

Case No: 76038  
Document No: 763232  
Decision No: 277/15/COL

EFTA SURVEILLANCE  
AUTHORITY

## EFTA SURVEILLANCE AUTHORITY DECISION

of 06 July 2015

exempting certain logistics services of Posten Norge AS 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

The EFTA Surveillance Authority (“the Authority”)

Having regard to the Act referred to at point 4 of Annex XVI to the EEA Agreement laying down the procedures for the award of public contracts in the utilities sector (*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*) (“Directive 2004/17/EC”), and in particular Article 30(1), 30(5) and 30(6) thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular Articles 1 and 3 of Protocol 1 thereto,

Having regard to the Decision of the Authority of 19 April 2012 empowering the Member with special responsibility for public procurement to take certain decisions in the field of public procurement (Decision No. 136/12/COL),

After consulting the EFTA Public Procurement Committee,

Whereas:

### I. FACTS

- (1) By letter of 20 March 2015,<sup>1</sup> and following pre-notification discussions, the Authority received a request from Posten Norge AS (“Norway Post”) to the effect of adopting a decision establishing the applicability of Article 30(1) of Directive 2004/17/EC to certain logistics services. The Authority informed Norway of the receipt of this request.<sup>2</sup> By letter of 1 June 2015,<sup>3</sup> Norway Post amended the scope

<sup>1</sup> Received by the Authority on 23 March 2015 – See Document No 752259.

<sup>2</sup> Document Nos 760094, 757507, 758208.

<sup>3</sup> Document No 758924.

of its request, following consultations with the Authority. By letters from the Authority of 10 June 2015, the EFTA Public Procurement Committee was consulted and asked to provide its view by written procedure.<sup>4</sup> The EFTA Public Procurement Committee delivered a positive opinion by unanimous vote on the Authority's draft decision on 26 June 2015.<sup>5</sup>

- (2) The request by Norway Post as amended concerns the following logistics services as defined by Norway Post:
  - (a) Standard Business-to-Business ("B2B") delivery of parcels - national, referring to the distribution of parcels weighing less than 35 kg sent from and delivered to businesses in Norway (including inbound parcels, referring to deliveries of parcels by a postal operator or logistics service provider in Norway on behalf of a postal operator or logistics service provider abroad).
  - (b) Standard B2B delivery of parcels - international outbound, referring to the distribution of parcels weighing less than 35 kg sent from businesses in Norway to businesses abroad.
  - (c) Express ("Day 1"/in-night) delivery of parcels - national, referring to the distribution of parcels and goods to businesses in Norway, with a guaranteed delivery by the next day before a set deadline.
  - (d) Express delivery of parcels – international (including inbound and outbound), referring to express transport of parcels to and from Norway.
  - (e) Groupage goods or general cargo, referring to the distribution of goods weighing between 35 kg and 2.5 tonnes (not parcels) handled through a network of terminals, excluding thermo and bulk transport, and whereby multiple items are delivered to the same recipients.
  - (f) Part load, referring to the distribution of goods exceeding 2 to 2.5 tonnes and which are not processed in terminals but delivered by road or rail, excluding thermo and bulk transport.
- (3) The request is accompanied by a report of the national competition authority, i.e. Konkurransetilsynet ("the Norwegian Competition Authority"), which concluded that Norway Post was exposed to a significant degree of competition on all of the markets that have been notified to the Authority.

## II. THE LEGAL FRAMEWORK

- (4) Article 30(1) of Directive 2004/17/EC allows for an exemption to the requirements of the rules on public procurement in a situation where the participants on a market are operating in a competitive environment. Article 30(1) of the Directive provides that:

*"Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in*

<sup>4</sup> Document Nos 758020, 759785, 759788.

<sup>5</sup> Document No 762175.



*which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.”*

- (5) Article 30(1) of the Directive sets out two requirements which must both be met before the Authority may grant an exemption under Article 30(5), taking into account Article 30(6), of the Directive.
- (6) The first requirement in Article 30(1) of Directive 2004/17/EC is that the activity must be carried out on a market to which access is not restricted. According to Article 30(3) of the Directive, access to a market is deemed to be unrestricted if the Member State has implemented and applied the relevant EEA legislation opening a given sector or a part of it.
- (7) Article 30(5) of Directive 2004/17/EC allows the Authority to adopt decisions on the basis of Article 30(1) upon requests by contracting entities when the legislation of a State provides for it. This requirement is met with regard to Norway. Directive 2004/17/EC has been implemented into the Norwegian legal order by the *Public Procurement Act of 16 July 1999 No. 69*<sup>6</sup> and the *Regulation No. 403 of 7 April 2006 on procurement rules in the supply sectors (water and energy supply, transport and postal services)*<sup>7</sup>. Section 15-1 of Regulation No. 403 states the conditions and the procedure for applying Article 30 of the Directive to Norwegian contracting entities. Regulation No. 403 provides that contracting entities can require the Authority to adopt a decision on the applicability of Article 30(1) of Directive 2004/17/EC to a given activity in Norway. Before the application is submitted, the contracting entities can, where appropriate, obtain a statement from the national competition authority.
- (8) The relevant EEA legislation pursuant to Article 30(3) of the Directive is, for the request at hand, referred to at point F of Annex XI to Directive 2004/17/EC, namely *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 (“Directive 97/67/EC”)*.<sup>8</sup> Norway has implemented Directive 97/67/EC into its national legal order, as well as its first modifications introduced by amending Directive 2002/39/EC.<sup>9</sup> However, the latest modifications to Directive 97/67/EC, introduced by amending Directive 2008/6/EC<sup>10</sup>, have not been incorporated into the EEA Agreement to this date. In spite of this fact, the provisions contained in those latest amendments to Directive 97/67/EC do not affect the activities concerned by the request, and consequently there is no legal obstacle to consider the presumption set out by Article 30(3) of the Directive 2004/17/EC is fulfilled.
- (9) The second requirement in Article 30(1) of the Directive 2004/17/EC is that the activity, in the EFTA State where it is performed, is directly exposed to competition. The question of whether an activity is directly exposed to competition is to be decided on the basis of *“criteria that are in conformity with the EC Treaty on competition, such as the characteristics of the goods or services concerned, the*

<sup>6</sup> Lov 16. juli 1999 nr. 69 om offentlige anskaffelser.

<sup>7</sup> Forskrift 7. april 2006 nr. 403 om innkjopsregler i forsyningssektorene (vann- og energiforsyning, transport og posttjenester).

<sup>8</sup> Act referred to at point 5d of Annex XI to the EEA Agreement. OJ L 15, 21.1.1998, p. 14.

<sup>9</sup> Act referred to at point 5d of Annex XI to the EEA Agreement. OJ L 176, 5.7.2002, p. 21.

<sup>10</sup> OJ L 52, 28.2.2008, p. 3.

*existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question”.*<sup>11</sup>

- (10) The existence of direct exposure to competition is to be evaluated on the basis of various indicators, none of which is, *per se*, decisive. In respect of the markets concerned by this Decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets.<sup>12</sup> Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. As the conditions vary for the different activities that are the subject of this Decision, a separate assessment is made for each relevant activity or market.
- (11) Although different market definitions might be envisaged in certain cases, it is not necessary to decide on the precise definition of the relevant market as regards a number of services listed in the notification submitted by Norway Post to the extent that the result of the assessment remains the same whether it is based on a narrow or a broader market definition.
- (12) This Decision is made solely for the purpose of granting an exemption pursuant to Article 30 of Directive 2004/17/EC and is without prejudice to the application of the rules on competition.

### III. ASSESSMENT

- (13) It should be kept in mind that the aim of this Decision is to establish whether the services concerned by the request are exposed to such a level of competition (in markets to which access is not restricted within the meaning of Article 30 of Directive 2004/17/EC) which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.
- (14) In this context, it should be recalled that the markets defined are generally characterised by the presence of several logistics service providers. However, for the purposes of this Decision, and without prejudice to the application of competition law more generally, the analysis of exposure to competition will assess only whether or not the activities of Norway Post are currently exposed to competition in the markets to which access is not restricted.
- (15) As explained above, the Authority has to determine whether the activities concerned are directly exposed to competition. To this end, it has examined the evidence provided by Norway Post as well as information provided by the Norwegian Competition Authority, competitors and customers of Norway Post. It should be noted that the Authority has relied primarily on the market data provided by Norway

<sup>11</sup> Article 30(2) of Directive 2004/17/EC.

<sup>12</sup> See also the Authority's Decision of 22 May 2012 exempting the production and wholesale of electricity in Norway 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 (Decision No 189/12/COL, OJ L 287, 18.10.2012, p. 21 and EEA Supplement No 58, 18.10.2012, p. 14).



Post to assess market shares and concentration levels. Some of the data were confirmed in the context of the Authority's market information gathering exercise, but the Authority was not able to confirm all of the market share data.

#### Market definition – product market

(16) In line with the European Commission's decisional practice in competition law cases,<sup>13</sup> as well as in cases relating to exemptions pursuant to Article 30 of Directive 2004/17/EC<sup>14</sup> concerning parcel delivery services, the applicant has distinguished the relevant markets based on the following:

- a. Standard/deferred and express delivery of parcels, according to the time sensitivity of the shipment;
- b. Domestic and international deliveries of parcels;
- c. Business-to-Consumers ("B2C") and Business-to-Business ("B2B") deliveries of parcels; and
- d. Parcels and freight, according to weight, format and the handling equipment needed.

#### Market definition – geographic market

(17) The European Commission ("the Commission") has found in various competition decisions,<sup>15</sup> but also in the context of Article 30 of Directive 2004/17/EC,<sup>16</sup> that the geographical markets for domestic and international B2B parcel delivery services, national and international express services, and general cargo/groupage (or light goods) and part-load services were national in scope. With respect to some of these markets, the Commission had considered whether these markets could be wider than national, but eventually did not conclude on this point.<sup>17</sup> This segmentation is mainly

<sup>13</sup> Commission Decision No IV/M.1549 of 8 July 1999 *Deutsche Post/ASG*, paragraph 10; Commission Decision No COMP/M.3155 of 19 June 2003 *Deutsche Post/Securicor*, paragraph 8; Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 49 to 63; and Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 156 and 164.

<sup>14</sup> Commission Decision No 2013/154/EU of 22 March 2013 exempting certain services in the postal sector in Hungary from the application of Directive 2004/17/EC, paragraphs 9 and 18; Commission Decision No 2010/142/EU of 3 March 2010 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC, paragraphs 9 to 14; Commission Decision No 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC, paragraphs 16 to 24; and Commission Decision No 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland from the application of Directive 2004/17/EC, paragraphs 17 to 23.

<sup>15</sup> Commission Decision No COMP/M.1347 of 23 February 1999 *Deutsche Post/Securicor*, paragraphs 32 to 34; Commission Decision No IV/M.1405 of 15 February 1999 *TNT Post Group / Jet Services*, paragraphs 29 to 31; Commission Decision No IV/M.1513 of 1 July 1999 *Deutsche Post / Danzas / Nedlloyd*, paragraphs 15 to 19; Commission Decision No COMP/M.1549 of 8 July 1999 *Deutsche Post/ASG*, paragraphs 15 to 18; Commission Decision No COMP/M.2908 of 21 October 2002 *Deutsche Post / DHL (II)*, paragraphs 19 and 20; Commission Decision No COMP/M.3155 of 19 June 2003 *Deutsche Post/Securicor*, paragraph 11; Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraphs 31 to 32; Commission Decision No COMP/M.5152 of 21 April 2009, *Posten AB/Post Danmark A/S*, paragraphs 64 to 74; Commission Decision No COMP/M.6503 of 4 July 2012 *La Poste/Swiss Post/JV*, paragraphs 53 to 56; and Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 241 to 243.

<sup>16</sup> Commission Decision No 2013/154/EU of 22 March 2013 exempting certain services in the postal sector in Hungary from the application of Directive 2004/17/EC, paragraph 19.

<sup>17</sup> Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraphs 25 to 27.

based on the fact that such services are provided at national level. The applicant's position is in line with the above-mentioned Commission's practice.

- (18) The Norwegian Competition Authority has come to the conclusion that the precise geographical definition of the relevant market can be left open as the result of the analysis would remain the same regardless of whether it is based on a narrow or broad market definition.<sup>18</sup>
- (19) Given that there are no indications of a wider or smaller geographical scope of the markets, for the purposes of evaluating whether the conditions laid down in Article 30(1) of Directive 2004/17/EC are fulfilled, and without prejudice to competition law, the Authority considers the relevant geographical markets for the purposes of this Decision to extend to the territory of Norway.
- (20) The issues are addressed in further detail below by reference to the product markets that have been notified by Norway Post.

## 1.1 The standard B2B parcel delivery market - national

### 1.1.1 Relevant product market

- (21) The applicant has submitted that the B2B standard national parcel delivery market should be defined as the distribution of parcels weighing less than 35 kg between businesses and delivered in Norway (including inbound parcels, referring to deliveries of parcels by a postal operator or logistics service provider in Norway on behalf of a postal operator or logistics service provider abroad).<sup>19</sup>
- (22) In its *Norway Post/Privpak* decision,<sup>20</sup> the Authority found that B2B parcel delivery services are used by business customers that require door-to-door delivery to other businesses within working hours. Such business customers are time sensitive and are prepared to pay a significantly higher price for such services. The Authority determined that the B2B parcel delivery services have different characteristics, prices and intended uses compared to the B2C parcel delivery services.<sup>21</sup> This conclusion appears to be in line with Commission practice where the Commission has defined separate parcel delivery markets for business customers and private customers because B2B and B2C deliveries were not considered to be substitutable.<sup>22</sup>
- (23) The applicant also distinguishes the B2B parcel delivery services market from the freight market because of the differences in handling and prices. The parcel-sorting facilities of B2B service providers are subject to a weight limitation based on a single person being able to lift each parcel and also on each parcel lending itself to machine

<sup>18</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 4.

<sup>19</sup> See Norway Post's application, page 23.

<sup>20</sup> EFTA Surveillance Authority Decision No 322/10/COL of 14 July 2010, *Norway Post/Privpak*.

<sup>21</sup> EFTA Surveillance Authority Decision No 322/10/COL of 14 July 2010, *Norway Post/Privpak*, section 12.1.2, paragraph 360.

<sup>22</sup> Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 58 to 63; Commission Decision No 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC, paragraphs 17 and 18; and Commission Decision No 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland from the application of Directive 2004/17/EC, paragraphs 17 and 18.



handling. The applicant states that parcels weighing more than 35 kg are not handled in the same sorting facility as parcels weighing less and service providers appear to apply weight limitations in the region of 30 to 35 kg.<sup>23</sup>

- (24) This is consistent with the Commission's practice where a separate product market for small package delivery services was identified. It has been considered that there is a separate product market for small package delivery services for which 31.5 kg appeared an appropriate threshold to distinguish small packages from freight. This is because freight and small packages are usually transported via different infrastructures which are designed in a different way. According to a market investigation conducted by the Commission in one of its recent cases, the respondents confirmed that there is no uniform weight limit across the industry to determine which units are acceptable in a small package network. However, most competitors mentioned weight limits ranging between 25 and 35 kg.<sup>24</sup>
- (25) Moreover, in Norway Post's view, national and international standard B2B parcel delivery services also constitute two separate product markets. International outbound parcels normally require the involvement of two service providers and different infrastructures.<sup>25</sup> This is again in line with the Commission's decisions, where the market has been distinguished between domestic and international small package delivery services.<sup>26</sup>
- (26) The applicant considers that the domestic B2B parcels delivery services and the international inbound parcels delivery services are part of the same market. There appears to be a number of Commission decisions where such international inbound delivery appears to have been included in the national market.<sup>27</sup> Whether these markets are considered separately or as part of the same market will not affect the final assessment so no further distinction will be made for the purpose of this Decision and the precise definition of the relevant market can thus be left open.
- (27) In view of the foregoing, the Authority concludes for the purpose of this Decision that there is a separate product market for the distribution of parcels weighing less than 35 kg between businesses in Norway.

### 1.1.2 Direct exposure to competition

- (28) Norway Post's market share on the B2B domestic market amounted to an estimated 35% by value in 2013. The estimated combined market share of the three largest competitors amounted to 33% which had been increasing every year since 2011. In this respect, PostNord had 13%, Schenker had 11% and UPS had 9% by value in

<sup>23</sup> See Norway Post's application, page 26.

<sup>24</sup> Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 159 to 164 and Commission Decision No IV/M.1513 of 1 July 1999 *Deutsche Post / Danzas / Nedlloyd*, paragraph 10.

<sup>25</sup> See Norway Post's application, page 25.

<sup>26</sup> Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 165 to 182 and Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 54 to 74.

<sup>27</sup> Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraph 54 to 57. See also Commission Decision No 2010/142/EU of 3 March 2010 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC, paragraphs 10 and 11 and Commission Decision No 2014/184/EU of 2 April 2014 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC, paragraphs 29, 44 and 45 (in respect of mail delivery deliveries).

2013.<sup>28</sup> In addition, Norway Post's competitors are international operators with the financial strength to expand and customers appear to use, to a large extent, tenders for the supply of services making it relatively easy to switch to a new service provider. The contract duration is also generally short and customers appear to have a low degree of loyalty towards their suppliers.<sup>29</sup>

- (29) Although the Norwegian Competition Authority stated that it could not verify the market share data provided by Norway Post on the basis of the information in its possession, it concluded that Norway Post appeared to face competition from large international competitors and "is exposed to a not insignificant degree of competition in the market for standard [B2B] parcel services."<sup>30</sup>
- (30) On the basis of the above, and particularly taking into account the competitors' current market positions and financial strength, the Authority concludes that the standard national B2B parcel delivery market is directly exposed to competition.

## 1.2 The standard B2B parcel delivery market - international outbound

### 1.2.1 Relevant product market

- (31) The applicant argues that the B2B standard international parcel delivery market should be defined as the distribution of parcels sent from businesses in Norway to businesses abroad and should be distinguished from the national B2B parcel delivery market.<sup>31</sup>
- (32) As stated in paragraph (16) above and in line with Commission practice,<sup>32</sup> national and international standard parcel delivery services constitute two separate product markets. In addition, as mentioned above, the applicant is of the opinion that the international inbound parcel services market segment should be part of the national domestic B2B parcel services market, in line with a number of Commission decisions.<sup>33</sup>
- (33) International outbound delivery involves the collection, international transport and delivery of parcels through an entirely different distribution network than domestic parcel delivery services. International outbound delivery normally engages two logistics service providers, one in the collection country and another in the destination country. In the collection country, a logistics service provider collects parcels for transport to several destination countries. The same or another logistics service provider then distributes the parcel to its final destination in the destination country.
- (34) In view of the foregoing, the Authority concludes for the purpose of this Decision that there is a separate product market for the distribution of parcels weighing less than 35 kg sent from businesses in Norway to businesses abroad.

<sup>28</sup> See Norway Post's application, pages 102-105.

<sup>29</sup> See Norway Post's application, page 107 and 115.

<sup>30</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 6.

<sup>31</sup> See Norway Post's application, page 25.

<sup>32</sup> Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 54 to 74 and Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 165 to 182.

<sup>33</sup> See paragraph (26) above.



### 1.2.2 *Direct exposure to competition*

- (35) On the market for international outbound B2B standard parcel services, Norway Post had a market share by value in 2013 of 9% whereas the shares of its largest competitors were 26% (DHL), 24% (UPS) and 11% (TNT) respectively.<sup>34</sup> The presence of several stronger competitors on the market appears to represent a considerable degree of competitive pressure.
- (36) On the basis of the above, the Authority concludes that the international outbound B2B standard parcel services market is directly exposed to competition. This conclusion is in line with the Norwegian Competition Authority's assessment.<sup>35</sup>

## 1.3 **The express Day 1/in-night parcel delivery market - national**

### 1.3.1 *Relevant product market*

- (37) According to the applicant, there is a separate market for the distribution of parcels and goods to businesses in Norway with a guaranteed delivery by the next morning before a set deadline. Such express services, referred to as Day 1 or in-night services by the applicant, constitute a separate product market from the standard B2B service with delivery deadline by the following afternoon. The express Day 1/in-night service is two to three times more expensive than the standard or deferred B2B service.<sup>36</sup>
- (38) As mentioned above, the delineation of a separate product market for express deliveries of parcels, on the basis of the speed of delivery, appears to be in line with the Commission's decisional practice.<sup>37</sup> The distinction is based on the fact that the two services are provided using different infrastructures and networks, that express services are faster and more reliable and that express delivery services are also considerably more expensive. Express services are typically overnight, time-certain and include a number of the following value-added services: proof of delivery, track and trace, possibility of changing destination or address in transit, desk-to-desk delivery, flexible billing and pricing, insurance and money-back guarantee.<sup>38</sup> Although there may be variations in delivery times as regards different express delivery services (as opposed to the differences between express and deferred parcel delivery services), the Commission has recently concluded that such different

<sup>34</sup> See Norway Post's application, pages 119 and 121.

<sup>35</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 6.

<sup>36</sup> See Norway Post's application, pages 53-54.

<sup>37</sup> Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraphs 21 and 22; Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 50 to 53; Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 188 to 219. See also Commission Decision No 2013/154/EU of 22 March 2013 exempting certain services in the postal sector in Hungary from the application of Directive 2004/17/EC, paragraph 9; Commission Decision No 2010/142/EU of 3 March 2010 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC, paragraph 11; Commission Decision No 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC, paragraph 19; and Commission Decision No 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland from the application of Directive 2004/17/EC, paragraph 19.

<sup>38</sup> Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraph 21.

services do not constitute separate product markets but are segments within the broader express market.<sup>39</sup>

- (39) In view of the foregoing, the Authority concludes for the purpose of this Decision that there is a separate product market for express delivery of parcels and goods to businesses in Norway.

#### 1.3.2 *Direct exposure to competition*

- (40) Norway Post's market share in 2013 for the national express market amounted to an estimated 28% by value whereas PostNord's market share amounted to 33%, Jetpak 11% and Schenker 12%. Norway Post's market share has been declining since 2011. Several international companies are active in this market and many customers organise tenders before entering into contracts with service providers.<sup>40</sup> Given these factors, and in line with the Norwegian Competition Authority's assessment and conclusion,<sup>41</sup> the Authority concludes that the national express parcel delivery market is directly exposed to competition.

### 1.4 **The express parcel delivery market – international (including inbound and outbound)**

#### 1.4.1 *Relevant market*

- (41) The applicant considers that there is a separate market for the express transport of parcels and goods to and from Norway.<sup>42</sup> Such market delineation appears again to be in line with the Commission's decisional practice.<sup>43</sup> Indeed, the Commission has held that the international delivery of parcels involves the collection, international transportation and delivery of parcels through an entirely different distribution network.<sup>44</sup> International express services require a significantly higher number of destinations, specific and complex logistics, more qualified personnel and the ability to deal with additional regulatory requirements. Even when some players are active both on the domestic as well as on the international express markets, their businesses tend to be organised separately. Therefore, from a supplier's perspective, the sales, marketing and operations of international and domestic express services are very different.<sup>45</sup> International express delivery has also been distinguished from domestic express delivery due to the national nature of infrastructure.<sup>46</sup>

<sup>39</sup> Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 220 to 226.

<sup>40</sup> See Norway Post's application, pages 134-147.

<sup>41</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 6.

<sup>42</sup> See Norway Post's application, page 23 and 148.

<sup>43</sup> Commission Decision No COMP/M.2908 of 21 October 2002 *Deutsche Post/DHL (II)*, paragraphs 10 to 18; Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraph 22; Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 54 to 57; and Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 165 to 187. See also Commission Decision No 2013/154/EU of 22 March 2013 exempting certain services in the postal sector in Hungary from the application of Directive 2004/17/EC, paragraph 9 and Commission Decision No 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland from the application of Directive 2004/17/EC, paragraph 19.

<sup>44</sup> Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraph 55.

<sup>45</sup> Commission Decision No COMP/M.3971 of 24 November 2005 *Deutsche Post/Exel*, paragraph 22.

<sup>46</sup> Commission Decision No COMP/M.2908 of 21 October 2002 *Deutsche Post/DHL (II)*, paragraph 12.



- (42) In view of the foregoing, the Authority concludes for the purpose of this Decision that there is a separate product market for international express delivery of parcels.

#### 1.4.2 *Direct exposure to competition*

- (43) On the market for the international express delivery of parcels, Norway Post had a market share by value of 4.4% in 2013 whereas it faces strong competition from major international companies, such as DHL with a market share of 38%, TNT with 21% and UPS with 19%.<sup>47</sup> Norway Post's market share is low compared to its competitors and has been declining since 2011. Given these factors, and in line with the Norwegian Competition Authority's assessment and conclusion,<sup>48</sup> the Authority concludes that the international parcel express delivery market is directly exposed to competition.

### 1.5 Freight forwarding by land - general cargo/groupage

#### 1.5.1 *Relevant product market*

- (44) The applicant argues that there is a separate market for freight forwarding – general cargo, referring to the distribution of goods weighing between 35 kgs and 2.5 tonnes which are handled through a network of terminals. According to the applicant, thermo and bulk transport should be excluded from this market.<sup>49</sup>
- (45) The applicant distinguishes the transport of B2B parcels from the transport of freight because freight requires a different handling equipment than parcels, which are typically handled in sorting facilities capable of handling large volumes with weight limitations of up to 30 to 35 kgs, in an automated manner and in standardised formats. Freight, on the contrary, is typically characterised by larger and heavier items that need specialised handling equipment (such as forklifts etc). In addition, freight transport is also subject to different pricing models than parcels transport, often leading to lower prices for freight deliveries.<sup>50</sup>
- (46) In addition, the applicant is of the view that the freight market can be separated into a market for general cargo/groupage and a market for heavier cargo or so-called part load. This distinction is based on differences in price but more importantly on the fact that these products require a different network or infrastructure for transport and handling. General cargo or groupage needs a terminal network as it is handled in terminals whereas part load requires broad vehicle cover as these items are generally sent directly from the sender to the recipient.
- (47) Although the Commission has not adopted a final position on the definition of the relevant market in the freight-forwarding services, it has in a number of cases clearly distinguished between parcel and freight-delivery services, according to weight,

<sup>47</sup> See Norway Post's application, pages 150 to 151.

<sup>48</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 6-7.

<sup>49</sup> Norway Post defines *thermal transport* as transportation of goods with a certain temperature (i.e. cold), carried out by specially equipped vehicles, at special prices and on special routes in frequent use (Norway Post's application page 29). Norway Post defines *bulk transport* as transportation of unpackaged goods, often liquid, gas or granulated form, unsuitable for transportation together with other types of goods (such as gravel, soil, fertilizer, oil and gas) requiring special types of vehicles such as specially equipped tanks or open trucks/trailers (Norway Post's letter dated 13 May 2015, Document No 757562).

<sup>50</sup> See Norway Post's application, page 23 and 26.

format and the handling equipment needed (parcel services aimed at handling high volumes of items that must be of limited weight and standardised format, whereby handling and transport are standardised to achieve low unit costs).<sup>51</sup> Freight forwarding has been defined in the Commission's practice as the organisation of transportation of items (possibly including ancillary services such as customs clearance, warehousing, ground services etc.) on behalf of customers according to their needs.<sup>52</sup>

- (48) In addition, in an exemption decision pursuant to Article 30 of Directive 2004/17/EC, the Commission made a distinction between the market for light good services, defined as the transportation of single consignments in transportation units of 35 kg to 2,5 tonnes, and the market for freight services, defined as transportation services concerning heavy container loads, over 5 tonnes or heavy container loads of 2,5 to 5 tonnes.<sup>53</sup> This reasoning appears to be in line with a Commission merger decision where a further segmentation within freight forwarding by road transport was made according to the categories "less than truck load or groupage", "semi-truck load or part load" and "full-truck load". "Less than truck load or groupage" was defined as everything bigger than a parcel but less than 2 tonnes whereas "semi-truck load or part load" was defined as freight above 2 tonnes up to a full-truck load. "Full-truck load" includes any freight that fills a whole truck. The Commission stated that the different handling requirements suggested separate product markets as the infrastructure and market participants were different. Ultimately, the Commission found it unnecessary to exactly delineate the markets as even on the narrowest possible market definition, there were no indications that the parties would become dominant.<sup>54</sup>
- (49) Although the Commission has considered a further sub-segmentation of freight-forwarding services, according to the type of operations, into domestic and international freight forwarding, as well as according to the type of forwarding means into freight forwarding by air, land and sea,<sup>55</sup> the Authority finds it unnecessary in the present case to delineate the relevant product markets beyond the definition outlined above. Similarly, whether bulk and thermo are considered separately or as part of the freight forwarding – general cargo market will also not affect the final assessment so no further distinction will be made for the purpose of this Decision and the precise definition of the relevant market can thus be left open.

<sup>51</sup> Commission Decision No IV/M.1513 of 1 July 1999 *Deutsche Post/Danzas/Nedloyd*, paragraph 10; Commission Decision No IV/M.1549 of 8 July 1999 *Deutsche Post/ASG*, paragraph 10; Commission Decision No COMP/M.2908 of 21 October 2002 *Deutsche Post/DHL (II)*, paragraph 10; and Commission Decision No COMP/M.6570 of 30 January 2013 *UPS/TNT Express*, paragraphs 159 to 164.

<sup>52</sup> Commission Decision No COMP/M.1794 of 7 February 2000 *Deutsche Post/Air Express International*, paragraph 8 and Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 108 to 110.

<sup>53</sup> Commission Decision No 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland from the application of Directive 2004/17/EC, paragraph 20.

<sup>54</sup> Commission Decision No IV/M.1549 of 8 July 1999 *Deutsche Post/ASG*, paragraphs 11 to 13. See also Commission Decision No COMP/M.1513 of 1 July 1999 *Deutsche Post/Danzas/Nedloyd*, paragraph 11, last sentence.

<sup>55</sup> Additionally, the Commission has argued that freight forwarding by land can be sub-segmented into freight forwarding by rail and by road. See Commission Decision No COMP/M.1794 of 7 February 2000 *Deutsche Post/Air Express International*, paragraph 8 to 11 and Commission Decision No COMP/M.5152 of 21 April 2009 *Posten AB/Post Danmark A/S*, paragraphs 108 to 110.



### 1.5.2 *Direct exposure to competition*

- (50) On the market for freight forwarding – general cargo, Norway Post had a market share by value in 2013 of 10% whereas Schenker had 13% and PostNord 12%. Norway Post's market share was stable in the period 2011-2013 and the same applied to its main competitors.<sup>56</sup> In addition, many large international operators are active on this market and exert significant competitive pressure on Norway Post. Given these factors, and in line with the Norwegian Competition Authority's assessment and conclusion,<sup>57</sup> the Authority concludes that the market for freight forwarding – general cargo is directly exposed to competition.

## 1.6 **Freight forwarding by land - Part load**

### 1.6.1 *Relevant product market*

- (51) In line with the arguments put forward under Section 1.5.1, the applicant argues that there is a separate market for freight forwarding – part load, referring to the distribution of goods exceeding 2 to 2,5 tonnes, not processed in terminals but rather transported by road or rail directly from the sender to the recipient. Here again, the applicant argues that thermo and bulk transport should be excluded from this market definition.<sup>58</sup>
- (52) Regardless of whether or not the relevant product market is defined narrowly or broadly, the final assessment will not be affected. Therefore, the Authority finds it unnecessary to further delineate the relevant product markets beyond the definition outlined above and will assess whether Norway Post is directly exposed to competition on the market for freight forwarding – part load, excluding thermo and bulk transport.

### 1.6.2 *Direct exposure to competition*

- (53) On the market for freight forwarding – part load, Norway Post had a market share by value in 2013 of 16% whereas Schenker had 11% and PostNord 9%. Norway Post's market share had been decreasing slightly since 2011. In addition, many large international operators are active on this market and exert significant competitive pressure on Norway Post.<sup>59</sup> In line with the Norwegian Competition Authority's assessment and conclusion,<sup>60</sup> the Authority finds that these factors should be taken as an indication that the market for freight forwarding – part load is directly exposed to competition.

<sup>56</sup> See Norway Post's application, pages 166 and 168.

<sup>57</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 7.

<sup>58</sup> See Norway Post's application, page 23.

<sup>59</sup> See Norway Post's application, page 183 to 195.

<sup>60</sup> See the Position of the Norwegian Competition Authority dated 29 January 2015 (Document No 746121), page 7.

#### IV. CONCLUSIONS

- (54) In view of the abovementioned indicators, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC is met in respect of the following services provided in Norway:
- (a) standard B2B parcel delivery (national);
  - (b) standard B2B parcel delivery (international outbound);
  - (c) express Day 1/in-night parcel delivery (national);
  - (d) express parcel delivery (international, including inbound and outbound);
  - (e) freight forwarding by land (general cargo / groupage);
  - (f) freight forwarding by land (part load).
- (55) Since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC shall not apply when contracting entities award contracts intended to enable the provision of services listed in points (a) to (f) of recital (54) in Norway, nor when design contests are organised for the pursuit of such activity in Norway.
- (56) This Decision is based on the information submitted before the Authority. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met.
- (57) This Decision is made solely for the purpose of granting an exemption pursuant to Article 30 of Directive 2004/17/EC and is without prejudice to the application of the rules on competition.
- (58) This Decision does not preclude the applicability of EEA rules on public procurement in areas not covered by its scope. Furthermore, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, where a contracting entity is engaged in “mixed” procurement, that is procurement used to support the performance of both activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard must be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support activities which were not exempted, the provisions of Directive 2004/17/EC are to be applied. Where it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the rules referred to in Article 9(2) and (3) of Directive 2004/17/EC.
- (59) The measures provided for in this Decision are in accordance with the opinion of the EFTA Public Procurement Committee.



HAS ADOPTED THIS DECISION:

Article 1

The Act referred to at point 4 of Annex XVI to the Agreement on the European Economic Area laying down the procedures for the award of public contracts in the utilities sector (*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*) shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Norway:

- (a) standard B2B parcel delivery (national);
- (b) standard B2B parcel delivery (international outbound);
- (c) express Day 1/in-night parcel delivery (national);
- (d) express parcel delivery (international, including inbound and outbound);
- (e) freight forwarding by land (general cargo / groupage);
- (f) freight forwarding by land (part load).


Article 2

This decision is addressed to the Kingdom of Norway.

Done at Brussels, 06 July 2015.

For the EFTA Surveillance Authority

  
Helga Jónsdóttir  
College Member

  
Markus Schneider  
Acting Director