COMMISSION IMPLEMENTING DECISION

of 16 December 2011

exempting certain financial services in the postal sector in Hungary 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 sector

(notified under document C(2011) 9197)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2011/875/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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(5) and (6) thereof,

Having regard to the request submitted by post, by Magyar Posta, received on 24 June 2011,

Whereas:

I. FACTS

(1) On 24 June 2011, the Commission received a request pursuant to Article 30(5) of Directive 2004/17/EC, transmitted to the Commission by post. The Commission requested additional information to the applicant and to the Hungarian Competition Authority, by e-mails of 8 August 2011. The respective replies were received on 2 September and on 15 September 2011. The request submitted by Magyar Posta (in the following referred to as 'Posta') concerns various financial services provided by Posta, and consists of two parts, namely: payment services and services performed on behalf of other financial institutions. In their turn, each part concerns various financial services that have been grouped under the following headings, as defined by Posta:

Payment services

1. Existing own services:

1.1. Services enabling cash to be placed on a payment account (bill payments and express bill payments),

1.2. Services enabling cash withdrawals from a payment account: (cash delivery service and pension payment service),

1.3. Money transfer services (domestic money order, international money order and Western Union money order — performed on behalf of others),

2. Account services and related payment services proposed to be provided in the future

2.1. Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account,

2.2. Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account,

2.3. Execution of payment transactions between payment accounts,

2.4. Issue of card-substitute payment instruments.

Services performed on behalf of others

3.1. Intermediation of current accounts and the related products and services (retail and corporate bank account services offered on behalf of credit institutions, including the accepting and forwarding of payment orders for execution, and the intermediation of sight deposits and fixed term deposits connected to a bank account),

3.2. Credit intermediation performed on behalf of credit institutions,

3.3. Intermediation and acceptance of payment cards performed on behalf of credit institutions (credit cards, debit cards, bank card acceptance and POS terminals),

3.4. Intermediation of investments and special purpose savings on behalf of others:

(a) sales of financial instruments (government securities, investment funds and other securities);

(b) intermediation of home savings products.

3.5. Intermediation of insurance products: (life insurance and non-life insurance)

[1] OJ L 134, 30.4.2004, p. 1.

(2) According to the application ([2]) the network of the Posta consists of more than 2 600 permanent postal outlets. However, not all services listed in the application are provided by all outlets ([3]). The total number of credit institutions branches currently operating on the territory of Hungary is of 4 605. According to Giro Zrt, OTP bank is the largest with 809 branches, followed by K&H Bank Zrt. (377 branches), CIB Bank Zrt. (218 branches), Reiffeisen Bank Zrt. (180 branches) and Erste Bank Hungary Nyrt. (145 branches). The eighth largest banks of the credit institutions sector each have over 100 branches, plus there are 22 small and medium-sized banks, 10 branches of credit institutions and 138 credit institutions set up as cooperatives with the larger one operating a network of 20-40 branches. In international comparison, using data of 2007 ECB Blue Book ([4]), this places Hungary in the middle of the range in terms of per capita number of branches.

II. **LEGAL FRAMEWORK**

(3) It should be recalled that, in accordance with point (c) of Article 6(2) of Directive 2004/17/EC, the provision of financial services as defined in the fourth indent of said point (c) are covered by that Directive only to the extent that such services are provided by entities which also provide postal services within the meaning of point (b) of that provision. Posta is the only contracting entity in Hungary which offers the services concerned by this Decision.

(4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the 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. Where no relevant Community legislation is listed in the Directive's Annex XI, as is the case in respect of the services concerned by this Decision, then Article 30(3), second subparagraph requires that it 'must be demonstrated that access to the market in question is free de facto and de jure'.

(5) Regarding financial services, it should be recalled that a large body of legislation has been adopted at Union level aiming at liberalising establishment and provision of services in this sector ([5]). In respect of payment services, it is noted that Hungary, transposed fully and timely, Directive 2007/64/EC on Payment Services through Act LXXXV/2009 on the Pursuit of the Business of Payment Services.

(6) Hungary has implemented Union legislation regarding liberalisation of capital movements and freedom to provide services and the relevant legislation on the liberalisation of financial markets. Moreover, Hungary satisfied the requirements set out in the Financial Services Action Plan. The Hungarian market of credit institutions and payment services is well regulated. According to Act CXII: 1996 on credit institutions and financial enterprises (the Banking Act), financial services and auxiliary activities are subject to authorisation. According to Act CXXXVII/2007 on investments firms and commodity dealers and on the regulations governing their activities, investment services may be performed by investments firms and credit institutions only. Act LX/2003 on insurance companies and insurance business provides that insurance activities may be performed by insurance companies only. The Posta is authorised to pursue the financial services subject to this application by the Hungarian Financial Supervisory Authority. Any institution that is able to meet the provisions regarding prudent operation and effective supervision could be authorised to carry out these services. The pursuit of financial services or activities auxiliary to financial services, as well as investment services and insurance services is open also to non-resident companies, through their branches, provided that they are authorised by the competent supervisory authority in the country of establishment. The requirement to have a Hungarian branch does not apply to financial institutions established in any EEA Member State, as these institutions may provide their services cross border.

(7) Having due regard o the facts set out in recitals 5 and 6 above, it can be assumed that, the condition set out in Article 30(3) relating to free access to the market can be taken to be met.

(8) 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 on a given market constitutes one criterion which should be taken into account. Other criteria considered may be the degree of concentration on those markets and/or the customer switching. As the conditions vary for the different activities that are

([2]) See application, p. 11.

([3]) For example, from among the payment services, international postal money orders service is provided in only 328 postal outlets and Western Union money transfer service provided as intermediary at 1 024 postal outlets. From among services provided on behalf of others, intermediation of Posta credit card, intermediation of investment bonds and certain insurance products are offered only at 343 locations, the current account products of OTP Bank for retail customers is offered at 244 postal outlets while corporate credit at only offered in only 45 locations.

([4]) European Central Bank: 'Payment and securities settlement systems in the European Union: non-euro-area countries — Hungary', August 2007.

([5]) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1).

concerned by this Decision, the examination of the competitive situation should take into account the different situations on different markets.

(9) Although narrower or a broader market definition might be envisaged in certain cases, the precise definition of the relevant market can be left open for the purposes of this Decision as far as a number of the services listed in the request submitted by Posta are concerned to the extent that the result of the analysis remains the same whether it is based on a narrow or a broader definition.

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

III. ASSESSMENT

Payment services

(11) The application lists two distinct categories of payment services, namely: (A) existing services; and (B) services which are planned for introduction in 2012. For the purposes of the assessment pertaining to this Decision, only the existing services will be taken into account, as there is no material evidence of the effects which the planned services would have, if and once introduced.

(12) The existing payment services performed by Posta are services enabling cash to be placed on a payment account and services enabling cash withdrawals from a bank account, whereby Posta acts as an intermediary, and money transfer services (domestic and international money order services of its own right, as well as Western Union money order services acting as intermediary).

(13) The aim of the present Decision is to establish whether the services offered by Posta are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, Posta's procurement for the pursuit of the activities concerned here will be carried out in a transparent, non-discriminatory manner based on criteria allowing it to identify the solution which overall is the economically most advantageous one. For this purpose it is therefore necessary to examine whether the banks and other financial institutions have the possibility to exercise competitive pressure on Posta.

(14) The main competitors of the Posta in the market for payment services are the banks and other financial institutions that are not covered by the provisions of the Directive 2004/17/EC, as they are not contracting entities in the sense of the directive and/or they do not provide financial services together with postal services.

(15) The payment methods offered by the banks are generally more attractive than the paper based and/or cash based ones, and are generally available. According to GfK Hungaria ([6]), the number of users of online banking services has increased by 200 000 by the end of 2010 compared to the year before and it reached 1 million users, with a growth rate getting higher. At the same time, according to the same source, the number of those who prefer to do their banking in person is declining — one fourth of all clients no longer go to the bank braches to do banking.

(16) The product market as defined by the applicant is the payment services market provided by credit institutions and other payment services providers, while the respective geographical market is considered to be nation-wide. The Hungarian Competition Authority (GVH) indicated that although it does not have all information and data at their disposal in order to be able to properly and precisely define the product market, the relevant product market definition provided by the applicant 'is likely to be acceptable'. As far as the geographical market is concerned, under the same disclaimer as above, GVH indicated that 'it is not aware of any evidence on which the geographical market should not be the whole territory of Hungary'.

(17) No further distinction of the payment services market into separate retail and wholesale product markets will be made for the purposes of this Decision, as the result of the analysis remains largely the same whether it is based on a narrow or a broader definition.

(18) The Hungarian Competition Authorities referring to the degree of concentration of the payment market states that, presumably, 'the 5-6 major banks, together with Magyar Posta have a very high combined market share in case of retail payment services, and possibly cover most of the market. The wholesale market might presumably be less concentrated due to the presence of several other financial institutions'.

Services enabling cash to be placed on a payment account (bill payments and express bill payments)

(19) These services allow customers to make payments for a service or good purchased. They are used by private persons for discharging payment obligations and are particularly used for making payments for public utilities services, telecommunications, financial services, insurance services, home delivery services, payment of taxes, etc.

([6]) GfK Hungaria: 'Internet banking continues to gain ground', 3 November 2010: http://www.gfk.com/imperia/md/content/gfk_hungaria/pdf/press_h/2010/press_2010_11_03_h.pdf

(20) The main factor for determining the relevant product market is to establish the scope of substitute products, which means the alternative means that a client would have for discharging payment obligations. Consequently, the applicant considers that the relevant product market covers cash deposits made to bank accounts in banks, or through ATMs ([7]), card payments and transfers between bank accounts (simple transfers and automatic debit transfers).

(21) As regards switching between payment methods, the Hungarian Competition Authority (GVH) confirmed that 'the major utilities and other service providers tend to offer various payment methods to their customers with a possibility to easily switch among these. There also seem to be a trend of persuading customers to use electronic payment methods instead of paper and cash based ones'. In this context the increased use of online banking is to be noted. However, as indicated in recital 9 above, the exact definition can be left open for the purposes of the present Decision.

(22) Posta market share for services enabling cash to be places on a payment account, calculated as a percentage of the total market as defined, represented ([8]) 3,91 % in 2007, 3,88 % in 2008 and 4,14 % in 2009. In terms of both volume and value, is to be noted that the number of Posta transactions and their value decreased in 2009 compared to previous two years ([9]).

(23) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure of Posta's activity to competition.

Services enabling cash withdrawals from a payment account

(24) The characteristics of services enabling cash withdrawals are that the account holder authorises payment from his payment account to the order of a third party. The scope of such services presently includes cash delivery and pension payment service. The main drawees are the State Treasury and the municipal governments using this scheme for payment of family allowances, social benefits unemployment benefits, etc. For payments made by the government, the payee has the option to have the amounts credited to a bank account or to receive it by means of postal delivery. In case of pension payment, the recipients have also the possibility to have part of the amount credited to their account and the other part delivered in cash. It is also possible to switch, at any time between postal cash delivery to bank transfer, by making a simple request to the Central Administration of National Pension Insurance.

(25) The Hungarian State, through the National Bank is pursuing a policy aimed at reducing the volume of cash transactions and encouraging the development of electronic payment methods and related infrastructure. Corporate entities are required to make payments through payment accounts and the wages of public servants are paid into bank accounts. According to a recent study ([10]) undertaken by the Hungarian National Bank, currently half of the pensions initiated by the state are made by other means than postal payments, and according to the application ([11]), both the number and total value of pensions paid through Posta were steadily decreasing in the last years.

(26) For the above reasons, transfer of payment between payment accounts (simple transfer and group transfers), cash withdrawals with bank cards at ATMs and POS ([12]) terminals, and cash withdrawals at bank tellers are considered the relevant product market for services enabling cash withdrawals from a payment account.

(27) In case of the above services, for the purposes of payment made to persons with bank account, payments between payment accounts (simple transactions and group transfers where payments are made from a single account to several persons) could be considered substitute products. Here as well, the exact definition can be left open for the purposes of the present Decision.

(28) Posta's market share for services enabling cash withdrawals from a payment account, calculated as a percentage of the total substitute service, represented ([13]) 2,44 % in 2007, 2,49 % in 2008 and 2,61 % in 2009. In terms of both volume and value, is to be noted that the number of Posta transactions and their total value had a decreasing trend in the last three years for which data are available, namely 2007, 2008 and 2009 ([14]).

(29) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure of Posta's activity to competition.

([7]) ATM — abbreviation for automated teller machine.
([8]) Relevant market shares where calculated by rapport to the total value of transactions. Please see page 34 of the application.
([9]) See page 32 of the application.
([10]) Hungarian National Bank: 'Nothing is free: a survey of the social costs of the main payment instruments in Hungary', by Dr Aniko Turjan, EVA Diveki, EVA Keszy-Harmath, Gergely Koczan, Kristof Takacs, Occasional Paper 93, 2011.
([11]) See pages 35 and 36 of the application.
([12]) POS — abbreviation for point of sale.
([13]) Relevant market shares where calculated by rapport to the total value of transactions. Please see page 36 of the application.
([14]) See pages 35 and 36 of the application.

Money transfer services

(30) The money transfer service provided by the Posta is generally used for payments made between private persons. The respective services are domestic money orders and international money orders provided in the Posta's own right and Western Union money transfer which are available domestically and internationally, offering a real-time method for sending money.

(31) For domestic transfers, both in Posta's own right and on behalf of Western Union, the applicant considers that transaction between payment accounts are substitutes for money transfers in case the payee has a payment account. Consequently the market of payments made in Hungary between accounts could be considered the relevant product market for domestic money transfers, although the exact definition can be left open.

(32) Calculated accordingly the market shares of the Posta were of less than 1 % in 2007, 2008 and 2009.

(33) In case of international money transfers, the activities undertaken by Posta and Western Union were considered close substitutes. Moreover the payments through payment accounts are considered substitutable products, therefore the cross border payments between payment accounts is considered the relevant product market by the applicant. However, the exact definition of the relevant market can be left open.

(34) The Posta's market share calculated on this basis is of 0,5 % in 2007, 2008 and in 2009.

(35) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure of Posta's activity to competition.

Services performed on behalf of others

(36) The application for exemption pertains also to certain activities of Posta, performed on behalf of others, in connection with certain financial services, where Posta acts as an intermediary.

Intermediation of current accounts and the related products and services

(37) The application for exemption covers the intermediation of current accounts and the related products and services, namely: retail and corporate bank account services offered on behalf of credit institutions, including the accepting and forwarding of payment orders for execution, and the intermediation of sight deposits and fixed term deposits connected to a bank account.

(38) The financial products and services offered by Posta as intermediary are provided by Erste Bank and OTP Bank. Posta is also offering deposit products on its own name.

(39) Previous Commission practice [15] make distinction between retail banking and corporate banking. Retail banking is defined as all banking services to private individuals and very small enterprises, while corporate banking generally comprises banking services to large corporate customers and small and medium enterprises. However, in previous decisions [16] related to the retail banking sector, the Commission left open whether individual retail banking products represent separate product markets or whether several retail banking products may form part of a single relevant product market.

(40) The relevant product market needs to be distinguished according to the stage in the distribution chain (upstream — provision of current accounts and related products and services or downstream — intermediation of current accounts and related products and services). For the activity of intermediation of retail payment accounts, the relevant product market could be considered as the market for intermediation of retail current accounts and deposit products. For the activity of intermediation of corporate payment accounts, the relevant product market could be considered as the market for intermediation for corporate current accounts and deposit products. However, in accordance with recital 9 of this Decision, it is not necessary to define the relevant market.

(41) The applicant defines the geographical market as the entire territory of Hungary. The Hungarian Competition Authority (GVH) confirmed that 'for the purpose of the present case, all the financial institutions present in Hungary perform their activities nation-wide; there are no signs of regional deviation in any aspects of the financial services provision'. Moreover, previous Commission practice [17] in connection to financial markets considered the relevant geographical market to be national in scope due to different competitive conditions within individual Member States and the importance of a network of branches.

(42) The market shares of Posta, calculated on the basis of the above consideration are as follows: for the retail current accounts and deposits: 1,45 % in 2007, 1,38 % in 2008 and 1,51 % in 2009, while on the market for corporate current account and deposits Posta market shares were negligible (0 %) in 2007, 2008 and 2009. These figures indicate that market shares for the intermediation of these financial services are also low

[15] Case COMP/M.5384 — BNP Paribas/Fortis, p. 3.
[16] Case COMP/M.4844, Fortis: ABN AMRO Assets.
[17] Case COMP/M.2225 Fortis/ASR, p. 3, COMP/M.5075Vienna Insurance Group/Erste Bank Versicherungssparte, and COMP/M.5384- BNP Paribas/Fortis, p. 15.

(43) The rest of the market is shared between other banks and financial institutions which are not subject to the provisions of Directive 2004/17/EC.

(44) In its inquiry on the retail banking of 2009 ([18]) the Hungarian Competition Authority (GVH) found that there are no major obstacles to account switching in Hungary, and moreover, it was observed that the level of current account switching is one of the highest when compared to the rest of EU Member State.

(45) The advantages of Posta's extensive network are counterbalanced by the growth in importance of online banking.

(46) According to a survey ([19]) of factors influencing the selection of a bank, by customers, the most important factors were found to be reliability and confidence, proximity and accessibility (including the availability of means to withdraw cash) and the quality of service. These conclusions were also confirmed by the results of the survey ([20]) on financial services and current account services. According to this source, the most important aspect when choosing a bank is the cost and reputation, while easy access (i.a. extensive network) appears to be less important. Furthermore, the spectrum of banking services, namely the availability of a broad range of banking services, and the high quality of service was also considered important. Given the above, although Posta has an extensive network, there are other criteria which were labelled as significant by customers (reputation as a bank, banking services, quality of service) which play a counterbalancing role in choosing a bank. Customers whose needs include a broad range of services would therefore be reticent to consider choosing or changing to a postal account not offering the accustomed range of services.

(47) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure of Posta's activity to competition.

Credit intermediation

(48) This activity represents the intermediation of credit provided by third parties, with the Posta acting as a multiple special services intermediary. Posta is offering credit products (with no collateral requirements, either movable, nor real estate) provided by Erste Bank to retail customers, while in the corporate sector, Posta offers a product of Magyar Fejlesztesi Bank, acting as a multiple special service intermediary.

(49) The services concerned here can be subdivided in many different ways, according to factors such as the purposes for which a credit is taken or the typical customer (consumers, SMEs, larger undertakings or public administration). Therefore, retail credit intermediation and corporate credit intermediation could be considered as separate product markets.

(50) The product market of retail credit intermediation is defined by the applicant as the market of unrestricted mortgage loans and personal loans, both in Hungarian Forint and foreign currencies. This is not contradicted by previous Commission practice ([21]) whereby the Commission left open whether individual retail banking products represents separate relevant product markets or whether several retail banking products may form part of a single relevant product market.

(51) In the corporate sector, the Posta is offering only one type of corporate credit product. This product is offered typically by other financial institutions (i.e. savings cooperatives). The Posta offers this product in 45 designated locations and not throughout its entire network. The relevant product market for the corporate sector is considered by the applicant to include SMEs loans offered by credit institutions. However, as indicated in recital 9 above, the exact market definition can be left open, for the purposes of this Decision.

(52) The geographical market is the entire territory of Hungary, virtually for the same reasons as stated in recital 41.

(53) Posta market shares in the market of retail credit as defined was less than 0,5 % in 2007, 2008 and 2009, while the market shares in the market of corporate credit is negligible (0 %) in the same years. The available data shows that the Posta market shares in these markets narrowly defined are so small that on a market more broadly defined Posta will have even smaller market shares.

(54) The rest of the market is shared between other banks and financial institutions — which are not subject to the provisions of the Utilities directive. The cumulated market shares ([22]) of the first three competitors in 2007, 2008 and 2009 were as follows: 52,54 %,

([18]) Switching in case of certain financial products for retail and small entrepreneurial clients — Sector Inquiry — final report, 5 February 2009, GVH — Hungarian Competition Authority. GVH performed this study on bank switching for the period 2002-2006.

([19]) Switching in case of certain financial products for retail and small entrepreneurial clients — Sector Inquiry — final report, 5 February 2009, GVH — Hungarian Competition Authority, and the related background study 'Information and experience related to switching between banks' summary analysis of the customer market, Millward Brown, September 2006.

([20]) Ipsos: Financial services, current account services, summary of the survey of retail customers, January 2009.

([21]) Case COMP/M.4844, Fortis/ABN AMRO Assets.

([22]) According to the supplementary information provided by the applicant in its letter of 2 September 2011.

51,39 % and 54,27 % respectively in the retail loans market and 42,69 %, 47,36 % and 48,07 % respectively in the corporate loans market.

(55) For the purposes of this Decision, and without prejudice to the competition law, the above mentioned factors should be taken as an indication of direct exposure of Posta's activity to competition.

Intermediation and acceptance of payment cards issued by credit institutions

(56) The Posta offers credit cards issued by Erste Bank Zrt. This product is a standard credit card, in terms of conditions and services offered.

(57) In respect of debit cards, the Posta acts as intermediary covering corporate and retail bank cards associated with current accounts. The Posta acts as multiple special services intermediary, while the service is provided by Erste Bank Hungary Nyrt. The cards offered are standard debit cards.

(58) In respect of accepting payment cards the postal outlets are equipped with POS terminals enabling cash withdrawals with bank cards. The applicant argues that from the perspective of customers, the same service (obtaining cash) can be obtain by means of cash withdrawals at a bank teller, or at other POS terminal operated by third parties at locations other than the postal outlets, therefore the products are substitutable.

(59) The Commission has, in the past, distinguished ([23]) two main payment card related activities: first the issuing of cards to individuals and companies and secondly the 'acquiring' of merchants for card payment acceptance. Moreover, within the activity of payment card issuing, the Commission has in previous decisions ([24]) discussed the possibility of distinguishing between different types of cards, but eventually the exact definition was left open.

(60) For the purposes of this Decision, and without prejudice to the competition law, three product markets will be taken into consideration, namely, the credit card market, the debit card market and the accepting of cards.

(61) As regards, the card accepting market, the product market defined by the applicant is not the market that was generally defined in previous Commission decisions mentioned in recital 59. The 'original' card accepting market is the one consisting of merchants who accept card payments. Another possible card accepting market is the one consisting of banks who offer card accepting services to such merchants. However, as confirmed by the Hungarian Competition Authority (GVH) ([25]), in case of Posta, considering that the POS devices functions as ATM machines of the two banks, for which Posta is acting as intermediary, 'Magyar Posta was probably correct to provide data on concentration based on concentration based on the number of ATM machines in operation'.

(62) In terms of geographical market, previous Commission cases ([26]) indicated that the market of payment cards is still national in scope, although it admitted that there may be scope for widening the market in the future. In the present case, the geographical market definition is considered to be the entire territory of Hungary.

(63) Between 2007 and 2009, Posta's market shares was of less than 1 % in the credit card market, of less than 3 % in the debit card market and of less than 6 % in the accepting card market as defined by the applicant.

(64) According to the Hungarian Competition Authority ([27]), following a recent study undertaken by the later and the Hungarian National Bank, out of the total number of 24 banks issuing debit cards the total market share of the top 5 banks in debit card issuing is approximately 82 %. According to the same source the credit card issuing market is less concentrated; out of the 18 banks issuing credit cards, the top 7 banks have a combined market share of 68 % of the market. Moreover, according to the application, the level of concentration as high in the accepting sector three quarters of the total number of ATMs ware operated by four banks.

(65) In view of the low market shares of Posta and the presence of other banks and financial institutions, which bring competitive pressure on Posta's activity we can conclude that for the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure of Posta's activity to competition.

Intermediation of investments and special purpose savings on behalf of others

(66) This category of services covers the sale of financial instruments and the marketing of special investments products. The financial instruments offered are government securities, investment funds of Erste Befektetesi Zrt, other securities and a special home savings

([23]) Case COMP/M.5241, American Express/Fortis/Alpha Card.

([24]) Case COMP/M.3894 Unicredito/HVB; COMP/M.2567 Nordbanken/Postgirot; COMP/M.3740 Barclays Bank/Foerenngssparbanken/JV, COMP/M.4844 Fortis/ABN AMRO Assets, COMP/M.5241 American Express/Fortis/Alpha Card.

([25]) GVH response of 15 September 2011 to Commission letter of request for information of 8 August 2011.

([26]) Case COMP/M.3740, Barclays Bank/Foereningssparbanken/JV and COMP/M.2567 Nordbanken/Postgirot.

([27]) GVH response of 15 September 2011 to Commission letter of request for information of 8 August 2011.

arrangement on behalf of Fundamenta Lakaskassza Zrt. and OTP Lakastakarekpenztar Zrt., acting as intermediary.

(67) In previous cases, the Commission has left open the question whether each of these services might constitute separate product markets ([28]). The definition will be left open in this case as the services provided by Posta as an intermediary do not raise competition concerns, regardless of the alternative market definition considered.

(68) As regards geographical scope, the Commission has considered ([29]) that most of the market segments are international in scope, but some of them have been analysed from a national perspective ([30]). The exact geographical market definition will be left open, and in the present case the geographical market will be considered the territory of Hungary.

(69) Between 2007 and 2009, Posta's market share was of less than 4 % in the market of government securities, between 3 % and 9 % in the market of investment units, of less than 2 % in the market for bonds and of less than 4 % in the market of home savings arrangements.

(70) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure to competition of Posta's activity in the investment market.

Intermediation of insurance products

(71) Posta offers life insurance on behalf of Magyar Posta Eletbiztosito Zrt. and non-life insurance on behalf of Magyar Posta Biztosito Zrt.

(72) In its previous decisions ([31]), the Commission has distinguished between three broad categories of types of insurances, namely: life insurance, non-life insurance and reinsurance. Moreover, it was observed that, from the demand side, life and non-life insurance can be further divided into as many individual product markets as there are different kinds of risks covered. In relation to life insurance the Commission has considered in previous decisions the following segmentations: life-individual, life-group and unit linked, or, alternatively, individual protection, group protection, personal pension, group pensions, savings and investments ([32]). In relation to non-life insurance the Commission has previously considered, inter alia, motor, fire, transport, health, property, general civil liability, casualty, litigation, working accidents and credit insurance ([33]). However, supply side considerations could lead to broader product markets. For the purposes of this Decision the exact product market definition can be left open.

(73) The Commission has in the past also analysed the distribution of insurance products and confirmed that the relevant market for either non-life or life insurance distribution would comprise all outward (i.e. third party or non-owned) distribution channels, such as brokers, agents and other intermediaries ([34]). However, for the purposes of this Decision the exact product market definition can be left open.

(74) In respect of geographical market, the Commission in its previous decisions ([35]) has defined the markets for life insurance as being national in scope due to national distribution channels, the established market structure, fiscal constraints and different regulatory systems. The same approach will be used in the present case and the geographical market will be considered the entire territory of Hungary.

(75) Between 2007 and 2009, Posta's market share was of less than 5 % ([36]) in the market of life insurance products, and of less than 1 % ([37]) for non-life insurance products. These figures indicate that market shares for the intermediation of insurance are also low.

(76) In the same years, the combined market shares of the first three competitors was of 52,29 %, 51,08 % and 50,1 % respectively in the market of life insurance products, and of 54,84 %, 52,56 % and 51,66 % respectively in the market of non-life insurance products.

(77) For the purposes of this Decision, and without prejudice to the competition law, these factors should be taken as an indication of direct exposure to competition of Posta's activity in the insurance market.

IV. **CONCLUSIONS**

(78) In view of the factors examined in recitals 11 to 77, 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 Hungary for the following activities:

(a) services enabling cash to be placed on a payment account;

([28]) Case COMP/M.3894, Unicredito/HVB, Case COMP/M.5384 BNP Paribas/Fortis.
([29]) Case COMP/M.2225, Fortis/ASR, COMP/M.1172, Fortis AG/Generale Bank.
([30]) Case COMP/M.4155, BNP Paribas/BNL.
([31]) Case COMP:M.4284, AXA/Winterhur, Case COMP/M.5384 BNP Paribas/Fortis.
([32]) Case COMP/4047 Aviva/Ark life, Case COMP/M.4284 Axa/Winterthur, Case COMP/M.4701 Generali/PPF Insurance Business.
([33]) Case COMP/M.4284, Axa/Winterthur, Case COMP/M.4701 Generali/PPF Insurance Business, Case COMP/M.2676 Sampo/Vama/IF Holding/JV.
([34]) Case COMP/M.4284 AXA/Winterthur, Case COMP/M.4844 Fortis/ABN AMRO Assets.
([35]) Case COMP/M.5075 Vienna Insurance Group/Erste Bank Versicherungssparte; COMP/M.4844 Fortis/ABN AMRO Assets.
([36]) Market share calculated on the basis of premium revenues.
([37]) Market share calculated on the basis of premium revenues.

(b) services enabling cash withdrawals from a payment account;

(c) money transfer services;

(d) intermediation of current accounts and the related products and services;

(e) credit intermediation;

(f) intermediation and acceptance of payment cards issued by credit institutions;

(g) intermediation of investments and special purpose savings on behalf of others;

(h) intermediation of insurance products.

(79) Since the condition of unrestricted access to the market is also met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable the services listed in recital 78 to be carried out in Hungary, nor when design contests are organised for the pursuit of such an activity in Hungary.

(80) The financial services carried out by Posta are auxiliary to postal services as per Article 6(2)(b) of Directive 2004/17/EC. The postal services carried out by the Posta are not subject to this exemption request, therefore for these activities the provisions of Directive 2004/17/EC continue to apply. In this context, it is recalled that procurement contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, when 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 shall 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 postal activities, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs 2 and 3 of Article 9 of Directive 2004/17/EC.

(81) This Decision is based on the legal and factual situation as of July to October 2011 as it appears from the information submitted by Magyar Posta, and the Hungarian Competition 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.

(82) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Hungary:

(a) services enabling cash to be placed on a payment account;

(b) services enabling cash withdrawals from a payment account;

(c) money transfer services;

(d) intermediation of current accounts and the related products and services;

(e) credit intermediation;

(f) intermediation and acceptance of payment cards issued by credit institutions;

(g) intermediation of investments and special purpose savings on behalf of others;

(h) intermediation of insurance products.

Article 2

This Decision is addressed to the Republic of Hungary in accordance to the Treaties.

Done at Brussels, 16 December 2011.

For the Commission

Michel BARNIER

Member of the Commission