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Information and Notices

Contents

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[1] Text with EEA relevance

[1] Text with EEA relevance

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

Guidance on the award of government-to-government contracts in the fields of defence and security (Article 13(f) of Directive 2009/81/EC of the European Parliament and of the Council)

(2016/C 450/01)

1. Introduction

Government-to-government sales ('G2G') is a method that allows governments to procure defence equipment, services, and works from other governments. The purchasing government does not deal directly with any defence contractor; instead, the sale is made by the other government, either by offering from its own stocks or after having itself procured the equipment for that purpose. G2G often includes but is not limited to product support, maintenance, training, and infrastructure construction.

G2G transactions represent a non-negligible part of the defence market in the EU. Between 2005 and 2012, the value of defence purchases made by a Member State from another government was approximately EUR 22,8 billion (9 %) of the total EU spending on defence equipment.

Governments may decide to purchase military equipment or services from another government for a variety of reasons. In many cases, G2G offers 'selling Member States' the opportunity to dispose of surplus equipment, and 'buying Member States' to purchase defence capabilities at affordable prices. It can, therefore, be a useful tool to cope with the challenges of budget constraints and the restructuring of armed forces. In certain circumstances, G2G can also be the most appropriate — or even the only — procurement option to satisfy specific military capability requirements that are needed to ensure interoperability or the 'operational advantage' of Member States' Armed Forces. G2G can also be a rapid means of meeting urgent operational requirements.

G2G can also be used as a tool for cooperation among Member States. This may be the case, for example, where one Member State purchases, in compliance with the Directive, equipment or services on behalf of all cooperating Member States and subsequently transfers parts of these equipment and services to the other governments. Sections 3 to 7 of this Communication do not cover, in these situations, the contracts awarded for such transfers.

G2G transactions can take various forms and concern diverse types of equipment and services. The role of, and benefit for, industry vary considerably, and, depending on the size and the subject matter of the contract, G2G can have an important impact on the market. A failure to investigate all procurement options and justify the chosen procurement strategy prior to the contract award between governments may imply discrimination against one or more economic operators within the EU, be in some cases the result of circumvention of applicable rules, and have a negative impact on the well-functioning of the internal market.

In the Communication 'Towards a more competitive and efficient defence and security sector' [1] of July 2013, the Commission stated that specific exclusions contained in Directive 2009/81/EC of the European Parliament and of the Council [2] 'might be interpreted in a way undermining the correct use of the Directive. This could jeopardise the level

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 542 final, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013DC0542&rid=1

[2] OJ L 216, 20.8.2009, p. 76.

playing field in the internal market. The Commission will therefore ensure that these exclusions are interpreted strictly and that they are not abused to circumvent the Directive'. In order to do so, the Commission announced its intention to provide, in consultation with Member States, guidance on these exclusions, starting with contracts awarded from a government to another government ([1]).

The purpose of this Notice is to provide guidance by setting out good procurement practices for applying this exclusion, especially in view of reducing the risks of contravening EU law. This Notice does not lay down additional obligations or pre-conditions for the use of this exclusion to those of existing EU law. It is not legally binding. Only the Court of Justice of the European Union ('the Court') is competent to give a legally binding interpretation of EU law.

2. **The legal framework**

Under Article 2 of Directive 2009/81/EC ('the Directive'), contracts in the fields of defence and security have to be awarded in conformity with the provisions of this Directive.

Article 13(f) of the Directive provides for the exclusion of contracts awarded by a government to another government relating to (i) the supply of military equipment or sensitive equipment; (ii) works and services directly linked to such equipment; or (iii) works and services specifically for military purposes, or sensitive works and sensitive services.

Recital 1, which states that 'national security remains the sole responsibility of each Member State, in the fields of both defence and security', is relevant in relation to this exclusion as national security can be the reason why Member States choose to envisage G2G procurement.

Recital 30 of the Directive states that 'given the specificity of the defence and security sector, purchases of equipment as well as works and services by one government from another should be excluded from the scope of this Directive'. A distinctive feature of this sector is the extent that defence and security procurement is influenced by national security, which may, for example, be driven by the need for interoperability with allies.

According to Article 1(9) of the Directive, 'government means the State, regional or local government of a Member State or third country'. This implies that contracts concluded by, or on behalf of, other contracting authorities/entities, such as bodies governed by public law or public undertakings, cannot be excluded on the basis of Article 13(f).

Only contracts concluded exclusively between two governments can constitute 'contracts awarded by a government to another government' in the sense of Article 13(f) of the Directive. G2G supply contracts entail, in principle, transfer of title from the selling government to the purchasing government ([2]). By contrast, the fact that a government provides guarantees of good execution, or similar forms of support, to an economic operator competing for a contract does not make the exclusion applicable to that contract. Moreover, the exclusion only covers the contract between the two governments; it does not cover related contracts concluded between the selling government and an economic operator.

Article 11 of the Directive concerns the use of exclusions and states that 'none of the rules, procedures, programmes, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive'. Furthermore, it is well-established case-law of the Court of Justice of the European Union ('the Court') that provisions, which authorise exceptions to EU public procurement rules, must be interpreted strictly ([3]). At the same time, the Court has held that an exception 'must be construed in a manner consistent with the objectives that it pursues'. Therefore, the principle of strict interpretation does not mean that the terms in which an exception is framed 'must be construed in such a way as to deprive that exception of its intended effect' ([4]).

([1]) Report from the Commission to the to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2014) 387, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0387&rid=1

([2]) This is without prejudice to Article 1(4) of the Directive, which defines 'supply contracts' as 'contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products'.

([3]) See, inter alia, Case C-337/06 Bayerischer Rundfunk, paragraph 64.

([4]) See Case C-19/13 Fastweb, paragraph 40.

According to the case-law of the Court, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context, in which it occurs and the objectives pursued by the rules of which it is part ([1]). This means, in particular, that in interpreting and applying Article 13(f), the objectives of the Directive must be taken into account. These objectives are, inter alia, laid down in recitals 2 and 3, which state that 'the gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base [EDTIB] (…)' and that 'Member States agree on the need to foster, develop and sustain a [EDTIB] that is capability driven, competent and competitive. In order to achieve this objective, Member States may use different tools, in conformity with [Union] law, aiming at a truly European defence equipment market and a level playing field at both European and global levels'.

Contracts falling outside the scope of application of the Directive may still be found subject to the rules and principles of the Treaty on the Functioning of the European Union (TFEU). There is, however, no case-law of the Court on the extent to which the rules and principles of the TFEU may apply to contracts excluded on the basis of Article 13(f) of the Directive.

3. **Market analysis**

It follows from the above that contracting authorities can, in duly justified cases, decide to award a contract to another government applying the exclusion under Article 13(f) of the Directive.

Decisions to award a contract to another government, therefore, should be preceded by an appropriate analysis, which clearly establishes that awarding a particular contract to another government is the only or the best option to fulfil the procurement requirements identified by the buying government.

This analysis should, in particular, identify whether competition is absent or impracticable (see Section 4) or whether, on the contrary, competition for the contract appears to be possible (see Section 5). When assessing whether competition is absent or impracticable or, on the contrary, appears to be possible, contracting authorities may choose to limit their analysis to the internal market.

This analysis implies an appropriate market examination adapted to the market conditions and to the specific requirements, which can also be done before finalising the definition of the requirement. For example, a contracting authority could publish a Request for Information notice on its website to initiate a technical dialogue, as referred to in recital 49 of the Directive, in order to give potential economic operators the opportunity to comment on the proposed requirement that could result in identifying alternative solutions.

Contracting authorities should document their analysis to be able, whenever required, to demonstrate, on the basis of supporting documentation, that their decisions are justified.

This is in line with effective procurement methods, especially in a situation of general budgetary constraints, and meets rules and standards of sound financial management. In addition, it considerably limits risks related to legal challenges both under EU and national law. Under EU law, it minimises the risks that the contracting authority's decision to award a contract to another government, applying the exclusion under Article 13(f), is successfully challenged, in particular, on the grounds of circumvention of the Directive (Article 11) and/or breach of the rules and principles of the Treaty.

4. **When competition is absent or impracticable**

Certain contracts, by their very nature, can only be awarded to other governments. This may be the case, for example, when one Member State provides military training to another Member State. Such contracts are generally awarded within the framework of military cooperation between States. Since there can be no commercial alternative, they have no impact on the functioning of the internal market.

In addition, there can be cases, where the analysis referred to in Section 3 clearly shows that commercial competition is absent or impracticable.

Some of the circumstances where competition is absent or impracticable in a commercial environment may be relevant for G2G procurement (e.g. single operator due to technical reasons or exclusive rights; urgency; additional supplies; repetition of works and services).

([1]) See, inter alia, Case 292/82 Merck, paragraph 12; Case C-34/05 Schouten, paragraph 25; Case C-433/08 Yaesu Europe, paragraph 24; and Case C-112/11 Ebookers.com, paragraph 12.

In these kind of situations, contracting authorities may have no viable alternative to awarding a contract directly to another government. This includes, for example, the following situations: i) the requirements identified by the contracting authority can, for technical reasons or reasons connected with the protection of exclusive rights, only be satisfied by one particular government; ii) the contracting authority faces urgent operational requirements such as an urgency resulting from a crisis or extreme urgency brought about by unforeseeable events; iii) additional supplies from the original selling government are needed as partial replacement or extension of existing supplies and a change of source of supply is not practicable due to reasons related to interoperability. Other circumstances can be envisaged where it is clear from the outset that a call for competition would not trigger more competition or better procurement outcomes than G2G procurement.

In cases, where contracting authorities consider competition to be absent or impracticable, they should document their analysis (see Section 3) to be able, whenever required, to demonstrate on the basis of supporting documentation that their decisions are justified.

Contracting authorities relying on Article 13(f) of the Directive because competition is absent or impracticable are advised to make their decision known by publishing either a free text in the OJ of the EU (see Section 5) or a voluntary ex ante transparency (VEAT) notice. Through such publication for procurement outside the Directive, the contracting authority announces its decision to award a contract to another government, based on Article 13(f), in situations where competition is absent or impracticable. The published text or VEAT will include a description of the intended G2G transaction, which will alert economic operators and provide an opportunity for them to present alternative solutions to the contracting authority that may have been overlooked.

'Annex D3 — Defence and Security' to the VEAT notice requires the contracting authority to provide a justification for the award of the contract without prior publication of a contract notice. Contracting authorities publishing a VEAT notice under the circumstances described in this paragraph would choose the option in paragraph 2 'the contract falls outside the scope of application of the Directive' and provide a short rationale for their decision.

For the sake of transparency, contracting authorities are also advised to publish — *ex post* — an announcement of the award of the G2G contract on, for example, their website or through a statement to the news media. Some of the information may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, in particular defence and/or security interests, or would harm legitimate commercial interests.

5. **When competition appears to be possible: pre-procurement advertising and finalisation of procurement strategy**

There can be cases where contracting authorities considering procurement from another government — based on the analysis referred to in Section 3 — are uncertain, whether competition for the satisfaction of their specific procurement requirements is absent or impracticable.

In these situations, in the interest of effective procurement, to comply with standards of sound financial management, and to avoid legal risks, contracting authorities should examine the market further by making their requirements known via pre-procurement advertising. The objective of this further market examination is to establish whether, at least, one EU economic operator could genuinely compete to satisfy the requirements of the contracting authority (i.e. is able to deliver a similar or better solution than the G2G one). This will enable contracting authorities to finalise their procurement strategy (G2G or commercial procurement) with full knowledge of the market.

In this context, possible means of pre-procurement advertising include:

— the *Official Journal of the European Union* (OJ),

— national official journals or procurement portals,

— advertisements on the contracting authorities' own website or procurement portal,

— as complementary means of advertising, professional journals.

In cases, in which it is clear from the market analysis that all potential suppliers are known, sending requests for information to such potential suppliers can constitute an alternative to publication.

In case it is not clear from the market analysis that all potential suppliers are known, contracting authorities are advised to publish, as pre-procurement information notice, a free text in the OJ of the EU. In this specific situation, contracting authorities have the possibility to request publication of a free text in the OJ of the EU (ojs@publications.europa.eu), if standard forms are not suitable. Contracting authorities also have the option of using the VEAT notice (see Section 4).

The information included in this pre-procurement information notice, or in a request for information, can be limited to a general description of the requirements and an indication of the available budget. Contracting authorities should explicitly mention that they are finalising their procurement strategy, which might lead to the award of a contract to another government or to the launch of a formal procurement procedure under the Directive. Contracting authorities should also mention that they are giving potential economic operators the opportunity to provide evidence that they are economically and technically capable of meeting the requirements.

Contracting authorities could also choose to invite potential economic operators to comment on the proposed requirements, and to offer solutions that might facilitate competition or generate better value for money. Should contracting authorities decide to do so, they must ensure that equal treatment is respected and competition is not distorted.

At the same time, contracting authorities can contact other governments to explore whether their requirements can be satisfied via G2G.

Contracting authorities will use the information gathered from the advertisement and from discussions with other governments to finalise their procurement strategy in full knowledge of the market.

6. **Negotiations with governments**

If, based on an impartial assessment of the information gathered from pre-procurement advertising, contracting authorities reach the conclusion that awarding a particular contract to another government is the only, or the best, option to fulfil their requirements; they will proceed with the negotiations with such government(s) and ultimately award the G2G contract under the exclusion of Article 13(f) of the Directive.

In order to ensure that the contracting authorities' requirements are satisfied in the best possible way in accordance with effective procurement methods, and to avoid legal risks, contracting authorities should conduct impartial negotiations with governments. This is particularly important, when several government offers exist, and when the impact on the internal market is significant.

The final selection should be based on objective criteria such as quality, price, technical merit, functional characteristics, running costs, lifecycle costs, after sales service and technical assistance, delivery date, security of supply, interoperability, and operational characteristics.

In any case, contracting authorities should document their assessment to be able, whenever required, to demonstrate on the basis of supporting documentation that their decisions are justified.

7. **Procurement under the Directive**

If, on the contrary, an impartial assessment of the information gathered from pre-procurement advertising shows that one or more EU economic operators is able to deliver a better value for money solution than the one offered by G2G and there is no objective justification to procure from the selling government, contracting authorities will start a procurement procedure under the Directive. The relevant provisions of the Directive will then have to be complied with.

Non-opposition to a notified concentration

(Case M.8109 — FIH Mobile/Feature Phone Business of Microsoft Mobile)

(Text with EEA relevance)

(2016/C 450/02)

On 22 September 2016, the Commission decided not to oppose the above notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004 [1]. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/homepage.html?locale=en) under document number 32016M8109. EUR-Lex is the online access to European law.

[1] OJ L 24, 29.1.2004, p. 1.

Non-opposition to a notified concentration

(Case M.8183 — Avnet/Premier Farnell)

(Text with EEA relevance)

(2016/C 450/03)

On 6 October 2016, the Commission decided not to oppose the above notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004 [1]. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/homepage.html?locale=en) under document number 32016M8183. EUR-Lex is the on-line access to European law.

[1] OJ L 24, 29.1.2004, p. 1.

Non-opposition to a notified concentration

(Case M.7792 — Konecranes/Terex MHPS)

(Text with EEA relevance)

(2016/C 450/04)

On 8 August 2016, the Commission decided not to oppose the above notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004 [1]. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/homepage.html?locale=en) under document number 32016M7792. EUR-Lex is the online access to European law.

[1] OJ L 24, 29.1.2004, p. 1.

Non-opposition to a notified concentration

(Case M.8241 — Nordic Capital/Nordnet/Group of individual investors)

(Text with EEA relevance)

(2016/C 450/05)

On 28 November 2016, the Commission decided not to oppose the above notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004 [1]. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/homepage.html?locale=en) under document number 32016M8241. EUR-Lex is the online access to European law.

[1] OJ L 24, 29.1.2004, p. 1.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Interest rate applied by the European Central Bank to its main refinancing operations [1]**:**

0,00 % on 1 December 2016

Euro exchange rates [2]

1 December 2016

(2016/C 450/06)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,0627	CAD	Canadian dollar	1,4240
JPY	Japanese yen	121,39	HKD	Hong Kong dollar	8,2422
DKK	Danish krone	7,4401	NZD	New Zealand dollar	1,5008
GBP	Pound sterling	0,84098	SGD	Singapore dollar	1,5175
SEK	Swedish krona	9,7935	KRW	South Korean won	1 241,64
CHF	Swiss franc	1,0764	ZAR	South African rand	14,9575
ISK	Iceland króna		CNY	Chinese yuan renminbi	7,3176
NOK	Norwegian krone	8,9628	HRK	Croatian kuna	7,5450
BGN	Bulgarian lev	1,9558	IDR	Indonesian rupiah	14 394,27
CZK	Czech koruna	27,061	MYR	Malaysian ringgit	4,7434
HUF	Hungarian forint	313,96	PHP	Philippine peso	52,833
PLN	Polish zloty	4,4676	RUB	Russian rouble	67,7700
RON	Romanian leu	4,5042	THB	Thai baht	37,901
TRY	Turkish lira	3,7032	BRL	Brazilian real	3,6597
AUD	Australian dollar	1,4378	MXN	Mexican peso	21,9342
			INR	Indian rupee	72,6370

[1] Rate applied to the most recent operation carried out before the indicated day. In the case of a variable rate tender, the interest rate is the marginal rate.

[2] *Source*: reference exchange rate published by the ECB.

Opinion of the Advisory Committee on mergers given at its meeting of 11 December 2015 regarding a draft decision relating to Case M.7630 — FedEx/TNT Express

Rapporteur: Slovenia

(2016/C 450/07)

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

2. The Advisory Committee agrees with the Commission that the notified transaction has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

3. The Advisory Committee agrees with the Commission's definitions of the relevant product and geographic markets as stated in the draft decision.

4. In particular, the Advisory Committee agrees that there is a separate product market for international intra-EEA small package express delivery services as well as a separate product market for extra-EEA small package delivery services comprising express and deferred services, both of which are national in scope.

5. The Advisory Committee agrees with the Commission's assessment that among integrators, the Parties are not particularly close competitors and the Merged Entity will be constrained post-transaction by its competitors on the markets for international intra-EEA express delivery services and extra-EEA delivery services.

6. The Advisory Committee agrees with the Commission's assessment that the proposed concentration is unlikely to result in a significant impediment to effective competition in any of the 30 national markets for the provision of international intra-EEA express delivery services.

7. The Advisory Committee agrees with the Commission's assessment that the transaction would also give rise to significant efficiencies on markets for international intra-EEA express delivery services.

8. The Advisory Committee agrees with the Commission's assessment that the proposed concentration is unlikely to result in a significant impediment to effective competition in any of the 30 national markets for the provision of extra-EEA delivery services to the world and any of the 30 national markets for extra-EEA deliveries to each of the six major world lanes.

9. The Advisory Committee agrees with the Commission's assessment that the transaction would also give rise to efficiencies on markets for extra-EEA delivery services.

10. The Advisory Committee agrees with the Commission`s consideration that the transaction will not remove an important competitive force on the market and other integrators (DHL and UPS) will continue to provide a competitive constraint also regarding services to SMEs.

11. The Advisory Committee agrees with the Commission that the proposed transaction would not significantly impede effective competition in the internal market or in a substantial part of it and could therefore be declared compatible with the internal market and the functioning of the EEA Agreement in accordance with Articles 2(2) and 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.

Final Report of the Hearing Officer [1]

FedEx/TNT Express

(Case M.7630)

(2016/C 450/08)

I. BACKGROUND

1. On 26 June 2015, the European Commission (the 'Commission') received a notification of a proposed concentration (hereinafter 'the Transaction') pursuant to Article 4 of the Merger Regulation [2] by which FedEx Corporation ('FedEx') intends to acquire sole control over TNT Express NV ('TNT') within the meaning of Article 3(1)(b) of the Merger Regulation by means of a public takeover under Dutch law. FedEx is hereafter also referred to as 'the Notifying Party' and FedEx and TNT are hereinafter referred to as 'the Parties'.

II. PROCEDURE

Article 6(1)(c) decision and access to key documents

2. On 31 July 2015, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation finding that the Transaction raised serious doubts as to its compatibility with the internal market and the EEA Agreement (hereinafter the '6(1)(c) decision').

3. The Parties submitted their written comments to the 6(1)(c) decision on 12 August 2015.

4. Following a request by the Notifying Party on 17 August 2015, non-confidential versions of certain key submissions of third parties collected during the first phase investigation were provided to the Notifying Party the very same day, complementing those documents already sent to it. Further key submissions of third parties were provided to the Notifying Party on a rolling basis during the second phase.

Extension of the time limit

5. On 12 August 2015, at the request of the Parties, the time limit for taking a final decision was extended by 20 working days pursuant to the second subparagraph of Article 10(3) of the Merger Regulation.

Interested third person

6. Following its written request of 15 October 2015, United Parcel Service, Inc. (hereinafter 'UPS') was recognised as an interested third person on 21 October 2015. Pursuant to Article 16(1) of the Merger Implementing Regulation [3] DG Competition informed UPS by letter of 27 October 2015 of the nature and subject matter of the procedure and invited UPS to submit any additional comments in writing taking into account that UPS had already met with DG Competition and made several submissions in the course of the investigation of the Transaction, thereby exercising its right to be heard pursuant to Article 18(4) of the Merger Regulation.

In its written submission of 4 November 2015 addressed to both DG Competition and the hearing officer, UPS made known its views on the Transaction but claimed that the Commission had not provided any information of the nature and subject matter of the procedure that was not already publicly known on the basis of the Commission's Press Release IP/15/5463 of 31 July 2015. UPS therefore considered that the Commission had not satisfied the legal requirement set out in the aforementioned Article 16(1) of the Merger Implementing Regulation.

DG Competition replied to UPS by letter of 11 November 2015 indicating that the depth and detail of UPS's submission of 4 November 2015 showed that UPS was sufficiently informed of the nature and subject matter of the procedure in this case so as to enable it to make its views known. DG Competition moreover expressed its willingness to engage with UPS and to give UPS a further opportunity to make its views known in a subsequent meeting that indeed took place on 18 November 2015.

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[1] Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1) (the 'Merger Regulation').

[3] Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1; corrigendum OJ L 172, 6.5.2004, p. 9) (the 'Merger Implementing Regulation').

In a letter of 25 November 2015 addressed to the hearing officer, UPS maintains however that the limited information which has been provided does not enable UPS to exercise its rights of defence, and UPS therefore requests further detailed information notably about the Commission's reasoning and the preliminary conclusions of its investigation.

I have examined UPS's request in the light of Articles 18 of the Merger Regulation, Articles 11 and 16 of the Merger Implementing Regulation, relevant case law and UPS's involvement in the Commission's procedure. My conclusion is that, in so far as UPS's right to be heard as a recognised interested third person is concerned, UPS has been sufficiently informed about the nature and subject matter of the procedure pursuant to Article 16 of the Merger Implementing Regulation and that UPS has moreover been closely associated with the procedure in this case, thus enabling UPS to effectively exercise its right to be heard in accordance with Article 18(4) of the Merger Regulation. On the basis hereof, I have rejected UPS's request by a decision pursuant to Article 7(2)(d) of Decision 2011/695/EU.

III. **DRAFT DECISION**

7. The draft Commission decision provides for the unconditional clearance of the Transaction pursuant to Article 8(1) of the Merger Regulation.

Given that the in-depth market investigation did not confirm the serious doubts initially raised in the Article 6(1)(c) decision, the Commission now considers that the Transaction does not significantly impede effective competition in the relevant markets and, accordingly, no Statement of objections has been sent to the Notifying Parties.

IV. **CONCLUDING REMARKS**

8. Apart from abovementioned request of UPS, I have not received any other procedural request or complaint from any party.

9. Overall, I conclude that the effective exercise of the procedural rights of all parties has been respected in this case.

Brussels, 18 December 2015.

Joos STRAGIER

Summary of Commission Decision

of 8 January 2016

declaring a concentration compatible with the internal market and the functioning of the EEA Agreement

(Case M.7630 — FedEx/TNT Express)

(notified under document C(2015) 9826)

(Only the English text is authentic)

(Text with EEA relevance)

(2016/C 450/09)

On 8 January 2016 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1]*, and in particular Article 8(1) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

I. **THE PARTIES**

(1) FedEx Corporation ('FedEx', United States of America) provides customers and businesses worldwide with a broad portfolio of transportation, e-commerce and business services. FedEx EEA-network has its central air hub in Paris. TNT Express NV ('TNT', the Netherlands) is active in the small package delivery and freight transport sectors. TNT's European network has its central air hub in Liège, Belgium.

II. **THE OPERATION AND EU DIMENSION**

(2) On 7 April 2015, FedEx and TNT (the 'Parties' or the 'Merged Entity') announced their conditional agreement on a public offer by FedEx for all the issued and outstanding shares in the capital of TNT with the aim of FedEx acquiring control of TNT (the 'Transaction').

(3) The Transaction involves the acquisition of sole control of TNT by FedEx and constitutes a concentration within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 ('the Merger Regulation'). It has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

III. **PROCEDURE**

(4) On 26 June 2015, the Transaction was formally notified to the Commission pursuant to Article 4 of the Merger Regulation.

(5) On 31 July 2015, the Commission found that the Transaction raised serious doubts as to its compatibility with the internal market and adopted a decision initiating proceedings pursuant to Article 6(1)(c) of the Merger Regulation ('the decision opening proceedings').

(6) The Parties submitted their written comments to the decision opening proceedings on 12 August 2015 and on the same day, at the Parties' request, the time limit for taking a final decision in this case was extended by 20 working days pursuant to the second subparagraph of Article 10(3) of the Merger Regulation.

(7) UPS was recognised as an interested third person pursuant to Article 18(4) of the Merger Regulation by a decision of the Hearing Officer dated 21 October 2015.

(8) The in-depth investigation allowed dispelling the competition concerns preliminarily identified in the decision opening proceedings. No statement of objections was adopted.

(9) The draft Decision was discussed with Member States during the Advisory Committee on Concentrations on 11 December 2015, which provided a favourable opinion. The Hearing Officer provided his favourable opinion on the proceedings in his report which was submitted on 18 December 2015.

(10) On 8 January 2016, the Commission adopted pursuant to Article 8(1) of the Merger Regulation a decision declaring the Merger compatible with the internal market and the EEA agreement (the 'Decision').

[1] OJ L 24, 29.1.2004, p. 1.

IV. COMPETITIVE ASSESSMENT

A. Introduction

(11) The Decision focuses on the market for small package delivery services. Any potential overlaps between the Parties' activities in the areas of cargo transport and freight forwarding do not give rise to affected markets.

(12) Both FedEx and TNT are providers of small package delivery services both inside the EEA and from the EEA to non-EEA destinations. They are both so-called integrators, meaning that they have full operational control over all transportation assets, a sufficient geographic coverage on a global level, a hub and spoke operating model, a proprietary IT network, and the reputation of reliably delivering small packages on time (so-called end-to-end credibility). The other two integrators are DHL and UPS.

B. The relevant markets

The relevant product markets

(13) In line with the Commission's previous decisional practice [1], the relevant market for small package delivery services includes consignments under 31,5 kg. The Commission makes a distinction as to whether the packages picked up in an EEA country are delivered within the same country (domestic markets), to a different EEA country (international intra-EEA markets) or to a country outside the EEA (extra-EEA services markets).

(14) In previous cases, notably when assessing international intra-EEA markets, the Commission also identified a market for express delivery services (with a next day delivery commitment) as separate from the market of deferred/standard delivery services (with a longer time frame commitment) [2]. These findings were based on, among others, the fact that the two types of services are provided by making use of different infrastructure, that a significant number of customers depends on express deliveries and that express delivery services are also considerably more expensive.

(15) In the case at hand, given the substantial overlaps between the Parties in the provision of extra-EEA services, the Commission undertook an extensive inquiry into these markets not assessed in detail previously.

(16) For the integrators, both extra-EEA express (that is, the fastest possible guaranteed delivery service) and deferred (slower but still highly reliable, day-definite) small package shipments essentially use the same network and supply chain steps (including sorting in air-hubs, long haul flights and customs clearance) on their journey to the various intercontinental destinations. Moreover, all integrators are directly competing for both types of services and there were indications that prices for express and deferred extra-EEA services move together, thereby not contradicting that express and deferred would belong to the same market. On this basis, the Commission considered express and deferred services as segments of the same extra-EEA market.

(17) From a destination perspective, while leaving the product market definition open, the Commission assessed the impact of the Transaction both on a worldwide as well as on a major trade lane basis (North America, Central and South America, Africa, Asia/Pacific, Middle East and the Rest of Europe).

The relevant geographic markets

(18) As regards the geographic market definition, that is to say, the origin of the delivery, in line with the decision in the UPS/TNT case, the Commission concluded that the international intra-EEA express market is national in scope. The assessment of the impact of the Transaction was carried out on a national level for the extra-EEA small package delivery services markets as well. However, in view of the network features of the industry and the crucial role of air networks for intercontinental deliveries, the competitive assessment on extra-EEA small package deliveries also included the EEA-level.

1. *Intra-EEA small package delivery services*

(19) The international intra-EEA express delivery of small packages within the EEA is a network industry, which requires a presence in all EEA countries. The required presence in turn entails investments in infrastructure all along the value chain (from pick-up, sorting, line-hauls, hubs, air network, planes and delivery). The integrators have the tightest control over their network and are the only ones with a seamless express network covering all EEA-countries. In assessing the competitive strengths of the various categories of the Parties' competitors in the international intra-EEA express markets, the Commission found, in line with the results of the market investigation, that non-integrated small package delivery providers generally exert a weak competitive constraint on the Parties.

[1] See, for instance, Commission Decision of 30 January 2013 in Case M.6570 — UPS/TNT Express, hereinafter ('UPS/TNT'), recital 164.
[2] See, inter alia, UPS/TNT, recital 219.

The Commission has therefore adopted a conservative approach and limited its competitive assessment of the effects of the Transaction on international intra-EEA express delivery services in the different EEA-countries on the competitive constraints that the four integrators exert on each other.

a) The Merged Entity's market position on international intra-EEA express delivery services markets would be moderate

(20) Given the inherent limitations of the market share data submitted by FedEx for the purpose of the competitive assessment in this case and in line with the Commission's approach in the UPS/TNT case, the Commission undertook a market reconstruction exercise. At EEA-level, the Merged Entity would have a market share below 30 %. It will still be the weakest of the three remaining integrators and thus the number three player after DHL and UPS. At country level, the Merged Entity would not have a market share exceeding 40 % based on 2014 revenue figures and would not become the number one player in any of the 30 national markets in the EEA investigated ([1]).

b) FedEx and TNT are not particularly close competitors regarding international intra-EEA express delivery services

(21) Even though both FedEx and TNT are integrators and therefore compete with each other in the field of international intra-EEA express delivery services in the 30 national markets in the EEA, the Commission concluded that the Parties are not particularly close competitors.

(22) On the one hand, FedEx's business focus is on customers with significant extra-EEA delivery needs. The majority of FedEx's international intra-EEA express revenues are derived from customers that have also purchased extra-EEA delivery services from it. FedEx's focus on international intra-EEA express customers with meaningful extra-EEA delivery requirements is driven by its limited ability to compete successfully for customers of stand-alone intra-European express services or customers that wish to source both international intra-EEA express and domestic/international intra-EEA deferred delivery services from the same provider. These limitations are due to FedEx's weaker EEA-wide network. This weaker network translates into FedEx's lower geographic coverage for the different express services, relative weakness in providing deferred and domestic services on a larger scale, and into a higher cost base resulting from lower economies of scale and density, which make FedEx significantly less competitive for international intra-EEA express deliveries. This in turn translates into a weak market position vis-à-vis TNT and the other two integrators and is consistent with FedEx's focus on extra-EEA deliveries.

(23) On the other hand, TNT's focus is on customers with standalone international intra-EEA and domestic/deferred delivery needs. Contrary to FedEx, TNT has a substantial European road-based and more efficient air network presence in the EEA and a higher proportion of sales in the domestic and deferred segments. A limited proportion of its revenues are derived from customers with extra-EEA delivery needs. TNT's sales data show that a large part of TNT's intra-EEA express revenues in Europe are generated with customers that also purchase domestic and/or international intra-EEA deferred delivery services from TNT. In contrast, TNT has been less successful at attracting international intra-EEA express customers that also require international extra-EEA delivery services.

(24) Also the Parties' internal documents confirmed that they do not perceive each other as particularly close competitors. Moreover, a clear majority of the Parties' customers does not see the Parties as particularly close competitors either (e.g. in terms of pricing, range and quality of services, reliability, geographical reach, track and trace etc.). Moreover, customers view FedEx as weaker than the other three integrators in the markets for international intra-EEA express delivery services.

(25) Last, notwithstanding a number of limitations identified, the bidding analysis submitted by the Parties provided further confirmation that FedEx is a weaker competitor for TNT than DHL and UPS.

c) The merger would not remove an important competitive force

(26) The Commission considered that TNT does not have specific qualities that enable it to exert significant competitive pressure on the other integrators which would result in a lessening of competition post-Transaction. First, TNT's international intra-EEA express cost position is not more advantageous than the cost position of DHL and UPS. Second, TNT has not been able to expand its market position to the detriment of the other integrators in recent years. Third, the Commission could empirically verify that TNT cannot be considered an aggressive price setter in the international intra-EEA express market. Fourth, TNT's focus in recent years was not on investing significantly in its network but rather on consolidating its services. Consequently, it cannot be said to have been an innovator in terms of network expansion in recent years.

([1]) There are 31 EEA countries. The Parties could, however, not provide data for Liechtenstein.

d) DHL and UPS would be in a position to constrain the Merged Entity post-Transaction

(27) Despite the fact that non-integrators, in particular road-based operators with a large network such as DPD and GLS, would exert a certain competitive constraint on the Merged Entity depending on the national market, the Commission took a conservative approach and limited its analysis of whether the Merged Entity's competitors will have a constraining effect on prices to DHL and UPS.

(28) First, the Merged Entity will face two strong and capable competitors. Based on the results of the Commission's market reconstruction, DHL will remain the market leader, followed by UPS. When asked whether post-Transaction there would be sufficient viable alternatives for their international intra-EEA express delivery needs, the vast majority of customers responded that this was the case. Both UPS and DHL were indicated as viable alternatives to the Merged Entity post-Transaction.

(29) Second, customers can protect themselves against a hypothetical post-merger price increase by the Merged Entity by switching to another provider. The clear majority of customers of international intra-EEA express delivery services are multi-sourcing, and switching between providers is easy.

(30) Third, DHL and UPS could easily increase their service supply in case of a hypothetical post-Transaction price increase by the Merged Entity and thereby cater for additional demand without incurring material additional cost.

e) A clear majority of customers has not expressed any concerns about the Transaction

(31) The vast majority of the customers who have responded to the Commission's first and second phase market investigation expressed a neutral or even a positive view about the overall effects of the Transaction on the market for international intra-EEA express small package delivery services.

f) The price concentration analysis was inconclusive

(32) In order to ensure full consistency with the quantitative analysis carried out in the UPS/TNT case, the Commission applied a price concentration analysis to evaluate the possible price impact of the proposed Transaction on FedEx's prices and, in turn, on TNT's prices. The Commission found that the price increases estimated by the model were not statistically significant. Therefore, the results of the price concentration analysis could not be used in a reliable way as evidence towards or against establishing a significant impediment of effective competition.

g) The merger will give rise to efficiencies

(33) FedEx argues that significant efficiencies would arise from the Transaction, in particular from the integration of FedEx's relatively inefficient European operations into TNT's network. The main categories of efficiencies affecting the express intra-EEA services were pick-up and delivery (PUD) cost savings and air network cost savings. Based on the information provided to it, the Commission concluded that a part of the claimed PUD cost savings and a part of the claimed air network cost savings (after pass-through) qualify as relevant merger specific efficiencies which could not be achieved to a similar extent by less anti-competitive alternatives. The time window for the realisation of the identified efficiencies was estimated to be 3 years. Even if the results of the Commission's price concentration analysis had been statistically significant, the PUD efficiencies associated with the Transaction would have more than offset the price increases estimated for FedEx customers in any of the national markets for international intra-EEA express delivery services.

h) Conclusion

(34) Therefore, the Commission concluded that the Transaction would not significantly impede effective competition in any of the 30 national markets for the provision of international intra-EEA express delivery services.

2. *Extra-EEA small package delivery services: General assessment*

(35) A number of operators provide extra-EEA services, among which the four integrators, national postal operators, freight forwarders and other courier companies. Similarly to intra-EEA express, extra-EEA express is also a network industry entailing infrastructure investments all along the value chain and requiring operators to ensure a presence in all EEA countries and all major world lanes, namely North America, Central and South America, Africa, Asia/Pacific, the Middle East and the Rest of Europe. As the integrators have the tightest control over their network and are the only ones with a seamless express network covering all EEA countries, the non-integrated players only exert a limited competitive constraint on integrators. The Commission has therefore, similarly to intra-EEA express,

assessed the impact of the Transaction on the most conservative basis, taking into account only the competitive constraint exerted on the Merged Entity by the other integrators on the various possible markets for extra-EEA deliveries. In light of the considerations set out below, the Commission concluded that the Transaction would not lead to a significant impediment to effective competition on any of the 30 national markets for extra-EEA small package deliveries to the world or any of the national markets for extra-EEA deliveries to the six major world lanes.

a) The market position of the Merged Entity would be moderate on markets for extra-EEA delivery services

(36) The Commission undertook a market reconstruction exercise based on revenue data provided by the four integrators, in view of assessing their relative market power on (i) the 30 national markets for international extra-EEA deliveries from an EEA country to the world; and (ii) the national markets for international extra-EEA deliveries from each of the 30 EEA countries to each of the six main world trade lanes. The Commission also analysed the impact of the Transaction on all EEA national markets in an aggregated way, that is to say, for extra-EEA deliveries to the world and to the six major destination lanes from the EEA.

(37) Looking at all 30 national markets for extra-EEA deliveries to the world and to the six major destination lanes, the Parties' combined market share is rather moderate on most plausible markets for extra-EEA delivery services. Looking at national markets for extra-EEA deliveries to the world, the Commission found that post-Transaction the relative position of the Merged Entity on most 30 national markets for extra-EEA deliveries to the world would be rather moderate. The Parties' combined market share would exceed 40 % and the increment of the Transaction would be over 5 % only on three national markets, that is Hungary, Estonia and Latvia. Last, on national markets for extra-EEA deliveries to the major world lanes, the Parties would have a combined market share of more than 40 % and the increment would be over 5 % on ten national markets.

b) Among integrators, the Parties are not particularly close competitors on markets for extra-EEA delivery services

(38) The Parties are not particularly close competitors for several reasons. First, the relative position of TNT is weaker among integrators on the total market for extra-EEA deliveries and on most possible sub-segmentations thereof. This results from the fact that TNT is mainly focused on Europe, unlike the other three integrators that are global players. A large part of TNT's revenues is generated through the provision of delivery services within Europe or from/to Europe while for the other three integrators, the Europe-related part of their activity represents a much smaller part of their overall business. This is especially the case for FedEx. A much smaller percentage of its total revenues is generated from services not from/to Europe, whereas this percentage is estimated higher for the other integrators. Also, within TNT's Europe-generated revenues, only a small percentage relates to the provision of extra-EEA services.

(39) Second, TNT owns a very limited air network in comparison to the other integrators. Unlike the other three integrators that use an extensive owned air network for their extra-EEA deliveries, TNT only uses four aircraft and purchases capacity from commercial or cargo airlines for all its other shipments. FedEx, on the other hand, uses a network of 17 owned aircraft for its extra-EEA delivery services. Using an owned air network offers significant advantages for an integrator, including, for instance, greater certainty as to the available capacity and cost structure as well as better service performance as it allows seamless connectivity, less movements of the small package and fewer handling points. The limited scope of TNT's extra-EEA air network is both a reflection of its relative weakness on markets for extra-EEA deliveries in comparison to the other three integrators and a restriction on its ability to compete on equal terms with them.

(40) Third, analysing the Parties' bidding data and in particular those of FedEx on extra-EEA deliveries, the Commission identified that TNT appeared as a weaker competitor of FedEx for extra-EEA opportunities than DHL and UPS. DHL appeared as FedEx's main competitor, with UPS coming second and TNT third. More specifically, DHL appeared as FedEx's competitor more than three times as often as TNT.

(41) Fourth, the Commission's market investigation confirmed that the Parties are not each other's closest competitors.

(42) Therefore, on markets for extra-EEA delivery services, the Commission concluded that TNT cannot be considered a particularly close competitor of FedEx.

c) The Transaction would not remove an important competitive force

(43) TNT is clearly the weakest of the four integrators with respect to extra-EEA deliveries and cannot be seen as an important competitive force that will be removed by the Transaction. Moreover, TNT's market share has not significantly increased in the course of the recent years as a result of some aggressive strategy. In addition, TNT follows a business model very similar to that of the other integrators on its provision of extra-EEA services, its services and prices are therefore comparable to those of its rivals. Also, TNT does not appear to be charging significantly lower prices than the other integrators and does not focus on it being a low-cost provider in its business plan and marketing; instead it prioritises its reliability, customer service quality and flexibility.

d) The Merged Entity would be constrained by its competitors also post-Transaction

(44) First, all four integrators already have a global footprint, offering small package delivery services to more than 220 countries in the world. They all have therefore already access to a customer base requiring extra-EEA services. Further, all integrators have the ability to organise either directly or by contracting third parties, the pick-up of small packages on all EEA countries, to arrange the air transfer of small packages at the destination lane and from there on, the delivery at destination.

(45) Second, in light of the above, even if an integrator has a somewhat lower share on a specific market for extra-EEA deliveries, this is not indicative of an inherent weakness to offer the service from that market. Indeed, in all instances, in which the share of a given integrator is limited on a specific product market/destination, but much higher on other product markets/destinations for deliveries from the same EEA origin country, this integrator is therefore in the position of providing extra-EEA services from that country of origin. Similarly, in all instances, in which an integrator has a limited share on a specific extra-EEA market, but has much higher shares for deliveries to that destination from other EEA countries of origin, this very integrator is thus able to provide extra-EEA delivery services to that destination.

(46) Third, there is no capacity restriction on extra-EEA services. All integrators are experienced in dealing with fluctuations in demand and tend to operate with a margin that enables them to take up additional volumes. They also can easily increase their airlift capacity or road network should there be a need and have in the past done so, in order to accommodate new large customers.

(47) Fourth, customers can easily switch supplier of extra-EEA small package delivery services. Most of them already multisource among integrators or other providers and their contracts do not contain exclusivity clauses. Customers' ability to increase the volumes they ship with UPS and DHL would, therefore, constrain the Merged Entity also post-Transaction.

(48) Last, non-integrators also exert some competitive pressure, in particular in relation to extra-EEA deferred services.

e) A clear majority of customers and competitors has not expressed any concerns

(49) The vast majority of the respondents to the Commission's market investigation were of the view that the Transaction will bring together the complementary strengths of FedEx, on the markets for extra-EEA, and of TNT, on the markets for intra-EEA delivery services. Specifically on extra-EEA markets, the relative majority of respondents considered that the impact of the Transaction will be positive, followed by those who considered it will be neutral.

f) The Transaction would give rise to efficiencies

(50) The Transaction would also give rise to significant efficiencies on markets for extra-EEA delivery services. These would be primarily generated by the Merged Entity's cost savings, resulting from the integration of all its volumes on the lower cost network of either FedEx or TNT. As a result, all volumes would be transported through TNT's cheaper intra-EEA network at origin and delivered through the lower cost network of either FedEx or TNT at destination. It is expected that further synergies will be realised, as the inter-continental flying moves to FedEx over time. Similarly to its approach for intra-EEA, the Commission assessed the verifiability of these efficiencies, their merger specificity and ability to be used to consumers' benefit and concluded that the Transaction would result in relevant efficiencies under the three-pronged test set out in the Horizontal Merger Guidelines.

3. *Extra-EEA small package delivery services: Country-by-country analysis*

(51) Pursuant to the results of the Commission's market reconstruction, the Merged Entity would have a combined market share of more than 40 % and the Transaction would lead to an increment of more than 5 % on 13 potential lanes for extra-EEA deliveries. Those markets correspond to extra-EEA deliveries from seven different EEA countries, namely Belgium, Bulgaria, Estonia, Latvia, Lithuania, Malta and Slovakia. For Belgium, Bulgaria, Estonia and Malta, those markets would be for extra-EEA deliveries to North America. For Latvia, it would be the markets for deliveries to North America, to Central and South America, to the Middle East and to Asia/Pacific. In the case of Lithuania and Slovakia, it would be the markets for deliveries to the Middle East. Finally, for Estonia, Hungary and Latvia it would also be for extra-EEA deliveries to the world. In addition, the Commission analysed in more detail the markets where the Merged Entity would have a moderate market share of less than 40 % and where the third competitor would, post-Transaction, have a market share below 20 %. Last, it also analysed in more detail the markets where the share of the third competitor would be smaller than the increment that the Transaction would bring about. Overall, on the basis of these criteria, 52 markets were analysed in more detail individually for the following countries.

(52) *Austria*: The Commission analysed in more detail the market for extra-EEA deliveries from Austria to the Middle East, where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL [50-60] %. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %.

(53) *Belgium*: The Commission analysed in more detail the markets for extra-EEA deliveries from Belgium to North America, where the Merged Entity would become the market leader with a market share of [40-50] % and an increment of [5-10] %, followed by UPS with [30-40] % and DHL with [10-20] %. It also analysed in more detail the markets for extra-EEA deliveries from Belgium to the world, to Central and South America, to Asia/Pacific and to the Middle East, where the Merged Entity would have a market share of [30-40] % and the third competitor (UPS) would, post-Transaction, have a market share of [10-20] %. In all these four markets, DHL would remain the market leader with [40-50] %, [50-60] %, [40-50] % and [50-60] % respectively.

(54) *Bulgaria*: The Commission analysed in more detail the markets for extra-EEA deliveries from Bulgaria to North America, where the Merged Entity would have a market share of [40-50] % with an increment of [5-10] %. DHL would also have a share of [40-50] % while UPS would be third with a market share of [10-20] %. The Commission also analysed in more detail the markets for extra-EEA deliveries from Bulgaria to the world, to Central and South America and to the Middle East, where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL with [50-60] % in all three markets. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %, [5-10] % and [10-20] % respectively. Finally, the Commission also analysed in more detail the market for extra-EEA deliveries from Bulgaria to Asia/Pacific where the Merged Entity would have a market share of [20-30] %, behind the clear market leader DHL with [60-70] %. The share of the third competitor (UPS) would be [5-10] %.

(55) *Croatia*: The Commission analysed in more detail the markets for extra-EEA deliveries from Croatia to Asia/Pacific, where the Merged Entity would have a market share of [20-30] % with an increment of [5-10] %, behind the clear market leader DHL with [60-70] %. UPS would, post-Transaction, have a market share of [5-10] %.

(56) *Cyprus*: The Commission analysed in more detail the markets for extra-EEA deliveries from Cyprus to Central and South America, to Asia/Pacific, to the Middle East and to Africa, where the Merged Entity would have a market share of [30-40] % with an increment of [5-10] %. In all these markets, DHL would remain the market leader with market shares of [60-70] %, [60-70] %, [50-60] % and [50-60] % respectively. The third competitor (UPS) would, post-Transaction, have a market share of [0-5] % in the markets to Central and South America as well as to Africa and [5-10] % in the markets to Asia/Pacific and to the Middle East. The Commission also analysed in more detail the market for extra-EEA deliveries from Cyprus to the world where the Merged Entity would have a market share of [20-30] % with an increment of [5-10] % behind the clear market leader DHL with [60-70] %. UPS would have a market share of [5-10] %.

(57) *Czech Republic*: The Commission analysed in more detail the markets for extra-EEA deliveries from the Czech Republic to the world and to the Middle East where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL with [50-60] % in both markets. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %. The Commission also analysed in more detail the markets for extra-EEA deliveries from the Czech Republic to Central and South America and to Asia/Pacific where the Merged Entity would have a market share of [20-30] % behind the clear market leader DHL with [60-70] % in both markets. UPS would have a market share of [5-10] %.

(58) *Estonia*: The Commission analysed in more detail the markets for extra-EEA deliveries from Estonia to the world and to North America where the Merged Entity would have a market share of [40-50] % and [50-60] % respectively with an increment of [10-20] % and [5-10] % respectively. DHL's share for the market from Estonia to the

world would also be [40-50] % and it would be [20-30] % for North America. UPS would be third with a market share of [10-20] % in both these markets. The Commission also analysed in more detail the market for extra-EEA deliveries from Estonia to Asia/Pacific where the Merged Entity would have a market share of [30-40] % behind the clear market leader DHL with [50-60] %. The third competitor (UPS) would have a market share of [5-10] %.

(59) *France*: The Commission analysed in more detail the markets for extra-EEA deliveries from France to Central and South America, to Asia/Pacific and to the Middle East where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL with [50-60] %, [40-50] % and [50-60] % respectively. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] % in all these markets.

(60) *Hungary*: The Commission analysed in more detail the markets for extra-EEA deliveries from Hungary to the world where the Merged Entity would have a market share of [40-50] % with an increment of [5-10] %. DHL's share would also be [40-50] % and UPS would have a market share of [10-20] %. The Commission also analysed in more detail the markets for extra-EEA deliveries from Hungary to Central and South America, to Asia/Pacific, to the Middle East and to Africa where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL with a market share of [40-50] %, [50-60] %, [40-50] % and [50-60] % respectively. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] % in all these markets.

(61) *Ireland*: The Commission analysed in more detail the markets for extra-EEA deliveries from Ireland to the world and to Asia/Pacific where the Merged Entity would have a market share of [30-40] % with a small increment of [5-10] % in both markets and would be behind the clear market leader DHL with [40-50] % and [50-60] % respectively. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %.

(62) *Latvia*: The Commission analysed in more detail the markets for extra-EEA deliveries from Latvia to the world, to North America, to Central and South America, to Asia/Pacific and to the Middle East where the Merged Entity would have a market share of [40-50] %, [50-60] %, [40-50] %, [40-50] % and [50-60] % respectively. In these markets, DHL would have a market share of [40-50] %, [20-30] %, [30-40] %, [30-40] %, [30-40] % respectively and UPS would be third with [10-20] %, [10-20] %, [20-30] %, [20-30] %, [10-20] % respectively.

(63) *Lithuania*: The Commission analysed in more detail the market for extra-EEA deliveries from Lithuania to the Middle East where the Merged Entity would have, post-Transaction, a market share of [40-50] % with an increment of [5-10] %. DHL would also have a market share of [40-50] % and UPS would be third with a market share of [10-20] %.

(64) *Luxembourg*: The Commission analysed in more detail the markets for extra-EEA deliveries from Luxembourg to the world, to Central and South America and to the Middle East where the Merged Entity would have a market share of [20-30] % with a small increment of [5-10] %, behind the clear market leader DHL with [60-70] % in all three markets. The share of the third competitor (UPS) would be [5-10] % in all three markets. The Commission also analysed in more detail the market for extra-EEA deliveries from Luxembourg to North America where the Merged Entity would have a market share of [30-40] % behind the clear market leader DHL with [50-60] %. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %.

(65) *Malta*: The Commission analysed in more detail the market for extra-EEA deliveries from Malta to North America where the Merged Entity would become a market leader with a market share of [40-50] % and an increment of [10-20] % followed by DHL with [30-40] % and UPS with [20-30] %.

(66) *Poland*: The Commission analysed in more detail the markets for extra-EEA deliveries from Poland to Central and South America and to the Middle East where the Merged Entity would have a market share of [30-40] %, behind the clear market leader DHL with a market share of [40-50] % in both markets. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %.

(67) *Slovakia*: The Commission analysed in more detail the markets for extra-EEA deliveries from Slovakia to the Middle East where the Merged Entity would have a market share of [40-50] % behind the market leader DHL with [50-60] %. UPS would have a market share of [0-5] % in this market. The Commission also analysed in more detail the markets for extra-EEA deliveries from Slovakia to the world, to Central and South America and to Africa where the Merged Entity would have a market share of [30-40] % behind the clear market leader DHL with [50-60] % in all three markets. The third competitor (UPS) would, post-Transaction, have a market share of [10-20] %, [5-10] % and [0-5] % respectively. The Commission also analysed in more detail the market for extra-EEA deliveries from Slovakia to Asia/Pacific where the Merged Entity would have a market share of [20-30] % behind the clear market leader DHL with [60-70] %. UPS would have a market share of [5-10] %.

(68) On the basis of the Commission's analysis of the Parties' submissions, the Parties' internal documents and the results of the market investigation, the Commission arrived at the following conclusions on the abovementioned markets for extra-EEA deliveries to the world and the major trade lanes: the Merged Entity will in most markets only have moderate market shares; FedEx and TNT are not close competitors; TNT does not constitute an important competitive force on these markets; DHL and UPS will have the required capabilities to effectively constrain the Merged Entity also post-Transaction; a large proportion of FedEx market share on these lanes actually derives from a few big customers of the Parties who can easily switch, resulting in the market shares of the Merged Entity remaining highly contestable; and the market investigation results were predominantly positive or neutral as to the impact of the Transaction. In addition, efficiencies were found to be generated on these markets.

(69) Consequently, in light of this assessment, the Commission concluded that the Transaction would not significantly impede effective competition in any of the above mentioned national markets for extra-EEA small package delivery services to the world or the world major trade lanes.

4. *Impact of the Transaction on SMEs*

(70) Certain participants to the market investigation suggested that the Transaction is likely to have a greater impact on SMEs, in particular in the form of price increases. Allegedly, TNT currently offers lower prices than all other integrators, and is therefore the provider of choice of SMEs engaging in e-commerce activities. According to these market participants, SMEs are generally likely to single source, they rely on integrators due to their need for different types of services and lack bargaining power so they 'pay the most' as they pay list prices. As a result of the Transaction, two close competitors would merge and the Merged Entity would be unlikely to have an incentive anymore to be the 'maverick integrator' towards SMEs.

(71) The Commission was of the view that this is not the case for a number of reasons. First, the Commission investigated the issue of SMEs in detail during the in-depth investigation. The replies to a questionnaire addressed to SMEs showed that, similarly to the view of all customers, the majority of SMEs had a positive or neutral view of the Transaction overall, as well as of its impact on service offer and quality. Moreover, the market investigation did not confirm the concern that SMEs single-source or pay list prices. SMEs responding to the market investigation, including those active in e-commerce, indicated that they generally multi-source their intra-EEA and extra-EEA express deliveries. The vast majority of the responding SMEs also indicated that they negotiate volume discounts; only few respondents do not negotiate any discounts at all.

(72) Second, the Commission considered that TNT could not be said to be a 'maverick' or a market leader in the SME sector for a number of reasons. TNT's customers, like those of other operators, will negotiate fixed discounted rates with TNT in advance, to be able to factor in transport costs. Therefore, TNT will not be able to apply fluctuating prices to its customers depending on the expected capacity utilisation of the relevant aircraft on a particular day. Moreover, the short term price elasticity of the express delivery services is very low. Therefore, if TNT foresees that its flight on a particular lane will be largely empty, giving discounts to existing or potential customers could not suddenly create a higher demand to ship items on that day and lane. This is also confirmed by the market investigation where the majority of SMEs indicated that they enter into framework contracts for a longer period of time instead of making ad hoc purchases when a need arises.

(73) Third, while TNT has had occasional campaigns also targeting SMEs, this is not reflective of a structurally different market position but can be considered as part of normal competitive behaviour to attract customers. TNT cannot be said to apply excessively low prices, on a structural basis and as part of a distinct business model to SMEs and is not a price setter in the market. Moreover, TNT has not aggressively expanded its market position in the SME segment.

(74) Fourth, the Commission further considered, as already indicated above, that the Parties were not particularly close competitors. They also do not appear to provide any differentiated product specifically to a particular group of SMEs or to have a focus on these customers which other integrators could not or do not also provide. Both DHL and UPS are already providing tailored service offerings on their websites for SMEs. The vast majority of responding competitors confirmed that the requirements of SMEs in relation to small package deliveries are no different from other businesses and that services to SMEs would not require any extra assets or resources.

(75) Consequently, in light of all of the above, the Commission concluded that the Transaction would not impede effective competition also in relation to services to SMEs.

V. **CONCLUSION**

(76) For the reasons mentioned above, the Decision concludes that the Transaction will not significantly impede effective competition in the internal market or in a substantial part of it.

(77) Consequently, the concentration is declared compatible with the internal market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.

V

(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

EUROPEAN COMMISSION

Prior notification of a concentration

(Case M.8233 — Rockaway E-Commerce/EC Investments/Bonak/Sully Systems)

Candidate case for simplified procedure

(Text with EEA relevance)

(2016/C 450/10)

1. On 25 November 2016, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([1]) by which the undertakings Rockaway Capital SE and its group ('Rockaway'), EC Investments a.s. ('ECI') and PPF Group NV and its group ('PPF') acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Sully Systems a.s. ('JVCo'), a newly created joint venture.

2. The business activities of the undertakings concerned are:

— Rockaway group is an investment group focusing on investments into existing companies and start-ups in new expanding segments of the market for internet services, most importantly on e-commerce services, such as online retail, online search engines, online payments and other online services,

— PPF is a large multinational finance and investment group focusing on financial services, consumer finance, telecommunications, biotechnologies, retail services, real estate and agriculture,

— ECI operates in the electricity, gas and heating sectors, as well as in media business,

— JVCo will act as a new holding company for the online shopping-related part of the Rockaway portfolio companies.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of the Merger Regulation. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 ([2]) it should be noted that this case is a candidate for treatment under the procedure set out in this Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301), by email to COMP-MERGER-REGISTRY@ec.europa.eu or by post, under reference M.8233 — Rockaway E-Commerce/EC Investments/Bonak/Sully Systems, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

([1]) OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation').
([2]) OJ C 366, 14.12.2013, p. 5.

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