

DECISIONS

COMMISSION IMPLEMENTING DECISION

of 22 May 2014

exempting certain services in the postal sector in Hungary from the application of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

(notified under document C(2014) 3372)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2014/299/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement procedures of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ⁽¹⁾, and in particular to Article 34 thereof,

Whereas:

I. FACTS

- (1) On the 21 November 2013 Magyar Posta Zrt. (hereinafter referred to as Magyar Posta) transmitted to the Commission, by e-mail, a request pursuant Article 30(5) of Directive 2004/17/EC of the European Parliament and of the Council ⁽²⁾. In accordance with the first subparagraph of Article 30(5) of that Directive, the Commission informed Hungary thereof by e-mail of 13 December 2013. The Commission requested additional information from Hungary by e-mails of 6 February 2014, and from the applicant by e-mails of 28 January 2014, 20 February 2014, 11 March 2014, 13 March 2014 and 25 March 2014. Additional information was received from Hungary by e-mail of 26 February 2014, and from the applicant by e-mails of 19 February 2014, 4 March 2014, 18 March 2014, 24 March 2014 and 27 March 2014 respectively.
- (2) The request concerns certain services provided by Magyar Posta on the territory of Hungary. The services concerned are described as follows in the request:
 - (a) services related to unaddressed advertising publications;
 - (b) services related to distribution of subscribed newspapers and periodical publications.

II. LEGAL FRAMEWORK

- (3) Article 34 of Directive 2014/25/EU, which replaced Directive 2004/17/EC, provides that contracts intended to enable the performance of one of the activities to which Directive 2014/25/EU 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

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

⁽²⁾ 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 (OJ L 134, 30.4.2004, p. 1).

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 III to Directive 2014/25/EU, which, for the postal sector, refers to Directive 97/67/EC of the European Parliament and of the Council ⁽³⁾.

- (4) Hungary has implemented and applied Directive 97/67/EC. 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 III to Directive 2014/25/EU, access to the market should be deemed not to be restricted in accordance with Article 34(3) of that Directive.
- (5) Direct exposure to competition in a particular market is evaluated on the basis of various criteria, none of which are, per se, decisive. In respect of the markets to which the request of Magyar Posta relates, 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 the request, the examination of the competitive situation should take into account the different situations in different markets.
- (6) 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 35 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or 102 of the Treaty or Council Regulation (EC) No 139/2004 ⁽⁴⁾.

III. ASSESSMENT

- (7) It should be kept in mind that the aim of this assessment 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 34 of Directive 2014/25/EU) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, 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.
- (8) In this context, it should be recalled that the markets concerned are generally characterised by the presence of several service providers. However, according to the available information, out of those providers, only Magyar Posta and its subsidiary Posta Kézbesítő Kft ⁽⁵⁾ (hereinafter referred to as POKÉZ) are contracting entities within the meaning of Directive 2014/25/EU. The procurement of the competitors of Magyar Posta and its subsidiary, for the purpose of carrying out the activities concerned by this decision, is not subject to the provisions of Directive 2014/25/EU. 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 the contracting entities are exposed to competitive pressure in markets to which access is not restricted.
- (9) 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 ⁽⁷⁾ is in line with this Commission practice. Hungary also took the view ⁽⁸⁾ that the geographical market for the activities subject to the request is national.
- (10) Given that 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 34(1) of Directive 2014/25/EU are fulfilled, and without prejudice to competition law, the relevant geographic market is considered to be the territory of Hungary.

⁽³⁾ 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).

⁽⁴⁾ 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).

⁽⁵⁾ POKÉZ performs solely unaddressed advertising and subscribed newspaper and periodical distribution for Magyar Posta. The sales revenue from these two activities range between [...] and [...] of Magyar Posta's sales between 2009 and 2013. The market shares of Magyar Posta, provided in this decision include the sales of POKÉZ.

⁽⁶⁾ Case No. COMP/M.6503 — La Poste/Swiss Post/IV.

⁽⁷⁾ Request, p. 9.

⁽⁸⁾ E-mail of the Hungarian Competition Authority Ref. AE/204-2/2014 of 26 February 2014.

Services related to distribution of unaddressed advertising publications provided by postal operators

- (11) The Commission has held in previous decisions that the market for the mail delivery services can be segmented in addressed mail markets and unaddressed mail markets ⁽⁹⁾.
- (12) Unaddressed advertising mail is characterised by the absence of particular destination address identifying the final addressee individually. It is unsolicited advertising mail, which fulfils certain criteria such as: uniform weight, format, contents and layout for distribution to a group of recipients.
- (13) Magyar Posta's services related to unaddressed advertising publication cover the following categories: domestic unaddressed advertising publication services (i.e. flyers, leaflets, etc.), domestic unaddressed election literature and distribution of free press. Magyar Posta considers that distribution of free press belongs to this product market given the fact that distribution of free press is contracted and distributed in the same way as the other types of unaddressed advertising.
- (14) The applicant defines the relevant product market as the market for services for unaddressed advertising publications (i.e. printed unaddressed advertising publications delivered to the letterbox).
- (15) Hungary was invited ⁽¹⁰⁾ to express its views with regard to the proposed market definition for unaddressed advertising market, having due regard to the current legal and factual situation in Hungary. Hungary confirmed ⁽¹¹⁾ the applicant's definition of the relevant product market.
- (16) Based on the information listed in recitals 11 to 15, for the purposes of the assessment of the request and without prejudice to competition law, the relevant product market is defined as services for distribution of unaddressed advertising publication provided by postal operators.
- (17) According to the available information ⁽¹²⁾, the market share of Magyar Posta in the market for unaddressed advertising publications was of around [...] % ⁽¹³⁾ in 2011, [...] % in 2012 and [...] % in 2013. The aggregated market shares of the first two competitors were of around [...] % in 2011, [...] % in 2012 and [...] % in 2013. The market is characterized by the presence of 4 major and several smaller market players, and Magyar Posta is not the market leader.
- (18) Moreover, Hungary ascertained ⁽¹⁴⁾ that due to a market based on tenders, there is a strong price competition and barriers to entry are low.
- (19) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 12 to 18 should be taken as an indication of exposure to competition of this activity in Hungary. This is in line with the opinion ⁽¹⁵⁾ of Hungary. Consequently, since the conditions set out in Article 34(1) of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU does not apply to contracts intended to enable the pursuit of this activity in Hungary.

Postal services for distribution of addressed newspapers

- (20) Newspaper and periodical distribution is a service whose aim is to ensure that the publication reaches the final consumer in due time. Distribution of addressed newspapers and periodicals requires an extensive network with appropriate staff, logistics equipment and a transport fleet.
- (21) The distribution of addressed newspapers and periodical publications provided by Magyar Posta contains several activities, as follows: [...].
- (22) In the distribution of addressed newspapers and periodicals, daily newspapers have special characteristics compared to other addressed publications (magazines) given that daily newspapers need to be delivered early every morning. This presumes collecting them from the publishers during the night and rapid transport in the early hours to delivery points.

⁽⁹⁾ Case COMP/M.5152 — Posten AB/Post Danmark A/S.

⁽¹⁰⁾ Commission letter Ares(2014)287916 of 6 February 2014 to the Hungarian Permanent Representation.

⁽¹¹⁾ See footnote 8.

⁽¹²⁾ E-mail of Magyar Posta of 19 February 2014.

⁽¹³⁾ [...] confidential information.

⁽¹⁴⁾ See footnote 8.

⁽¹⁵⁾ See footnote 8.

- (23) Nationwide distribution is currently performed, by MédiaLOG Logisztikai Zrt. (hereinafter referred to as MédiaLOG) and by Magyar Posta. At regional and county level there are a number of distributors which are active in different regions and whose combined capacities cover the whole country with the exception of Budapest and Pest counties.
- (24) Hungary points to the fact that national distribution and regional distribution are not substitutes for one another ⁽¹⁶⁾. The main reasons are: (a) the fact that the regional networks work with different deadlines so, in order to use their services, the national daily newspapers would have to introduce earlier deadlines for printing, (b) the fact that there is no regional distribution network in Budapest and Pest counties — which account for more than a quarter of Hungary's population and (c) that there are certain difficulties in concluding individual agreements with several regional distributors with a view to cover the entire national territory. The applicant does not share this view of Hungary, however it did not provide substantial evidence to support its assertion. Hence the following assessment will take into account only the competition between the nationwide distributors.
- (25) Previous Commission decisions ⁽¹⁷⁾ made a distinction between early delivery time distribution of newspapers and standard delivery time distribution of newspapers.
- (26) Hungary confirmed ⁽¹⁸⁾ that such distinction is pertinent in the case of Hungarian market. Moreover, the competitive situation appears to be different in each relevant product market ⁽¹⁹⁾, in terms of distribution of market shares, which is also an indication of the fact that there is a case for defining separate relevant product markets.
- (27) Based on the information listed in recitals 20 to 26, for the purposes of this Decision and without prejudice to competition law, the relevant product markets are defined as follows: the market for early delivery time distribution of addressed newspapers and the market for standard delivery time distribution of addressed newspapers and publications.

Early delivery time distribution of addressed newspapers

- (28) Magyar Posta entered the market for early delivery of newspapers in 2012, and in 2013 gained a substantial share of the market. More precisely, according to its own estimates ⁽²⁰⁾, Magyar Posta had a market share of [...] % in 2012 and [...] % in 2013. [...].
- (29) The main competitor of Magyar Posta is MédiaLOG, which has been the market leader for the last 5 years ⁽²¹⁾, with a market share of [...] % between 2009 and 2011, [...] % in 2012 and [...] % in 2013. MédiaLOG is owned by a group which is also involved in the publishing of newspapers and periodicals, and is distributing mainly the publications of the group.
- (30) Until 2012, MédiaLOG was the only national distributor and distributed not only the newspapers of publishers belonging to the owners of MédiaLOG but also national newspapers of publishers without a distribution network. Since Magyar Posta entered into this market, a publisher without a distribution network would have the possibility of choice between two national distributors. [...].
- (31) According to the available information ⁽²²⁾, MédiaLOG distributes newspapers partly by its own means and partly by means of subcontractors. [...].
- (32) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 28 to 31 should be taken as an indication of exposure to competition, of this activity in Hungary. Consequently, since the conditions set out in Article 34(1) of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU does not apply to contracts intended to enable the pursuit of this activity in Hungary.

⁽¹⁶⁾ See footnote 8.

⁽¹⁷⁾ 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 procurement procedures of entities operating in the water, energy, transport and postal services sector (OJ L 215, 18.8.2007, p. 21).

⁽¹⁸⁾ See footnote 8.

⁽¹⁹⁾ E-mail of Magyar Posta of 18 March 2014.

⁽²⁰⁾ See footnote 19.

⁽²¹⁾ See footnote 19.

⁽²²⁾ See footnote 8.

Standard delivery time distribution of addressed newspapers and publications

- (33) According to its estimates ⁽²³⁾, Magyar Posta had market shares of around [...] % from 2009 to 2011, [...] % in 2012 and [...] % in 2013.
- (34) A constant jurisprudence should also be recalled in this context, according to which ‘very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation when there is a market share of 50 %’ ⁽²⁴⁾.
- (35) The sole competitor of Magyar Posta is MédiaLOG, which according to the applicant’s estimates ⁽²⁵⁾, had a market share of around [...] % between 2009 and 2011, [...] % in 2012 and [...] % in 2013.
- (36) According to the available information ⁽²⁶⁾, MédiaLOG distributes newspapers and periodical publications partly by its own means and partly by means of subcontractors, [...].
- (37) As regards market entry the Commission notes that there were no entries in the market concerned over the last 5 years, and it is not aware of any potential entry in the near future.
- (38) The applicant did not provide conclusive evidence of existing competitive pressure on its activities, which would challenge its increasing dominant position in this market.
- (39) For the purposes of this Decision and without prejudice to competition law, in view of the factors listed in recitals 33 to 38, it cannot be concluded that the category of services in question is directly exposed to competition in Hungary. Consequently, since the conditions set out in Article 34(1) of Directive 2014/25/EU are not met, it should be established that the provisions of Directive 2014/25/EU shall continue to apply to contracts intended to enable the pursuit of standard time delivery distribution of addressed newspapers and publications in Hungary.

IV. CONCLUSIONS

- (40) In view of the factors examined in recitals 3 to 39, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered to be met in Hungary in respect of the following services:
- (a) services related to distribution of unaddressed advertising publications provided by postal operators;
- (b) postal services for early delivery time distribution of addressed newspapers.
- (41) Since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable the services listed in points (a) and (b) of recital 40 to be carried out in Hungary nor when design contests are organised for the pursuit of such an activity in that country.
- (42) This Decision is based on the legal and factual situation as of November 2013 to March 2014 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 34(1) of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation.
- (43) Nevertheless, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered not to be met with respect to postal services for standard delivery time distribution of addressed newspapers and publications, on the territory of Hungary.
- (44) Since some services subject to this request continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 5 of Directive

⁽²³⁾ See footnote 19.

⁽²⁴⁾ See point 328 of the judgment of the Court of First Instance (Third Chamber) of 28 February 2002. *Atlantic Container Line AB and Others v Commission of the European Communities*. Case T-395/94. European Court reports 2002 Page II-00875.

⁽²⁵⁾ See footnote 19.

⁽²⁶⁾ See footnote 8.

2014/25/EU. 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 2014/25/EU 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 2014/25/EU 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 Article 5(5) of Directive 2014/25/EU.

- (45) 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 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Hungary:

- (a) services related to distribution of unaddressed advertising publications provided by postal operators;
- (b) postal services for early delivery time distribution of addressed newspapers.

Article 2

This Decision is addressed to Hungary.

Done at Brussels, 22 May 2014.

For the Commission
Michel BARNIER
Member of the Commission
