II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 30 April 2008

exempting express and courier services in Italy from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document number C(2008) 1642)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2008/383/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1], and in particular Article 30(4) and (6) thereof,

Having regard to the request submitted by Italy by e-mail of 17 January 2008,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

(1) On 17 January 2008, Italy transmitted a request pursuant to Article 30(4) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested additional information by e-mail of 6 February 2008, which was transmitted by the Italian authorities by e-mail of 20 February 2008.

(2) The request submitted by Italy on behalf of Gruppo Poste Italiane SpA (hereinafter referred to as 'Poste Italiane') concerns express and courier services, domestic and international, in Italy.

(3) The request is accompanied by the conclusions of the independent national authority, Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority), that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC would be met.

II. LEGAL FRAMEWORK

(4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which Directive 2004/17/EC applies shall not be subject to that Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it.

[1] OJ L 134, 30.4.2004, p. 1. Directive as last amended by Commission Regulation (EC) No 213/2008 (OJ L 74, 15.3.2008, p. 1).

(5) Since Italy has implemented and applied Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1], access to the market should be deemed not to be restricted in accordance with the first subparagraph of Article 30(3) of Directive 2004/17/EC.

(6) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, *per se*, decisive. In respect of the markets concerned by this decision, the market share of the main players constitutes one criterion which should be taken into account. Another criterion is the degree of concentration.

(7) This Decision is without prejudice to the application of the rules on competition.

III. **ASSESSMENT**

(8) As a public enterprise within the meaning of Article 2(1)(b) of Directive 2004/17/EC exercising several of the activities mentioned in Article 6 of that Directive, Poste Italiane, on whose behalf the request has been introduced, is a contracting entity for the purposes of Directive 2004/17/EC. According to the available information, it would seem to be the sole contracting entity operating in the markets concerned by this decision.

(9) A number of companies are active in the provision of courier and express services in Italy, both for domestic as well as for international services. Whether seen alone or together with its wholly owned subsidiary, SDA Express Courier (SDA), Poste Italiane does not have the biggest market share in respect of either domestic or international express and courier services. In fact, for domestic express and courier services, its market share in 2006 amounted to 5,2 % (15,4 % including the 10,2 % share of SDA) and the aggregate market shares of its two largest competitors on this market amounted to 43,5 % in 2006. In respect of international express and courier services, Poste Italiane had a market share in 2006 of 2,7 % (3,4 % including the 0,7 % share of SDA) whereas the aggregate market shares of its two largest competitors in 2006 amounted to 61,7 %. These factors should therefore be taken as an indication of direct exposure to competition of express and courier services, domestic and international.

IV. **CONCLUSIONS**

(10) In view of the factors examined in recitals (8) and (9), the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in Italy in respect of express and courier services, domestic and international.

(11) Since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable express and courier services, domestic and international, to be carried out in Italy, nor when design contests are organised for the pursuit of such an activity in Italy.

(12) This Decision is based on the legal and factual situation as of January to February 2008 as it appears from the information submitted by the Italian Republic. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable express and courier services, domestic and international, to be carried out in Italy.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 30 April 2008.

For the Commission

Charlie McCREEVY

Member of the Commission

[1] OJ L 15, 21.1.1998, p. 14. Directive as last amended by Directive 2008/6/EC (OJ L 52, 27.2.2008, p. 3).