

# COMMISSION

## COMMISSION DECISION

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

(notified under document number C(2008) 8409)

(Only the Swedish text is authentic)

(Text with EEA relevance)

(2009/46/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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 request submitted by Posten AB Sweden (hereinafter referred to as Sweden Post) by e-mail of 19 June 2008,

After consulting the Advisory Committee for Public Contracts,

Whereas:

#### I. FACTS

(1) On 19 June 2008, Sweden Post 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 Swedish authorities thereof by letter of 25 June 2008, to which the Swedish authorities, following a request for prolongation of the deadline, answered by e-mail of 2 September 2008. The Commission also requested additional information of Sweden Post by e-mail of 30 July 2008, which was transmitted by Sweden Post by e-mail of 15 August 2008.

(2) The request submitted by Sweden Post concerns certain postal services as well as certain services other than postal services in Sweden. The services described in the request are as follows:

(a) addressed first class letters services (Consumer to Consumer (CtC), Consumer to Business (CtB), Business to Business (BtB) and Business to Consumer (BtC)), both domestic and international; this category also includes priority distribution of newspapers and express services;

(b) non-priority letter services, including the so-called 'e-brev' services, distribution of non-priority newspapers and addressed direct mail. E-brev is a service whereby the customer submits material on electronic media and this is then transferred through a printing and enveloping service into physical letters which are combined with a postage service; within this category of services, further distinctions are made according to the fact that certain types of mail are handled differently and priced differently. Thus, there is a fundamental difference between single items and large sorted shipments (also called pre-sorted bulk mail). For this last category, yet another difference is made according to the geographic area in which this service is offered, i. e. between large sorted shipments in metropolitan areas <sup>(2)</sup> and large sorted shipments elsewhere in Sweden. A particularly relevant consequence of this distinction is that prices differ according to where the services are rendered and the differences are substantial <sup>(3)</sup>. For the purposes of this Decision, three different services will therefore be considered, namely:

— non-priority letter services in general, i.e. all non-priority letter services as just described, to the exclusion of:

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

<sup>(2)</sup> Defined as certain postal code areas pertaining to larger cities and environs, such as Stockholm, Gothenburg, Malmö and Västerås.

<sup>(3)</sup> On average 0,40 SEK — in comparison, the price for a non-priority letter of up to 20 g (single item) is 4,0 SEK and the price for non-priority letters in large sorted shipments outside of the metropolitan areas is 2,84 SEK. On average, the price in metropolitan areas is 16,39 % cheaper for non-priority letters in large sorted shipments.

- large sorted non-priority shipments in metropolitan areas, and
  - large sorted non-priority shipments elsewhere in Sweden than in metropolitan areas;
- (c) unaddressed direct mail services;
- (d) domestic BtB standard parcel services;
- (e) domestic BtC standard parcel services;
- (f) domestic consumer standard parcel services (CtC and CtB);
- (g) domestic express and courier parcel services;
- (h) international parcel services (BtB, BtC, CtB, CtC), that is services relating to parcels originating outside of Sweden and services relating to parcels to be delivered outside of Sweden;
- (i) domestic pallet services (also called light goods services, i. e. services relating to goods of up to approximately 1 000 kg);
- (j) philatelic services;
- (k) third and fourth party logistics, defined as including import, warehousing and distribution as well as direction, control and development of the customer's flows of goods;
- (l) outsourcing of internal office services. This is described as follows in the application: 'Postservice entails that a company's internal post management

routines are managed by an external player in order to free up internal resources and enhance business efficiency. *Postservice* constitutes a part of the Outsourcing of Internal Office Services Market, which includes a number of other services. Many companies operate on this market and the services they provide vary. The services are bundled differently and sometimes include most of the services which can be deemed to constitute postal service, while in other cases only a few are included and the emphasis is then placed on, for example, cleaning services<sup>1</sup>.

- (3) The request furthermore mentions a service consisting in the provision of post-boxes, but concludes — correctly — that this is an ancillary service that should be considered as a part of the provision of an access to the postal infrastructure. It can therefore not be the subject of an autonomous decision pursuant to Article 30.
- (4) The request is accompanied by the conclusions of the independent national authority, Konkurrensverket<sup>(1)</sup> (the Swedish Competition Authority), whose main comments and conclusions are as follows: 'Konkurrensverket does not have any decisive objections against the way in which [Sweden Post] has delimited the relevant markets. (...) The picture of an existing and increasing competition against [Sweden Post] from new companies within the postal sector is correct, this applies in particular to the more densely populated areas. (...) Sweden is however thinly populated with large geographical areas within which it will currently and probably for the foreseeable future not be commercially interesting for new companies to establish themselves [i. e. to provide postal services]. This means that [Swedish Post] also in the future will continue to be the sole market operator or at the least will have very strong market position within certain parts of the Swedish postal market. (...) To conclude, Konkurrensverket considers that [Sweden Post's] request pursuant to Article 30 of the Utilities Directive, 2004/17/EC, meets the requirements to be granted an exemption for the markets mentioned [therein]. (...)'

## II. LEGAL FRAMEWORK

- (5) 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.

<sup>(1)</sup> Note of 28.2.2008, Dnr 656/2007.

- (6) Since Sweden 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 <sup>(1)</sup>, without using the possibility to reserve any services pursuant to its Article 7, 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.
- (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) 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 Sweden Post 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.
- (9) This Decision is without prejudice to the application of the rules on competition.

### III. ASSESSMENT

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

##### *Addressed first class letter services*

- (10) In respect of addressed first class letters, Sweden Post has a market share which has been stable at slightly more than [... %] <sup>(\*)</sup> each year between 2005 and 2007, whether measured in terms of value or of volume <sup>(2)</sup>. According to Sweden Post, this level of market share would not differ to any significant degree even if referred separately to each of the possible segments that could be contemplated (CtC, CtB, BtC, BtB,

domestic and international, letters and first class newspapers, single items and shipments, sorted and unsorted shipments, large and small shipments, metropolitan area and the rest of Sweden (...)) <sup>(3)</sup>. Consequently, in the present case, the question whether or not all these segments are part of the same product market can be left open. However, according to Sweden Post, the relevant market to evaluate its markets position against, would be a larger 'Messages Market', which, in addition to addressed letters of all categories and types, priority and non-priority newspapers and periodicals as well as addressed direct mail, would include 'all electronic alternatives to physical distribution of postal items. (...) Examples include e-mail, EDI, communication via websites (with information submission, transaction execution, etc.), business systems (which generate communication and service applications, such as e-invoicing systems) and telephony services (in the form of SMS and MMS).' On a market thus defined Sweden Post would have 'a limited market share'. According to Sweden Post there would, in fact, be competitive pressure from the possibility to substitute 'traditional' paper-based letter services with electronic means of communication (such as e-mail or SMS). 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 in terms of the form of communication, the consumption of time of the communication and the customer preferences. There are also significant barriers to switching between paper-based mail and electronic mail <sup>(4)</sup>. This indicates that electronic communications belong to a different product market and therefore they cannot exercise a direct competitive restraint on Sweden Post's addressed first class 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 <sup>(5)</sup>. Whether there is direct exposure to competition can therefore not be evaluated using the 'messages market' as reference. Failing that, Sweden Post argues that the relevant market would be a 'market for addressed physical messages', that is one single market covering all forms and categories of letters (priority and non-priority, express and 'normal'), addressed direct mail,

<sup>(1)</sup> OJ L 15, 21.1.1998, p. 14.

<sup>(\*)</sup> Confidential information.

<sup>(2)</sup> Measured by value, the markets shares were [... %] for, respectively, 2005, 2006 and 2007, whereas the corresponding markets shares measured in terms of volume for the same years were respectively [... %].

<sup>(3)</sup> See the request, point 3.1, C, p. 25-26.

<sup>(4)</sup> For instance, roughly one quarter of Swedish households are not connected to the Internet. Furthermore, the part of the Swedish population that pays its bills via internet is stated to be 'slightly over half', which, conversely, means that almost half do not do so.

<sup>(5)</sup> See also the conclusion in the same sense set out in recital 10 of Commission Decision 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland, excluding the Åland Islands, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 215, 18.8.2007, p. 21).

newspapers and periodicals. On the thus defined market, the market share of Sweden Post for 2007 is stated to be [...] % in terms of value and [...] % in terms of volume. Apart from the fact that pricing conditions are widely different for the different types of services concerned, this high market share spans over market shares for Sweden Post varying between [...] % and [...] % in terms of value and between [...] % and [...] % in terms of volume, which is not consistent with one single market. The market for addressed first class letters should therefore be evaluated separately and the market shares of Sweden Post on that market are such that, in the absence of any indications to the contrary, it should be concluded that the services relating to addressed first class letters examined in this recital are not directly exposed to competition in Sweden. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Sweden.

#### *Non-priority letter services in general*

- (11) In respect of non-priority letter services in general as defined under recital 2(b), first indent, Sweden Post has an estimated market share of [...] % in 2007 <sup>(1)</sup> in terms of value with the largest competitor having a share amounting to the remaining [... %]. A constant jurisprudence should be recalled in this context <sup>(2)</sup>, 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 %'. In view of the high level of concentration [...] % on this market and in the absence of any other indicators to the contrary, it should therefore be concluded that non-priority letter services in general are not directly exposed to competition in Sweden. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of that activity in Sweden.

#### *Large sorted non-priority shipments elsewhere in Sweden than in metropolitan areas*

- (12) In respect of large sorted non-priority shipments elsewhere in Sweden than in metropolitan areas, as defined under recital 2(b), third indent, the information given by Sweden Post states that the 'market shares of the players who offer large shipments outside metro-

politan areas are not measured separately, but only as part of all other mail destined to these areas. This means that the market shares of these players are approximately the same as the market shares for the players providing first class items which means that [Sweden Post's] market share [is] approximately [...] %.' 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 large sorted non-priority shipments elsewhere in Sweden than in metropolitan areas are not directly exposed to competition in Sweden <sup>(3)</sup>. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of that activity in Sweden.

#### *Unaddressed direct mail services*

- (13) In respect of unaddressed direct mail which for the purposes of this Decision means unaddressed deliveries intended as marketing communications, Sweden Post has an estimated market share of [...] % in terms of value, with the biggest significant competitor holding [... %], also in terms of value. However, according to Sweden Post, the relevant market to evaluate its market positions against, would be a larger 'Advertising Distribution Market', which, in addition to unaddressed direct mail would include 'other advertising distribution channels, such as newspaper advertisements, TV and radio advertisements, outdoor advertisements, advertising via the Internet, sponsoring, etc.'. On a thus defined market, Sweden Post's share would be approximately [...] % <sup>(4)</sup>. The existence of one single, broad market comprising publicity in various media has, however, already been examined and rejected in a previous Commission Decision <sup>(5)</sup>. Whether there is direct exposure to competition can therefore not be evaluated using the 'advertising distribution market' as reference. The market for unaddressed direct mail services must therefore be examined separately. In view of the high level of concentration on this market, taking into account also the constant jurisprudence mentioned in recital 11 and in the absence of any other indicators to the contrary, it should be concluded that unaddressed direct mail services are not directly exposed to competition in Sweden. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of that activity in Sweden.

<sup>(1)</sup> 2005: [confidential] 2006: [confidential].

<sup>(2)</sup> 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.

<sup>(3)</sup> Population density was not considered to be a relevant factor in reaching the just-mentioned Decision 2007/564/EC concerning Finland, whose population density — 17,4 inhabitants per km<sup>2</sup> as of 1 January 2007 — is lower than the Swedish population density, 22,2 inhabitants per km<sup>2</sup> as of 1 January 2007.

<sup>(4)</sup> Including its addressed direct mail, which, however, is deemed by Sweden Post in its request to be part of the addressed physical message market, 'taking into consideration, *inter alia*, the division of postal services made in the Utilities Directive.'

<sup>(5)</sup> See point 11 of Commission Decision of 8 April 2005 (Case No IV/M.3648 — GRUNER + JAHR/MPS). The media concerned were publicity in periodicals, television, Radio and internet. See in the same sense, point 15 of Commission Decision of 24 January 2005 (Case No IV/M.3579 — WPP/GREY), which, *inter alia*, states '... it rather appears that different media types are complementary rather than interchangeable, since different media can address different audiences in different ways.'

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

- (14) Sweden Post considers that there would be one single market, called 'The Sorting Office Processed General Cargo Market', for 'standardised distribution of parcels, parcel shipments and pallets in national, regional or global transportation networks', as these would all have a common denominator in that 'sorting offices for processing large volumes of goods are a central feature of the networks.' On a market thus defined, Swedish Post would have a market share of the order of [... %]. However, this spans over widely differing market shares, varying from [... %] by value for domestic express parcel services to [... %] by value for domestic consumer standard parcel services. This is inconsistent with one single market. Domestic consumer standard parcel services must therefore 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 usually differs significantly. In respect of these services, Sweden Post's position is quite strong with an estimated market share that has remained stable over the period 2005-2007 at the order of [... %] by value<sup>(1)</sup>. While this may change in the coming years following the entry of two new competitors during (late) 2007, it should be concluded that the category of services examined is not directly exposed to competition in Sweden. Therefore Article 30(1) of Directive 2004/17/EC does not apply to contracts intended to enable the pursuit of those activities in Sweden.

*Outsourcing of internal office services*

- (15) According to the information submitted by the Sweden Post, there would be one single market for outsourcing of internal office services. As set out under recital 2(l), this would cover different types of services ranging from one or more services relating to postal items, e. g. mailroom management services, to cleaning services. The precise combination of services depends on the demands of the individual customers. Apart from all other considerations concerning the absence of substitutability between as widely differing services as cleaning services and mailroom management services, both on the supply side and on the demand side, it cannot be ascertained beforehand which services may be grouped together if one or more customers decide to request them. A decision as to the legal regime applicable to outsourcing of internal office services would therefore entail substantial legal uncertainty. Under these circumstances, outsourcing of internal office services as defined

<sup>(1)</sup> According to a study provided by Sweden Post and accompanying its request, Sweden Post 'in fact makes no distinction between the two types of service. Whether the parcel is C2C or C2B, the service is provided under the same product name ("Postpaket"). 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 Finland in Decision 2007/564/EC.

in the notification from Sweden Post 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***Large Sorted Non-Priority Shipments in Metropolitan Areas*

- (16) As set out under recital 2(b), above, there is a separate market in Sweden for large sorted non-priority shipments in metropolitan areas. On this market, Sweden Post's market share amounts to [... %] by value in 2007. Considering the degree of concentration on this market, where the biggest competitor has obtained a share estimated at approximately [... %] by value in 2007, these factors should be taken as an indication of direct exposure to competition.

*BtB standard parcel services, domestic*

- (17) In respect of domestic BtB standard parcel services, Sweden Post's market share amounted to [... %] by value in 2007. Considering that the estimated aggregate market shares of the two biggest competitors with regard to domestic services amount to [... %], and that the aggregate share of the three biggest competitors lies between [... %] by value, there is therefore a not indifferent market share for the three biggest competitors and it is concluded that the activity is directly exposed to competition.

*BtC standard parcel services, domestic*

- (18) Sweden Post's market share for domestic services amounts to an estimated [... %] by value in 2007. However, at [... %] by value in 2007, the estimated market share of the biggest competitor amounts to about half of that of Sweden Post and at that level it can be considered that that competitor would be able to exert a significant competitive pressure on Sweden Post. These factors should therefore be taken as an indication of direct exposure to competition.

*Express and courier parcel services, domestic*

- (19) On this market, Sweden Post had a share by value of [... %] in 2007, while the aggregate market share of the two biggest competitors amounted to [... %]. These factors should therefore be taken as an indication of direct exposure to competition of domestic express and courier parcel services.

*International parcel services*

- (20) On the market for international parcel services as defined under recital 2(h), above, Sweden Post has a market share by value in 2007 of [... %], whereas the share for its biggest competitor was at a comparable level at [... %] and the aggregate share of the two biggest competitors was almost double that of Sweden Post at [... %]. These factors should therefore be taken as an indication of direct exposure to competition of international parcel services.

*Domestic pallet services (also called light goods services)*

- (21) On the market for domestic pallet services as defined under recital 2(i), above, Sweden Post has an estimated market share of [... %]. According to the information supplied by Sweden Post '... the market is dominated by DHL, Schenker, DSV and [Sweden Post], with [Sweden Post] and DSV competing for third place. In addition, there are both local and nationwide haulage firms which offer transportation of pallets. There are some 14 000 companies in the transport sector in Sweden and it is not possible to say how many of them also include a pallet service in their product range.' These factors should therefore be taken as an indication of direct exposure to competition.

*Third and fourth party logistics*

- (22) On the market for third and fourth party logistics as defined under recital 2(k), Sweden Post's market share is fairly negligible at less than [... %], with 'a large number of Swedish and international players operating on the Swedish market, such as DHL, Schenker, DSV and Green Cargo. In addition, there are companies which were originally in the shipping and forwarding industry with their own global networks, such as Maersk and Tradimus', according to the information supplied by Sweden Post. This can therefore be taken as an indication of direct exposure to competition.

*Philatelic services*

- (23) For the purposes of this Decision, philatelic services are defined as 'sales of stamps and stamp related products mainly to collectors of stamps and, to a limited extent, to gift- and souvenir buyers.' According to the information given, Sweden Post is the largest company that continuously issues new stamps in Sweden. Other players that offer newly issued stamps on the philately market in Sweden are locally established Swedish post

operators and foreign, mainly Nordic, post operators. However, the philately market is not limited to stamps offered by post operators but also comprises sales of stamps through auctioneers, stamp traders and sales on the Internet through different sales- and auction sites. Sweden Post's estimated market share on the overall market for philatelic services in Sweden, whether provided by dealers or auction houses, is estimated at [... %], auctioneers hold a joint market share of [... %], stamp traders jointly [... %], sales on the Internet jointly [... %] and other post operators in Sweden [... %] all together. The estimated aggregate shares of the three largest auctioneers ([... %]) is somewhat greater than that of Sweden Post. 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**

- (24) In view of the factors examined in recitals 2 to 23, 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 Sweden in respect of the following services:
- (a) large sorted non-priority shipments in metropolitan areas;
  - (b) domestic standard business to business parcel services;
  - (c) domestic standard business to consumer parcel services;
  - (d) domestic express and courier parcel services;
  - (e) domestic pallet services (also called light goods services);
  - (f) third and fourth party logistics;
  - (g) philatelic services; and
  - (h) international parcel services.

- (25) 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 (h) of recital 24 to be carried out in Sweden, nor when design contests are organised for the pursuit of such an activity in Sweden.

(26) This Decision is based on the legal and factual situation as of June to September 2008 as it appears from the information submitted by Sweden Post and the Kingdom of Sweden. 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 Sweden:

- (a) large sorted non-priority shipments in metropolitan areas;
- (b) domestic standard business to business parcel services;
- (c) domestic standard business to consumer parcel services;
- (d) domestic express and courier parcel services;

- (e) domestic pallet services (also called light goods services);
- (f) third and fourth party logistics;
- (g) philatelic services; and
- (h) international parcel services.

*Article 2*

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 19 December 2008.

*For the Commission*  
Charlie McCREEVY  
*Member of the Commission*