Previous decisions under the Merger Regulation defined ⁽⁸⁾ contract logistics as: 'the part of the supply chain process that plans, implements and controls the efficient, effective flow and storage of goods, services and related information from the point of origin to the point of consumption in order to meet customer's requirements'. The Commission assessed further possible distinctions ⁽⁹⁾ (i.e. between domestic and cross border services, by reference to the types of goods handled or the industry serviced, or between lead logistics providers and traditional contract logistics service providers) but in the end the precise scope of the product market definition was left open ⁽¹⁰⁾. The applicant follows also the Commission's position. In the present case, given that there are no indications that further distinction is needed, for the purposes of this decision and without prejudice to competition law, the product market is defined as contract logistics.
- (18) In conclusion, taking due account the above, for the purposes of this Decision, and without prejudice to competition law relevant product markets shall be those listed in recital 2.

⁽¹⁾ Letter of the Hungarian Authorities of 13 January 2013 (page 9, paragraph 2).

⁽²⁾ Decision 2010/142/EC, Decision 2009/46/EC, Decision 2007/564/EC.

⁽³⁾ The e-mail of the national Regulatory Authority of 21 January 2013 provides estimates of the volumes of B2X, market and separately for B2B and B2C markets based on the data requested from Magyar Posta and from its first three competitors. According to this information, in 2011, on the B2X market Magyar Posta was the second market player (35 % of market shares) following the market leader (40 % of the market shares) and followed by the third market player (15 % of market shares). In the B2C market, Magyar Posta held 51 % of market shares, while its main competitors had 26 %, 11 % and 10 % market shares respectively. In the B2B market, Magyar Posta was the third market player (16 % of market shares), while the market leaders held 57 % and 22 % respectively.

⁽⁴⁾ Decision 2009/46/EC, Decision 2007/564/EC, Commission Decision 2007/169/EC (OJ L 78, 17.3.2007, p. 28).

⁽⁵⁾ Case No COMP/M. 1794 — Deutsche Post/Air Express International, of 7 February 2000, paragraph 8.

⁽⁶⁾ Case No COMP/M. 5152 — Posten AB/Post Danmark, of 21 April 2009, paragraph 108.

⁽⁷⁾ Case No COMP/M. 1794 — Deutsche Post/Air Express International, of 7 February 2000, paragraph 9.

⁽⁸⁾ Case No COMP/M. 3496 — TNT forwarding Holding AB/Wilson Logistics Holding AB.

⁽⁹⁾ Case No COMP/M. 1895 — Ocean Group/Exel, of 3 May 2000, paragraphs 8 and 9.

⁽¹⁰⁾ Case No COMP/M. 3971 — Deutsche Post/Exel, of 24 November 2005, paragraph 20.

2. Relevant geographical market

- (19) In its practice⁽¹⁾, the Commission has taken the view that the markets for domestic parcel 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 Commission practice.
- (20) Given that, in this case, there are no indications of a wider or smaller geographical scope, 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 Hungary.
- (21) As regards, domestic pallet services and contract logistics, the applicant considers that the markets are national in scope. As the services concerned by the request are domestic services, and Magyar Posta is active only in Hungarian market, for the purposes of this decision, the relevant geographic market is considered to be the territory of Hungary.

3. Market analysis

- (22) It should be kept in mind that the aim of the present Decision is to establish whether the services concerned by the request are exposed to such a level of competition (on markets to which access is not restricted within the meaning of Article 30 of Directive 2004/17/EC) 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, procurement for the pursuit of the activities concerned here 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.
- (23) In this context, it should be recalled that the product markets defined above are generally characterised by a large number of operators. However, according to the available information⁽²⁾, out of these only Magyar Posta is a contracting entity in the sense of Directive 2004/17/EC. The procurement of Magyar Posta's competitors, for the purpose of carrying out the activities described above is not subject to the 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 on a given market, but will assess whether or not the activities of Magyar Posta are exposed to competition on markets to which access is not restricted.

3.1. Domestic standard consumer parcel services (C2X)

- (24) Standard consumer parcel services must be considered apart, as they satisfy different needs of demand (universal postal service) in relation to commercial parcels, where the technological process of providing this service and operational solutions employed usually differ significantly. In respect of these services, Magyar Posta's market position is very strong with an estimated market share that has remained relatively stable over the period 2008-2011 at the order of around 80 % by value. The main competitor has a market share of approximately [...], while the rest of the main market players have market shares of under [...].
- (25) The Commission also notes that in spite of the continuous expansions of different competitor's networks, there is currently a considerable difference in size of Magyar Posta network compared to its competitors⁽³⁾.
- (26) It should therefore be concluded that the category of services examined here is not directly exposed to competition in Hungary. This is in line with the opinion of the Hungarian Authorities⁽⁴⁾. Consequently, Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Hungary.

3.2. Domestic standard business post parcels (B2X)

- (27) In respect of B2X standard parcel services, according to available information⁽⁵⁾, Magyar Posta's market share was around 35 % by volume in 2011, and it was second placed after the market leader who held 40 % of the market share, while the third competitor had also a 15 % market share. These factors should be taken as an indication of direct exposure to competition of Magyar Posta, on the B2X standard parcel services.

3.3. Domestic express parcel services

- (28) Magyar Posta's market share of the market for domestic express parcel services has been steadily falling over the period from 2008 to 2011, from approx. 55 % by value⁽⁶⁾ in 2008 to round 41 % in 2011, by value.

⁽³⁾ According to page 20 of the application Magyar Posta has a network of 2735 postal outlets across the country. According to the letter received from Magyar Posta on 20 November 2012, the main competitor has a network of 372 collection points, while another competitor recently reached 400 points collection points.

⁽⁴⁾ Letter of the Hungarian Authorities, of 13 January 2013, page 8.

⁽⁵⁾ E-mail of the national Regulatory Authority of 21 January 2013.

⁽⁶⁾ When measured by volume, Post's market share in 2008 was of the order of approximately 43 %.

⁽¹⁾ Case No COMP/M.5152 — Posten AB/Post Danmark A/S, of 21 April 2009, Case No COMP/M.3971 — Deutsche Post/Exel, etc.

⁽²⁾ Letter of the Hungarian Authorities, of 13 January 2013, page 3.

The aggregate market share of the two biggest competitors amounted to slightly over 22 % by value in 2008 and increased to around 30 % by value in 2011, i.e. almost three quarter of Magyar Posta's market share, at which level they would be able to bring a significant competitive pressure to bear on Magyar Posta⁽¹⁾. These factors should therefore be taken as an indication of direct exposure to competition.

3.4. Domestic courier parcel services

- (29) According to the applicant, the market for courier parcel services is not highly concentrated. Eight companies account for 60-67 % of the relevant market, by value. The market is dominated by three companies, but their cumulated market share is less than 50 % over the last four years.
- (30) Magyar Posta's market share of the market for domestic courier parcel services was between 2 and 3 % by value over the last four years. These factors should therefore be taken as an indication of direct exposure of Magyar Posta to competition.

3.5. Domestic pallet services

- (31) The market size of domestic pallet services is the second smallest one in the CEP sector in Hungary, and given its marginal importance, the market has only few permanent operators. Magyar Posta market share decreased, by value, from 67,6 % in 2008 to 38,7 % in 2010, and then increased in 2011 to 56,7 %, by value. The first competitor increased its market shares steadily between 2008 and 2011. The cumulated market shares of the second and third competitors ranged between 20 % and 49 % between 2008 and 2011, at which level they would be able to bring a significant competitive pressure on Magyar Posta.
- (32) Moreover, Magyar Posta's request refers only to services provided within the CEP sector. In addition, pallet services are also provided by undertakings outside the CEP sector.
- (33) The factors listed above in the above two recitals shall therefore be taken as an indication of direct exposure of Magyar Posta to competition. This opinion is also endorsed by the Hungarian Authorities⁽²⁾.

3.6. Contract logistics

- (34) The market shares of Magyar Posta in this segment are below 1 %. The market is characterised by a large number of market players⁽³⁾ and it is seen as a very dynamic market. These factors should therefore be taken as an indication of direct exposure to competition.

IV. CONCLUSIONS

- (35) In view of the factors examined in recitals 2 to 34, 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 Hungary in respect of the following services:
- (a) domestic standard business post parcels (B2X);
 - (b) domestic express parcel services;
 - (c) domestic courier parcel services;
 - (d) combined freight services; and
 - (e) contract logistics.
- (36) 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 (e) of recital 35 to be carried out in Hungary, nor when design contests are organised for the pursuit of such an activity in this country.
- (37) This Decision is based on the legal and factual situation as of October 2012 to January 2013 as it appears from the information submitted by Magyar Posta and the Hungarian 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 significant changes in the legal or factual situation.
- (38) 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 domestic standard consumer parcel services, on the territory of Hungary.
- (39) Since the domestic standard consumer parcel services 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 the domestic standard consumer parcel services, 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.

⁽¹⁾ The same reasoning was applied in previous Decisions, see e.g. recital 11 of Decision 2010/142/EC.

⁽²⁾ Letter of the Hungarian Authorities of 13 January 2013, page 10.

⁽³⁾ I.e. DHL Group, Kuhne Nagel Kft, Liegl&Dachser Kft, Gebrüder Weiss Szállítványozási és Logisztikai Kft; Waberer's Group; Trans-Sped Group; Masped Group, etc.

(40) 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 Hungary:

- (a) domestic standard Business post parcels services (B2X);
- (b) domestic express parcel services;
- (c) domestic courier parcel services;

(d) combined freight services; and

(e) contract logistics.

Article 2

This Decision is addressed to Hungary.

Done at Brussels, 22 March 2013.

For the Commission
Michel BARNIER
Member of the Commission
