

COMMISSION IMPLEMENTING DECISION (EU) 2016/1195**of 4 July 2016****exempting courier services and other services than postal services in Poland 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(2016) 3986)***(Only the Polish text is authentic)****(Text with EEA relevance)**

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 by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ⁽¹⁾, and in particular Articles 34 and 35,

Having regard to the request submitted by President of the Office of Electronic Communications on behalf of Poczta Polska S.A. by post and received on 2 February 2016,

Whereas:

I. FACTS

- (1) On 2 February 2016, the European Commission received by post a formal request from the President of the Office of Electronic Communications on behalf of Poczta Polska S.A. (hereinafter 'the applicant') pursuant to Article 35(1) of Directive 2014/25/EU. The request was accompanied by an opinion of the President of the Office of Electronic Communications that the services listed meet the conditions justifying their exemption on the basis of Article 34 of Directive 2014/25/EU. The Commission considers that this opinion does not qualify as a reasoned and substantiated position in the sense of Article 35(2) of Directive 2014/25/EU, since it is a simple statement that the mentioned conditions are met without providing any arguments in the support of that statement. Pursuant to the request, the Commission was asked to establish that the provisions of Directive 2014/25/EU, and the procurement procedures provided for in that Directive, did not apply to courier services and others services than postal services in Poland.
- (2) The request was submitted by the competent authority — President of the Office of Electronic Communications, in accordance with Article 138f of the Public procurement law ⁽²⁾, at the request of Poczta Polska S.A. as contracting entity, with its registered office in Warsaw, and agreed with the President of the Office for Competition and Consumer Protection (UOKiK) and with the President of the Public Procurement Office (UZP).
- (3) The Commission requested additional information by e-mail of 19 February 2016. This information was submitted by the Office of Electronic Communications by e-mail of 26 February 2016 within the deadline set by the Commission.
- (4) In accordance with point 1 of Annex IV to Directive 2014/25/EU, the Commission has 105 working days to adopt the decision. The deadline expires on 7 July 2016.

II. LEGAL FRAMEWORK

- (5) According to Article 34 of Directive 2014/25/EU, contracts intended to enable one of the activities referred to in Articles 8 to 14 of that Directive are not subject to that Directive if, in the Member State in which it is performed, 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

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

⁽²⁾ Journal of Laws 2013, item 907, as amended.

of the sector concerned. Access to a given market is deemed to be unrestricted if the Member State has implemented and applied Union legislation relating to the opening of the relevant market as set out in Annex III to Directive 2014/25/EU. Pursuant to Point F of that Annex, Directive 97/67/EC of the European Parliament and of the Council ⁽¹⁾ (hereafter 'the Postal Services Directive') (as amended by Directive 2002/39/EC of the European Parliament and of the Council ⁽²⁾ and Directive 2008/6/EC of the European Parliament and of the Council ⁽³⁾) constitutes relevant Union legislation relating to the opening of the postal services markets.

- (6) Poland implemented the Postal Services Directive by the Law of 23 November 2012 — Postal law ⁽⁴⁾ which became applicable from 1 January 2013 with respect to services of the clearance, sorting, transport and delivery of courier items and services in respect of unaddressed mail items. For these services, Poland reached the sufficient level of market opening and access to the market should be deemed not to be restricted in accordance with Article 34 of Directive 2014/25/EU.
- (7) It can also be observed that none of the services for which the request has been submitted have been subject to statutory monopoly in the past. Only postal services defined in Article 7 of the Directive 97/67/EC as amended by Directive 2002/39/EC and Directive 2008/6/EC have been reserved for the designated universal service providers. With the implementation of the Directive 2008/6/EC all Member States, including Poland, completely liberalised their postal markets and, with the exception of services under Article 8 of the above Directive, no postal services should be subject to statutory monopoly.
- (8) The request covers activities relating to the provision of postal services and other services than postal services on condition that such services are provided by an entity which also provides postal services, which are listed as being relevant under Directive 2004/17/EC of the European Parliament and of the Council ⁽⁵⁾, which was a legal basis on which the request was based. These services are:

- (1) clearance, sorting, transport and delivery of courier items;
- (2) printing and packaging services;
- (3) services in respect of unaddressed mail items;
- (4) services in respect of international money orders;
- (5) services in respect of payments to a bank account;
- (6) bureaux de change services;
- (7) brokering services in respect of the payment of pension benefits;
- (8) services in respect of the sale of banking products;
- (9) services in respect of the sale of insurance products;
- (10) services in respect of cash withdrawals using a payment card;
- (11) cash handling services;
- (12) road freight transport services;
- (13) warehousing services.

⁽¹⁾ 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).

⁽²⁾ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21).

⁽³⁾ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3).

⁽⁴⁾ Journal of Laws 2012, item 1529.

⁽⁵⁾ 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).

- (9) Among the services, other than postal services, covered by the request, it is noted that the services listed from points 4 to 13 of the previous recital, although in the scope of the Directive 2004/17/EC, are not covered by Directive 2014/25/EU. For these services the legislator has already examined the competitive situation and found that it is such that the discipline of the later Directive is no longer needed in respect of procurement made for the pursuit of these activities which have consequently been excluded from its scope.
- (10) 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 covered by the request, the market share of the main players on a given market constitutes one criterion which should be taken into account. Finally, the question of possible barriers to entry may also be relevant. 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.
- (11) 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 ⁽¹⁾.

III. ASSESSMENT

- (12) The applicant, Poczta Polska S.A., is a contracting entity in the meaning of the contracting entity within the meaning of Article 4(1)(a) of Directive 2014/25/EU carrying out activity relating to postal services referred to in Article 13 of Directive 2014/25/EU.
- (13) Undertakings associated with the contracting entity, at the request of which the applicant has submitted this request, which carry out the activity which is the basis of the request are the following undertakings: Pocztowe Towarzystwo Ubezpieczeń Wzajemnych, Poczтовая Agencja Usług Finansowych S.A., Pocztylion-Arka Powszechna Towarzystwo Emerytalne S.A., Bank Pocztowy S.A.
- (14) For the purpose of the assessment the relevant activities are the following:
- (a) the services of clearance, sorting, transport and delivery of courier items;
 - (b) services in respect of unaddressed mail items;
 - (c) printing and packaging services.

Services of clearance, sorting, transport and delivery of courier items

- (15) The Commission has held in previous decisions that the market for the mail delivery services can be segmented in basic postal service and an express or courier delivery service ⁽²⁾. In addition to faster and more reliable collection, transportation and delivery of the postal items, an express mail service is characterised by the provision of supplementary services, such as guarantee of delivery by a given date, delivery to the addressee in person or tracking and tracing of postal items throughout the distribution process. The definition proposed by the applicant is in line with the Commission precedents. For the purposes of this Decision and without prejudice to competition law, the relevant product market is defined as distribution of courier items.
- (16) As regards the geographical market, in its previous decisions, the Commission took the view that the markets for postal services, which could include narrower markets (e.g. letter mail services; small package delivery services) appeared to be national in scope ⁽³⁾. Furthermore, the Commission also considered that for example the market for the international delivery of small packages had a national dimension ⁽⁴⁾. The applicant's proposed definition is in line with the Commission precedents. Given that there are no reasons to assume a wider or a narrower scope of the market, for the purposes of this Decision, and without prejudice to competition law the geographical market for courier services is national in scope.

⁽¹⁾ 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).

⁽²⁾ Commission Decisions 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services (OJ L 10, 12.1.1990, p. 47) and Commission Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services (OJ L 233, 28.8.1990, p. 19).

⁽³⁾ Case COMP/M.2908 Deutsche Post/DHL (II), recital 20 and Case COMP/M.5152- Posten AB/Post Danmark A/S, recital 64-74, COMP/M.6570 — UPS/TNT Express, recital 243, case COMP 39562 Slovak Post.

⁽⁴⁾ Case COMP/M.5152 — Posten AB/Post Danmark A/S, recital 74.

- (17) Regarding the assessment whether the activity is directly exposed to competition, based on the information provided by the applicant and also when looking at the last report of the postal markets in Poland ⁽¹⁾, it can be established that there are several operators active in the market for express and courier services, including subsidiaries of all large integrators (i.e. UPS; DHL; FedEx), subsidiaries of national postal operators active in this segment of the postal market (e.g. DPD; GLS) and national providers (e.g. InPost; K-EX). According to available information ⁽²⁾, market share of *Poczta Polska* in this segment of the market was almost 12 % in terms of volume and 9 % in terms of turnover in 2014, compared to almost 3 % in terms of volume and 5 % in terms of turnover in 2013.
- (18) The market shares of the competitors of *Poczta Polska S.A.* appear to be higher or comparable to those of *Poczta Polska S.A.*. The market shares of the biggest competitors in terms of turnover are respectively: [...] [...] %] in 2013 and [...] in 2014; [...] [...] %] in 2013 and [...] %] in 2014; [...] [...] %] in 2013 and [...] %] in 2014; [...] [...] %] in 2013, [...] %] in 2014; [...] [...] %] in 2013 and [...] %] in 2014 ⁽³⁾.
- (19) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 15 to 18 should be taken as an indication of exposure to competition, of this activity in Poland. Consequently, since the conditions set out in Article 34 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 Poland.

Unaddressed mail services

- (20) 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.
- (21) 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 ⁽⁴⁾.
- (22) Based on the information provided by UKE and having in mind the existing practice of the Commission, for the purposes of this Decision and without prejudice to competition law, the relevant product market could be defined as services related to the distribution of unaddressed mail items.
- (23) According to previous Commission practice, geographically unaddressed mail delivery is in principle national, as the delivery networks are organised at a national level, there are likely differences in pricing across different Member States and most of unaddressed mail items are advertising material, where the language is an important factor of targeted audience (= addressees). The applicant's proposed definition is in line with the Commission precedents. Given that there are no reasons to assume a wider or a narrower scope of the market, for the purposes of this Decision, and without prejudice to competition law the geographical market for unaddressed mail services is national in scope.
- (24) The market shares of the competitors of *Poczta Polska S.A.* appear to be higher or comparable to those of *Poczta Polska S.A.*. The market shares of the biggest competitors in terms of turnover are respectively: [...] in terms of turnover [...] %] in 2013, in [...] %] in 2014; [...] [...] %] in 2013, [...] %] in 2014; [...] [...] %] in 2013, [...] %] in 2014. The market share of *Poczta Polska S.A.* was low compared to its competitors, and it amounted to 6,2 % in terms of volume and 13,94 % in terms of turnover in 2014 ⁽⁵⁾.
- (25) Based on the information provided in the request and taking account of the report of UKE from 2014, it seems that there are several competitors to *Poczta Polska* in this market. In view of their stable market share in 2013 and 2014 and in view of the fact that there are almost no barriers to entry into this market it can be assumed with some certainty that *Poczta Polska* is currently exposed to direct competition and will face competitive constraints also in the foreseeable future.

⁽¹⁾ Report of Urząd Komunikacji Elektronicznej from 2014, table 17, p. 35.

⁽²⁾ Raport o stanie rynku pocztowego za rok 2014, p. 44.

⁽³⁾ [...] confidential information.

⁽⁴⁾ Case COMP/M.5152 — Posten AB/Post Danmark A/S.

⁽⁵⁾ Report of Urząd Komunikacji Elektronicznej from 2014, table 20, p. 46

- (26) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 20 to 25 should be taken as an indication of exposure to competition, of this activity in Poland. Consequently, since the conditions set out in Article 34 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 Poland.

Printing and packaging services

- (27) The printing and packing services are offered as a package of services for mass delivery which is a common practice in relation to mass correspondence. The package includes, among other things, receipt of documents, printing, enveloping and foliation, packaging.
- (28) In order to increase cost efficiency, such internal processes are often outsourced by companies to third parties.
- (29) Based on the information provided by UKE and having in mind the existing practice of the Commission ⁽¹⁾, for the purposes of this Decision, and without prejudice to competition law, the relevant product market is defined as services related to the printing and packaging of mail items.
- (30) According to Commission precedents, the delivery market for printing and packaging is in principle national. First, the printing facility is organised nationally, even though it may be the case that some printing can be done outside the national territory. Second, there are differences in pricing across different Member States. Third, most of these services are performed for potential or actual national senders in view to optimise their internal processes and reduce their costs.
- (31) The applicant's proposed definition is in line with the Commission precedents. Given that there are no reasons to assume a wider or a narrower scope of the market, for the purposes of this Decision, and without prejudice to competition law the geographical market for printing and packaging services is national in scope.
- (32) The market share of Poczta Polska S.A. is very low and it amounted to mere 1,17 % in 2014 ⁽²⁾.
- (33) The market shares of Poczta Polska S.A. competitors are significantly higher. The market shares of the biggest players in terms of turnover are the following: Emerson Polska sp. z o.o. S.K.A. 28,4 % in 2013 and 24,6 % in 2014; Unizeto Technologies S.A. 21,2 % in 2013 and 21,0 % in 2014; Inforsys S.A. 17,8 % in 2013 and 20,7 % in 2014 ⁽³⁾.
- (34) Based on the information provided in the request and taking account of the report of UKE from 2014, it can be concluded that Poczta Polska S.A. is currently exposed to direct competition and will face competitive constraints also in the foreseeable future.
- (35) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 27 to 34 should be taken as an indication of exposure to competition of this activity in Poland. Consequently, since the conditions set out in Article 34 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 Poland.

IV. CONCLUSION

- (36) In view of the factors examined in recitals 3 to 35, the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should be considered to be met in Poland in respect of the following services:
- (a) clearance, sorting, transport and delivery of courier items;
 - (b) unaddressed mail items;
 - (c) printing and packaging services.

⁽¹⁾ Commission Implementing Decision 2014/184/EU of 2 April 2014 exempting certain services in the postal sector in Austria 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 101, 4.4.2014, p. 4) recital 76.

⁽²⁾ According to the information submitted by the applicant.

⁽³⁾ Ibid.

- (37) 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 of clearance, sorting, transport and delivery of courier items, printing and packaging services, services in respect of unaddressed mail items be carried out in Poland, nor when design contests are organised for the pursuit of such an activity in that geographic area.
- (38) This Decision is based on the legal and factual situation as of 2 February 2016 to 23 March 2016 as it appears from the information submitted by the applicant, and the 2014 report of UKE. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 34 of Directive 2014/25/EU are no longer met.
- (39) 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 Poland:

- (a) clearance, sorting, transport and delivery of courier items;
- (b) unaddressed mail items;
- (c) printing and packaging services.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 4 July 2016.

For the Commission
Elżbieta BIEŃKOWSKA
Member of the Commission
